

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

REGULATIONS ESTABLISHING SYSTEM )  
OF RATEMAKING )

Docket No. RM2007-1

**MEDCO HEALTH SOLUTIONS, INC. COMMENTS ON REGULATIONS  
ESTABLISHING A SYSTEM OF RATEMAKING  
IN RESPONSE TO COMMISSION ORDER NO. 26  
(September 24, 2007)**

On August 15, 2007, the Commission issued Order No. 26, “Order Proposing Regulations to Establish a System of Ratemaking.” These proposed regulations are the initial product of the Commission’s interpretation of the Postal Accountability and Enhancement Act (“PAEA”) (Pub. L. 109-435, 120 Stat. 3198) and follow four rounds of comments from the Postal Service, the Office of the Consumer Advocate, the mailing public, as well as three field hearings. Commission Order No. 30 set September 24, 2007 as the deadline for comments on the proposed regulations. Medco Health Solutions, Inc. (“Medco”) hereby submits these comments on the Commission’s proposed regulations.

Medco utilizes market dominant mail products (First-Class Mail parcels and Standard Mail parcels) and competitive mail products (Priority Mail, Express Mail, and Parcel Select). Therefore, Medco is interested not only in rate setting of both market dominant and competitive products, but also in the categorization of products between the market dominant and competitive product lists.

Medco appreciates the Commission’s effort to propose regulations which are designed to implement a new and an extremely challenging law. These Comments focus on the need for the Commission to examine requirements imposed by the Administrative Procedure Act.

**The Proposed Regulations Implementing the New Rate and Classification Adjustments for the Postal Service’s Market Dominant Products Must Comply with the Administrative Procedure Act.**

As noted in paragraph 2026 of Order No. 26, prior to enactment of PAEA, all Postal Service requests for rate changes, and all requests for classification changes, were subject to “10-month trial-type ‘omnibus’ rate and classification proceedings” before the Commission (Order No. 26, ¶ 2026, p. 17.) Under the Postal Reorganization Act of 1970 (“PRA”), these proceedings were “adjudicatory” in nature, governed by sections 556 and 557 of the Administrative Procedure Act (“APA”), in which the Postal Service, users of the mails, and an officer of the Commission representing the public participated with ample opportunity to conduct written discovery and cross-examination of opposing witnesses under oath, to present lay and expert testimony, and to brief all factual and legal issues. *See* 5 U.S.C. § 556; 39 U.S.C. § 3624 (repealed); and Order No. 26, ¶ 2026, p. 17.

According to Order No. 26, “barring a final omnibus rate case under 39 U.S.C. § 3622(f), the PAEA casts that apparatus aside and replaces it with a simpler process.” ¶ 2026. Although it is true that PAEA permits the Commission to adopt “new, streamlined procedures to initiate rate (and class) changes” (Order No. 26, ¶ 1003, p. 1), it does not inaugurate a process to be established by unconstrained discretion of the Commission. To the contrary, the PAEA did not change the Commission’s obligation under 39 U.S.C. section 503 (formerly section 3603), which requires it to “promulgate rules and regulations and establish procedures, **subject to chapters 5 and 7 of title 5**” of the United States Code (emphasis added). As the United States Court of Appeals for the District of Columbia has observed, this substantively unchanged section of the PRA “specifically refer[s] to the APA,” and requires

the Commission's "procedures" to comply therewith. *See National Easter Seal Society v. United States Postal Service*, 656 F.2d 754, 767 (D.C. Cir. 1981).

Consistent with the exercise of its rulemaking power, the Commission undertook its present task of promulgating regulations establishing a system of ratemaking by complying with 5 U.S.C. section 553(c), which required the Commission to publish a general notice of proposed rulemaking in the *Federal Register* in accordance with specifications of 5 U.S.C. section 553(b), stating (1) the "time, place, and nature" of the public rule making proceedings; (2) "the legal authority under which the rule is proposed"; and (3) the "substance of the proposed rule." Further, as also required by 5 U.S.C. section 553(c), the Commission has given "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,"<sup>1</sup> as well as oral "testimony,"<sup>2</sup> and has acknowledged that "commenters' observations [have] provide[d] useful guidance" in "developing new regulations." Order No. 26, ¶ 2004, p. 6. Indeed, sprinkled throughout the Commission's Order are references to such public comments as it found them relevant to its task,<sup>3</sup> as required by 5 U.S.C. section 553(c), which states that "consideration" of such presented "relevant matter" is required in order for the Commission to "adopt[] a concise general statement of the[] basis and purpose" of the rules adopted.

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<sup>1</sup> 5 U.S.C. § 553(c); *see* Order No. 26, ¶ 2002, p. 5 and n.4.

<sup>2</sup> *See, e.g.*, Order No. 26, ¶ 2012, p. 11 and n.8.

<sup>3</sup> *See, e.g.*, Order No. 26, ¶¶ 2012 (p. 11), 2019 (p. 14), 2022 (p. 15), and 2032-2036 (pp. 19-21).

Notwithstanding the positive contributions that public commentary has made to formulation of the Commission's Order, and notwithstanding the continuing Congressional mandate in 39 U.S.C. section 503 that the Commission comply with the APA, the Postal Service argued that, with implementation of the proposed rules governing "rate adjustments" for market dominant products, the role of public commentary in the ratemaking process has come to an end. In support of its position, the Postal Service has stated that "the logic of the PAEA suggests that if public input is not expressly provided for in the statute, it is not authorized." *See* Order No. 26, ¶ 2022, p. 15.

To its credit, the Commission has rejected the argument that there be no "public input during the review period" wherein the Commission assesses whether Postal Service's proposed rate adjustments comply with the Commission's ratemaking regulations and statutory standards as spelled out in 39 U.S.C. section 3622(d)(1)(C)(ii), unless the proposed rate increase has been prompted by "extraordinary or exceptional circumstances," under 39 U.S.C. section 3622(d)(1)(E). *See* Order No. 26, ¶¶ 2022 and 2023, pp. 15-16. Finding no "statutory bar to incorporating" public input into its section 3622(d)(1)(C)(ii) review, however, the Commission also has operated under the view that it has "broad discretion in deciding on how to conduct its review." Thus, it has adopted a truncated process for receiving public comment with respect to that review, without having presented any analysis as to whether its proposed procedures comply with the rulemaking standards of the APA. *See, e.g.*, Order No. 26, ¶ 2023, p. 16.

As discussed *supra*, PAEA leaves intact the 39 U.S.C. section 3603 requirement that the Commission "shall promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5" of the United States Code. Congress has mandated that, before the

Postal Service may make any rate adjustment for market dominant products, it must submit that proposal to the Commission for review. To that end, the Commission, after soliciting public comment, has proposed rules establishing a system of ratemaking that contemplates interstitial rate adjustments, but only insofar as those adjustments conform to Congressional policy and Commission regulations. Such interstitial ratemaking falls within the APA definition of a rule,<sup>4</sup> because the proposed rate adjustment cannot be implemented without the Commission making a “statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ... includ[ing] the approval or prescription for the future of rates....” 5 U.S.C. § 551(4). *See* Order No. 26, proposed rules 3100.2 through 3100.43.

Unmistakably then, the Commission “review” mandated by 39 U.S.C. section 3622(d)(1)(C)(ii) is “rule making,” and such review thus must meet the APA procedural requirements for rulemaking, as set forth in 5 U.S.C. section 553(c). That section, in turn, mandates that **before** an agency may make a rule, it “**shall** give interested persons an opportunity to participate in the rule making through the submission of written data, views, or arguments with or without opportunity for oral presentation.” (Emphasis added.) Thus, it is not a matter of “broad discretion” whether “public input might be helpful in determining the compliance of the anticipated rate changes....” Rather, it is a matter of legal obligation. The question is whether the Commission’s proposed rules governing receipt of public comment meet those legal obligations.

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<sup>4</sup> 5 U.S.C. § 551(4).

**A. APA Required Notice.**

In order for an agency to fulfill its obligation under the APA to receive the public comment mandated by 5 U.S.C. section 553(c), it must comply with the notice requirements of 5 U.S.C. section 553(b). The latter section generally requires that notice be “published in the Federal Register,” and that such notice include three items: (1) “the time, place, and nature of” the rulemaking proceedings; (2) “reference to the legal authority under which the rule is proposed;” and (3) “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”

The Commission’s proposed rules identify different types of rate adjustments for market dominant products. A Type 1 adjustment is broken down into two classes: a Type 1-A adjustment “represents the usual type of adjustment to rates of general applicability” and a Type 1-B adjustment which “uses unused rate adjustment authority in whole or in part.” Order No. 26, proposed rules 3100.3 and 3100.4 (p. 103). With respect to notice of proceedings for Type 1-A and Type 1-B rate adjustments, proposed rule 3100.13 provides for a filing in the *Federal Register*, but it does not specify the contents of the Commission’s notice, nor refer to the content requirements of such a notice in the APA. *See* Order No. 26, p. 106. Thus, the proposed rules do not appear to establish proper notice procedures as required by 39 U.S.C. section 3603.

**B. APA Requires Opportunity for Public Comment.**

With respect to Type 1-A and 1-B rate adjustment filings, proposed Rule section 3100.13(a) “allow[s] 20 days from the date of the filing [of the notice] for public comment.” Order No. 26, p. 106. But subsection (b) limits such public comment to:

(1) Whether the planned rate adjustments measured using the formula established in rule 3100.21(b) are at or below the annual limitation established in rule 3100.11; and (2) Whether the planned rate adjustments are consistent with the policies of 39 U.S.C. § 3622 and any subsequent amendments thereto.

Importantly, this proposed regulation would bar any comments from mailers to the Commission that proposed rates or classification changes violate any applicable provision of PAEA other than section 3622. In an apparent attempt to justify this limitation, the Commission has simply stated that PAEA has “marked[ly] shift[ed] [postal rate regulation] away from PRA-style in-depth examination,” thus the “proposed scope of public comment is no longer open-ended.” (Order No. 26, ¶ 2029, p. 18.)

Conspicuously absent from the Commission’s explanation is whether the time and content limits imposed on public comment are consistent with the APA requirement that in the rulemaking process an “agency **shall** give interested persons an opportunity to participate in the rule making....” *See* 5 U.S.C. § 553(c) (emphasis added). Standard agency practice under this APA provision has always welcomed public comment on a wide range of matters, with ample agency discretion to weed out the irrelevant **afterwards** as it prepares the APA required “general statement of [the adopted rule’s] basis and purpose.” Further, it would appear to be in the Commission’s interest **not** to exclude at the outset any public comment, such as it has here by its statement that it “**does not invite, and will not entertain**, public comment ... on matters such as costing methods.” Order No. 26, ¶ 2029, p. 18 (emphasis added).

Nor does it appear to be in either the Commission’s or the public’s best interest to provide a **maximum** 20-day period between the public notice and submission of public comments. To be sure, the Commission has, with the exception of exigency-based rate

adjustments, required a minimum of 45 days for advance public notice of the Postal Service's planned rate adjustments (proposed rule 3100.1), thereby adding, in effect, 25 days to the 20-day period. Although the two added together provide for 45 days, it appears reasonable to establish the 20-day period as a **minimum**, thereby allowing flexibility should the proposed rate adjustment be complex or controversial. Although the APA sets no fixed period of time between an agency notice and filing of public comments, 5 U.S.C. section 553(c) contemplates that the time period be a reasonable one, lest the mandated "opportunity to participate in the rule making" be too fleeting.<sup>5</sup>

The proposed rules would compound this problem by unconditional exclusion of public comment from its "review [of] the consistency of an amended notice of rate adjustment with filing requirements." (Order No. 26, ¶ 2029, p. 18.) Instead, the Commission has announced that it "anticipates handling resolution of discrepancies or other matters through direct communication with the Postal Service." (Order No. 26, ¶ 2026, p. 17.) Such an exclusionary rule appears to be in direct conflict with the 5 U.S.C. section 553(c) requirement that public comment be invited before the making of any rule.

### **C. Mail Classification**

39 U.S.C. section 3642 mandates that the Commission maintain accurate postal product lists with oversight responsibility "to verify that the rates and categorization of products are in

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<sup>5</sup> Understandably, the Commission has not set any specific time periods within which public participation is to occur in relation to a request for Type 3 or exigent rate increases. *See* proposed rule 3100.65. In such a case, the Commission has provided other means to ensure the effectiveness of public participation. *See* proposed rule 3100.65(c) and (f).

compliance with the PAEA.” (Order No. 26, ¶¶ 4003 (p. 85) and 4007 (p. 86).) To that end, the Commission has proposed rules requiring the Postal Service to establish a Mail Classification Schedule which categorizes products as either market dominant or competitive. (*Id.*, ¶¶ 4001-4007, pp. 85-86.) Within 30 days after enactment of its rules governing mail classifications, the Postal Service shall file a proposed Mail Classification Schedule reflecting the market dominant and competitive product lists as specified in 39 U.S.C. section 3621(a) and 39 U.S.C. section 3631(a) respectively. Proposed rule 3200.11 (p. 125). With respect to this initial Schedule, the Commission will file a public notice in the *Federal Register*, providing opportunity for public comment before incorporating a mail classification schedule into its rules. *Id.*

This provision for notice and public comment with respect to the initial Mail Classification Schedule does not refer to the APA standards for such notice and comment in rulemaking proceedings. Such compliance appears to be especially important; indeed, the Commission “expects the Postal Service to propose comprehensive modifications to the product lists to more accurately reflect market dominant and competitive products,” thereby indicating the necessity for providing ample time and opportunity for public comment. Order No. 26, ¶ 4010, p. 87.

Once the Commission adopts the initial Mail Classification Schedule, however, there appears to be very little, if any, assurance of any opportunity for public comment with respect to changes to the Mail Classification Schedule (other than adding a product to a list, removing a product from a list, or moving a product from one list to the other), the Commission having complete discretion whether to invite comments from the public. *See* proposed rule

3200.12(c)(2) (p. 127). For the reasons stated above, the APA requires notice and opportunity for public comment in the exercise of the Commission's rulemaking process, which would include modification of the Mail Classification Schedule. *See* 5 U.S.C. § 551(4).

Respectfully submitted,

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