

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

REGULATIONS ESTABLISHING SYSTEM
OF RATEMAKING

)
)
)
)
Docket No. RM2007-1

**COMMENTS OF THE MCGRAW-HILL COMPANIES, INC.
IN RESPONSE TO ORDER NO. 26, PROPOSING REGULATIONS
TO ESTABLISH A SYSTEM OF RATEMAKING**

The McGraw-Hill Companies, Inc. ("McGraw-Hill"), through its undersigned counsel, respectfully submits these comments in response to the Commission's Order No. 26, proposing regulations to establish a system of ratemaking in accord with the Postal Accountability and Enhancement Act ("PAEA"). In McGraw-Hill's view, the Commission has ably developed comprehensive regulations (with exceptions noted below) to implement the ratemaking provisions of PAEA. McGraw-Hill presents only three points for the Commission's consideration. First, McGraw-Hill urges that the Commission's rules should make some provision for prior review by the Commission at least of major classification changes proposed by the Postal Service. Second, McGraw-Hill believes that the Commission's rules should provide (as the Commission may have intended) for prospective review of proposed rate changes, beyond price cap issues, at least at the Commission's discretion. Third, McGraw-Hill reiterates its concern that the Commission's rules should provide at least in general terms for potential rollback of the price cap or unused rate adjustment authority in the event of significant service deterioration or cost-shifting to mailers.

I. The Commission's Rules Should Provide for Appropriate *Prospective* Review of Proposed Major Classification Changes.

Subpart E ("Requests Initiated by the Postal Service to Update the Mail Classification Schedule") of part 3200 [3020] ("Product Lists") of the Commission's proposed Rules of Practice and Procedure provides:

§ 3200.90 [3020.90] – General. The Postal Service shall assure that product descriptions in the Mail Classification Schedule accurately represent the current offerings of Postal Service products and services.

§ 3200.91 [3020.91 – Modifications. The Postal Service shall submit corrections to product descriptions in the Mail Classification Schedule, that do not constitute a proposal to modify the market dominant product list or the competitive product list as defined in rule 3200.30 [3020.30], by filing notice of the proposed change with the Commission no later than 15 days prior to the effective date of the proposed change.

§ 3200.92 [3020.92] – Implementation. The Commission shall review the proposed corrections for formatting and conformance with the structure of the Mail Classification Schedule, and subject to editorial changes, shall update the Mail Classification Schedule to coincide with the effective date of the proposed change.

McGraw-Hill is concerned that if the Outside-County Periodicals subclass is designated as a single market-dominant "product" pursuant to § 3200.11 [3020.11] of the Commission's proposed rules, subpart E of part 3200 [3020] of the proposed rules might be read to grant to Postal Service broad discretion to effect major classification changes to the Outside-Periodicals subclass – including eventual full zoning of the editorial pound charge for Outside-County Periodicals mail -- without prior substantive

review by the Commission.¹

The Commission has recognized in this regard that:

There are inherent limits on the scope or magnitude of any update allowable under subpart E. Specifically excluded are updates that would modify the market dominant or the competitive product lists. Implicitly excluded are updates that might be governed by other rules such as changes to rates and fees. A proposed update may not change the nature of a service to such an extent that it effectively creates a new product or eliminates an existing product. This subpart is not intended for such changes.

Order No. 26, ¶ 4041. However, the Postal Service may not view zoning of the editorial pound charge as requiring modification of the market-dominant product list, and *average* rates for the Outside-County Periodicals subclass may not increase (thus no price cap issues may be raised) even if the effect of the classification change is another significant rate increase for smaller-circulation Periodicals. Further, the Postal Service may not agree with adversely affected Periodicals mailers that zoning of the editorial pound charge would “effectively create[] a new product or eliminate[] an existing product” (id.).²

Under the proposed rules, therefore, adversely affected Periodicals mailers could well have no opportunity to raise any issue with the Commission respecting any such

¹ See Reply Comments of The McGraw-Hill Companies, Inc. in Response to Supplemental Comments of the United States Postal Service on the Classification Process, filed July 6, 2007 (incorporated herein by reference).

² McGraw-Hill appreciates (and does not doubt) the intent expressed by the Postal Service to consult with and attempt to accommodate mailers in formulating any proposed classification changes, prior to their submission to the Commission. As in the most recent rate case, however, there have long been fundamental disagreements among Periodicals mailers regarding classification changes, and such disagreements cannot necessarily be resolved to the satisfaction of all by the Postal Service alone.

proposed classification change until after it had already been implemented. With all respect to the Commission, to relegate such Periodicals mailers to “after-the-fact review” through the complaint process (id. ¶ 4042) would be neither fair nor efficient in McGraw-Hill’s view. It would not be fair because once a major classification change had already been implemented, the Commission would naturally be reluctant to “unscramble the egg” by ordering reversal of the change. Similarly, because implementation of major classification changes is disruptive and expensive for both mailers and the Postal Service (e.g., requiring considerable planning, training, and software changes, etc.), it is more efficient to resolve beforehand any issue as to whether any such change would pass muster under PAEA.

McGraw-Hill offers two suggestions in this regard. First, the Commission should at least treat proposed changes in product descriptions (i.e., classification changes) for market-dominant mail under subpart E of part 3200 [3020] of the proposed rules the same way that the Commission treats proposed changes in size and weight limitations for market-dominant mail under subpart F of part 3200 [3020] of the proposed rules. For the latter proposed changes, the Commission would require the Postal Service to file notice thereof with the Commission 45 days prior to their contemplated effective date (§ 3200.111(a) [3020.111(a)]), and would “seek public comment on whether the proposed update is in accordance with the policies and the applicable criteria of title 39” (§ 3200.111(b) [3020.111(b)]), while reserving authority to “direct other action as deemed appropriate” if the proposed change may be inconsistent with title 39 (§ 3200.111(c) [3020.111(c)]). McGraw-Hill sees no reason why major classification changes for market-dominant mail should be subject to less oversight by the

Commission than changes in size and weight limitations for market-dominant mail.³

Further, McGraw-Hill is of the view that the Commission's rules should provide that upon the Commission's own initiative or at the request of any interested party for good cause shown, the Commission may extend the 45-day review period to the extent reasonably necessary under the particular circumstances presented. The Commission has already well recognized that it has the statutory authority to do so (Order No. 26, pp. 14-15), and that it may be particularly appropriate to do so for "classification changes or operations changes likely to have material impact on mailers." *Id.* at 105 (§ 3110.10(b) [3010.10(b)]). By proceeding on a case-by-case basis in this regard, the Commission could best balance the competing statutory goals under PAEA of providing appropriate flexibility to the Postal Service while ensuring transparent, stable and reasonable rates and classifications for mailers. Under this approach, it is nonetheless likely that the vast majority of classification changes proposed by the Postal Service would be approved by the Commission within 45 days.

³ For example, as set forth in McGraw-Hill's July 6, 2007 Reply Comments (*see* note 1, *supra*), at pp. 4-5, the Postal Service should not be permitted to implement full zoning of the editorial pound charge applicable to all Outside-County Periodicals mail without prior review by the Commission, given the Commission's longstanding precedent upholding a flat editorial pound charge as a bedrock of the subclass, and its recent recognition of the importance of a flat editorial pound charge both in moderating 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 feature of the Periodicals class). *See* Docket No. R2006-1, Op. & Rec. Dec. ¶¶ 5608, 5681, 5700, 5771.

II. The Commission’s Rules Should Provide for Prospective Review of Proposed Rate Changes, Beyond Price Cap Issues, at the Commission’s Discretion.

The Commission has already made the salutary determination that “public input might be helpful in determining the compliance of the anticipated rate changes with the statutory pricing provisions,” and has invited public comment not only on rate cap issues, but more broadly on “[w]hether the planned rate adjustments are consistent with the policies of 39 U.S.C. § 3622.” Order No. 26, ¶¶ 2023, 2029, §3100.13(b)(2) [3010.13(b)(2)]. See also *id.* ¶ 2043 (“in the interest of transparency and accountability, the Postal Service has a burden to explain how its rates ... meet the objectives and factors of the PAEA”), ¶ 2047 (similar), § 3100.14(b)(7) [3010.14(b)(7)] (similar). However, § 3100.13(c) [3010.13(c)] of the proposed rules appears to provide for a determination by the Commission only “whether the planned rate adjustments are consistent with the test for compliance with the annual limitation,” and not whether they are also consistent with other policies under § 3622 of PAEA, as to which the Commission’s proposed rules solicit public comment.

It may well be that because many proposed rate adjustments are not challenged during the initial 45-day review period as contrary to such other policies, the Commission will have no occasion to determine within that period (as opposed to the annual compliance review) whether those proposed rate adjustments are consistent with policies of PAEA other than the price cap. Further, even if a planned rate adjustment is challenged on non-price-cap grounds, the Commission may not have time to resolve the issue within the 45-day period or any appropriate extension thereof, or

may not feel that the challenge is sufficiently serious to warrant any such extension. In that event, the Commission presumably should permit the planned rate adjustments to take effect without prejudice to later resolution of issues raised in public comments, and should so state.

However, the Commission's rules should nevertheless provide for the possibility that a serious non-rate-cap issue may be raised within the initial 45-day review period and the Commission may have time to resolve it within that period, or may be able to do so within an appropriate extension of that period, and may deem the issue sufficiently serious as to warrant such an extension.⁴ In this regard, McGraw-Hill suggests that § 3100.13(c)(1) [3010.13(c)(1)] of the Commission's proposed rules be revised as follows (new language in brackets): "If the planned rate adjustments are in compliance with the annual limitation and, if applicable, with the exception for unused rate adjustment authority, [and are not found by the Commission to be inconsistent with any other policy of 36 U.S.C. § 3622,] they may take effect" If this suggestion is accepted, similar revisions should be made to §§ 3100.13(c)(2), 3100.13(d),⁵ 3100.13(e), 3100.13(e)(1), and 3100.13(e)(2) [3010.13(c)(2), 3010.13(d), 3010.13(e), 3010.13(e)(1), and 3010.13(e)(2)].

⁴ As in the case of proposed classification changes (addressed in part I, *supra*), McGraw-Hill is of the view that the Commission's rules should provide that upon the Commission's own initiative or at the request of any interested party for good cause shown, the Commission may extend the 45-day review period for planned rate adjustments to the extent reasonably necessary under the particular circumstances presented, particularly "when price changes are more complicated." Order No. 26, ¶ 2021. As in the case of proposed classification changes, McGraw-Hill does not contemplate that such extensions would be granted routinely by the Commission.

⁵ Further, it may be appropriate to insert a comma and the phrase "if any," after the word "modifications" in § 3100.13(d) [3010.13(d)] of the proposed rules.

This approach would accommodate concerns about “the potential for intra-class [rate] increases to exceed the cap” – which the Commission has characterized as a “clear example of where statutory objectives may conflict” -- in a way that also accommodates the Commission’s concerns. Order No. 26, ¶¶ 2032, 2036. This approach does not involve any “cap” below the class level, nor would it require the Postal Service to justify any and all intra-class rates that exceed the cap. The Postal Service would not be required to provide any such justification except in the unusual case where the Commission so required, in addressing a serious issue that a proposed intra-class rate increase exceeded the upper limits of the zone of reasonableness mandated by PAEA.⁶ In the event that a serious issue is presented during the 45-day initial review period that a planned rate adjustment does not comply with the non-rate-cap policies of PAEA, the Commission should resolve it if feasible to do so within a reasonable timeframe, rather than permitting rates to take effect that the Commission may later find to be unlawful.

III. The Commission’s Rules Should Provide for Potential Rollback of the Price Cap, or Unused Rate Adjustment Authority, in the Event of Significant Service Deterioration or Cost Shifting to Mailers.

The Commission noted in Order No. 26 that McGraw-Hill among others had suggested that the Commission’s proposed rules should include a “method to reduce the price cap if the Postal Service performance levels deteriorate, or if the Postal Service places costly mail preparation requirements on mailers.” Id. at ¶ 2066. The Commission stated that it is “sympathetic to these concerns” but proposes to defer

⁶ See McGraw-Hill’s July 6, 2007 Reply Comments at pp. 6-7.

them. *Id.* at ¶ 2067. In part, the Commission reasoned that rules governing service performance and reporting have yet to be developed, and likewise no one has yet suggested a precise methodology for reducing the percentage price cap to account for service deterioration or cost-shifting to mailers. *Id.* The Commission added that it could develop additional regulations later if necessary but that for now it is “best to presume” that the Postal Service will “operate within both the letter and the spirit” of PAEA. *Id.* at ¶ 2068.

McGraw-Hill shares that presumption, but is concerned that if service for Periodicals were nevertheless to deteriorate widely over a substantial period – tantamount to a de facto rate increase – the Commission has signaled that no corresponding rate relief would be available even theoretically (unless and until a subsequent rulemaking proceeding is initiated and completed, presumably having only prospective effect). McGraw-Hill suggests that an appropriate middle ground for the Commission would be to affirm now in its rules, in general terms at least, that its remedial authority does extend to rolling back commensurately the price cap or any unused rate adjustment authority of the Postal Service if and as appropriate after an annual compliance review encompassing classwide service performance, in order to mitigate any wide and sustained deterioration in service (or cost-shifting to mailers).⁷

⁷ See Reply Comments of the McGraw-Hill Companies, Inc. Pursuant to Order No. 2, filed May 7, 2007, pp. 2-3 & n.3. The remedial authority of the Commission under PAEA is broad and flexible. See McGraw-Hill’s July 6, 2007 Reply Comments, pp. 5-6 (discussing *Chevron* case); Reply Comments of The McGraw-Hill Companies, Inc. Pursuant to Order no. 21, filed July 30, 2007, pp. 6-7 (discussing more narrowly tailored remedies for broad service failure).

McGraw-Hill appreciates the Commission's consideration of McGraw-Hill's comments in this and related dockets.

Respectfully submitted,

Timothy W. Bergin
Hall, Estill, Hardwick, Gable, Golden &
Nelson, P.C.
1120 20th Street, N.W.
Suite 700, North Building
Washington, DC 20036-3406
Telephone (202) 973-1224

Counsel for
The McGraw-Hill Companies, Inc.