

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

Regulations Establishing System
Of Ratemaking

Docket No. RM2007-1

**REPLY COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA
ON NOTICE OF PROPOSED RULEMAKING
(October 9, 2007)**

The Newspaper Association of America (“NAA”) hereby submits its reply comments on the Commission’s Notice of Proposed Rulemaking¹ in this proceeding to implement the ratesetting provisions of the Postal Accountability and Enhancement Act of 2006 (“PAEA”). NAA will address the procedures for review of proposed negotiated services agreements for market-dominant products, the distinct tests for special classifications in Section 3622(c)(10), and PostCom’s arbitrary proposal to limit parties’ statutory complaint rights.

I. THE COMMISSION MUST ENSURE THAT IT HAS AN ADEQUATE OPPORTUNITY TO REVIEW PROPOSED NEGOTIATED SERVICES AGREEMENTS FOR COMPLIANCE WITH STATUTORY CRITERIA

NAA’s opening comments on the *NPRM* pointed out that Section 3622(c)(10) establishes specific criteria for special classifications, including negotiated services agreements, that go beyond the standard criteria that otherwise apply to proposed rate adjustments. NAA’s comments also noted how these additional criteria should cause the Commission to amend Subpart D of its

¹ Order No. 26 (Aug. 15, 2007), 72 *Fed. Reg.* 50744 (Sept. 4, 2007) (“*NPRM*”).

proposed rules for changes in rates of market-dominant products (§§ 3100.40 to 3100.43)² so that its procedures for considering such special classifications ensure its ability to apply these criteria effectively.

In particular, NAA demonstrated that prior review of NSAs for market-dominant products is necessary in order to avoid potentially irreparable harm to an affected marketplace.³ NAA also pointed out why the Commission should entertain public comment to inform its review of whether those criteria are satisfied by the proposal.⁴ Other commenters took very similar positions.⁵

NAA particularly agrees with Medco Health Solutions that public comment on proposed rate adjustments is required by the Administrative Procedures Act. Although Medco focused its analysis on the APA's requirement of public comment on "Type 1" rate adjustments, its analysis applies equally to special classifications under Section 3622(c)(10), which are rates of "particular applicability." Postal rates, whether of general applicability or for NSAs, are "rules" under the APA subject to notice and comment.⁶ Thus, the Section

² NAA herein uses the rule sections as originally published in the *NPRM*. These correspond to Sections 3010.40 to 3010.43 as renumbered. See Notice of Adjustment In Numbering Of Proposed Rules (August 27, 2007).

³ See also Val-Pak Comments at 7 (a complaint may be too late where irreparable harm has occurred).

⁴ See also Val-Pak Comments at 21-22. Val-Pak also agrees with NAA that the terms of an NSA should be publicly available.

⁵ *Id.* See also APWU Comments at 6 (urging greater public participation in reviews of NSAs); Office of the Consumer Advocate Comments at 3-9 (demonstrating need for additional information from Postal Service to demonstrate compliance with Section 3622).

⁶ See Medco Comments at 5 (noting that proposed rate adjustments covered by proposed rules 3100.2 through 3100.43 – which include the NSA procedures -- are "rules" of general or particular applicability on which the APA requires public comment).

3622(d)(1)(C)(ii) rate adjustment process, which applies to proposed special classifications, under the APA must include provision for public comment. This public comment need not be protracted, but must be adequate to ensure due process under the APA.

Although not addressing Subpart D (Type 2 rate adjustments) of the ratesetting rules in detail, the Postal Service and a few other commenters express concern with the Commission's proposed rule 3200.30⁷ relating to the procedures for classifying new products as market-dominant or competitive, as required by Section 3642 of the PAEA.⁸ Their concern is that proposed rule 3200.30, when read in conjunction with the Commission's view that each NSA is a separate product could delay implementation of NSAs, is potentially lengthier and more burdensome than the review under Section 3622, including subsection (c)(10), and that only the latter should apply.

Those commenters overstate their case. The text of the *NPRM* states that the inquiry under proposed rule 3200.30 (renumbered as rule 3020.30) is primarily intended to address whether a proposed new special classification properly is classified as market-dominant or competitive. See *NPRM* at ¶ 4026 (“the primary focus of the review will be on compliance with the statutory requirements for proper categorization of the Postal Service product as either market dominant or competitive. Review of the operational parameters of the product and the financial basis of the product typically will be minimal”). Properly

⁷ As published in the *NPRM* (renumbered as section 3020).

⁸ USPS Comments at 4-6; Advo Comments at 2; Discover Financial Services Comments at 2.

classifying an NSA is of course a matter of considerable importance under the PAEA. If the Postal Service is suggesting that there be no possibility of classification reviews for new service offerings, it is urging a result which is contrary to the PAEA.

Any new NSA is both a new classification and a new rate, although it may not constitute a new “product.” As NAA stated previously, whether a particular NSA is a separate “product” or merely a rate option under an existing product should be determined by the Commission on a case-by-case basis.⁹ However, it needs to have a procedure for making that determination. Proposed rule 3200.30 *et seq* would establish precisely that process, allowing for classifying new offerings as products or not, and as market-dominant or competitive, on a case-by-case basis.

The flaw in the urging of the Postal Service and others to eliminate the rule 3020 procedure for NSAs is that whether a particular arrangement falls into the market-dominant or competitive category is something for which a review is required; it cannot be determined *a priori* and is to be decided ultimately by the Commission, not by the Postal Service. To be sure, in many instances the Commission’s contemplated review would be straightforward and could be resolved expeditiously. One would expect little dispute, for example, that a new NSA that is functionally-equivalent to the *Capital One* NSA should be classified within the market-dominant product category as an option within First-Class Mail, but not as a new “product.” In that case, the Commission’s review would

⁹ Comments of the Newspaper Association of America on Second Advance Notice of Proposed Rulemaking at 14-15 (June 18, 2007).

conclude that the proposal is not a “product” but is properly classified as market-dominant.

However, more complicated NSAs could pose more difficult questions. Consider, for example, an NSA that coupled *Bookspan*-like Standard Mail volume discounts (within the market-dominant category) with volume discounts for bulk parcel post and Priority Mail (both with the competitive category). The process of properly classifying such an NSA could well benefit from public comment. And the Commission should have, as it has proposed to have, a mechanism that would provide it with the flexibility to take more than the minimum 45 day period for rate changes to classify such a proposal.

But it is also conceivable that an NSA that plainly otherwise satisfies substantive legal requirements – for example, an NSA for a similarly situated mailer -- could take effect while the Commission continues to consider whether to classify it as market-dominant or competitive, and/or whether the NSA is truly a separate product or merely an option within an existing product. This should adequately address the Postal Service’s stated concern about possibly open-ended product classification proceedings. However, as NAA explained in its opening comments on the *NPRM*, where an NSA is substantively unlawful on its face, or where substantial doubt of its lawfulness exists, the Commission would plainly need to take sufficient time to determine its compliance with the statutory criteria before denying it, or allowing it to take effect, as the case may be.

For these reasons, the Commission should retain proposed rule 3200.30 *et seq* as proposed.

II. THE SECTION 3622(c)(10) “IMPROVED FINANCIAL POSITION” TEST IS SEPARATE FROM THE “UNREASONABLE HARM TO THE MARKETPLACE” TEST

Advo and Time Warner contend that proposed rule 3100.42(d)(3) (renumbered as 3010.42(d)(3)) – which would require the Postal Service to provide an analysis of the effects of an NSA “on the contribution to institutional costs from mailers not party to the agreement” -- is unnecessary and should be eliminated. They argue that the consideration of lost revenues from other mailers is irrelevant to an NSA under the PAEA due to the price cap regime and that the only “impact” consideration relevant to NSAs under the PAEA is the “unreasonable harm to competition” test in Section 3622(c)(10).¹⁰ They are incorrect.

Section 3622(c)(10) of the PAEA provides that a market-dominant NSA may be established:

When available on public and reasonable terms to similarly situated mailers, that—

(A) either—

(i) improve the net financial position of the Postal Service through reducing Postal Service costs or increasing the overall contribution to the institutional costs of the Postal Service; or

(ii) enhance the performance of mail preparation, processing, transportation or other functions; and

(B) do not cause unreasonable harm to the marketplace.

¹⁰ Advo Comments at 3-4; Time Warner Comments at 11.

Advo and Time Warner overlook that when the Postal Service chooses to rely on the “increasing the overall contribution to the institutional costs of the Postal Service” alternative in (A)(i), the analysis necessarily must include an evaluation of lost contribution from non-parties to an NSA. This is because subsection (A)(i) refers to improving the *net* financial position of the Postal Service by increasing the *overall* institutional cost contribution. Ignoring the effect on contribution from other mailers would limit consideration to merely the gross effect from the NSA mailer and ignore the net impact on the Postal Service.

Suppose, by way of illustration, Mailer X competes with Mailer Y. By virtue of an NSA, Mailer X enjoys lower rates or extra services that enable it to take business from Mailer Y. Assume further that due to the NSA Mailer X mails sufficient “new” mail (including business taken from Mailer Y) that it makes a larger total contribution to institutional costs than before, when evaluated on its own. But Mailer Y (having lost business to Mailer X because of the NSA) may mail less, resulting in its paying less total postage and less contribution. Taking into account the effect on Mailer Y, instead of considering Mailer X alone, thus reduces or possibly even eliminates the “net benefit” to the Postal Service. Thus, evaluating lost revenues from other mailers is an essential element when determining, under Section 3622(c)(10)(A)(i), whether a proposed special arrangement will result in increased *overall* contribution and thereby improve the net financial position of the Postal Service.

In arguing that the only “impact consideration” relevant to NSAs under the PAEA is the “harm to the marketplace” element in Section 3622(c)(10)(B), Advo

and Time Warner incorrectly confuse two distinct tests. The “increased overall contribution” test in Section 3622(c)(10)(A)(i) is separate and distinct from the “unreasonable harm to the marketplace” test in (B). Not only do they appear in different subparts separated by the conjunction “and,” which evidences two distinct criteria, but they require two different analyses. The “increased overall contribution” test (when relied upon by the Postal Service) requires consideration of the effect of a special classification on the Postal Service’s finances; the “harm to the marketplace” test (which applies in all instances) requires consideration of the effect of the proposed special classification on competition in the broader marketplace, including between the NSA mailer and its competitors, and involves considerations well beyond the Postal Service’s finances.

Advo and Time Warner also argue that the PAEA’s price cap will prevent the Postal Service from raising rates to recoup losses from an NSA, thus reducing the need to consider the “impact” of an NSA on other mailers.¹¹ In effect, they would redefine the “harm to the marketplace” test to whether rates for other mailers would rise, ignoring all other competitive and marketplace effects. This argument really is an attack on the statute – Congress did not say “higher rates for other mailers”; it chose the broader “harm to the marketplace” test. Moreover, Advo and Time Warner overstate the effect of the price cap. As NAA has previously pointed out,¹² other mailers will still bear the consequences of money-losing NSAs under the PAEA as under prior law. At a minimum, any

¹¹ Advo Comments at 4; Time Warner Comments at 12; see also National Postal Policy Council Comments at 9.

¹² Reply Comments of the Newspaper Association of America at 19-20 (May 7, 2007).

losses suffered by the Postal Service from improvident NSAs will reduce any incentive to raise rates for non-NSA mailers by less than the maximum allowed by the price cap.¹³ Thus, such a loss could cause other mailers to pay higher rates than they might otherwise have had to pay, even under the PAEA.¹⁴

Furthermore, the Advo and Time Warner contention would be correct only if the Postal Service always will raise all rates by the maximum allowed by the cap. The PAEA does not require the Postal Service to do so; indeed, the pricing flexibility and “banking” provisions in the PAEA demonstrate Congress’s expectation to the contrary. Because there is a possibility that the Postal Service may raise rates by less than the cap, other mailers stand to be harmed by money-losing NSAs.

Finally, Time Warner argues (at 12) that considering the effects of an NSA on non-parties would be “perverse” because PAEA allows general rate adjustments that raise rates for some mailers while lowering rates for others, and that NSAs should not receive closer scrutiny. This argument has no merit. Congress has specifically required the Commission to consider both (and

¹³ This consequence would arise when the Postal Service decides by how much to raise rates in the annual adjustment, based on its then-current financial condition. That is a different concern than the possibility that, when adjusting rates within a class, the Postal Service might raise other mailers’ rates to offset NSA discounts. The Commission has already addressed that possibility by correctly excluding the NSA discount from the price cap compliance calculation.

¹⁴ What *is* true is that replacing the former cost-of-service regime with price caps eliminates the former Prior Year Loss Recovery element of the revenue requirement, the mechanism through which future mailers paid for past financial losses. However, the Postal Service continues to have an economic incentive to recover past losses. Although the PYLR is no longer a formal component of a rate request under PAEA, the economic pressure that drove PYLR is, if anything, stronger, as the obligation to “breakeven” has been replaced with the opportunity to earn a profit.

separately) the effect of a proposed special classification on the contribution from other mailers and the effect of that classification on the broader marketplace.

Accordingly, the analysis in proposed rule 3010.42(d)(3) is appropriate and the rule should be retained.

III. POSTCOM'S PROPOSAL TO LIMIT COMPLAINTS IS CONTRARY TO THE STATUTE

In its comments, PostCom argues that the Commission should prohibit as “absolutely contrary to the letter and spirit of the Act” any complaints challenging proposed rates during the 45-day period following a notice of rate adjustment.¹⁵ This issue lies outside the scope of the current *NPRM*. In any case, PostCom’s proposal is contrary to the law as well as poor administrative policy.

PostCom cites no statutory authority for its startling proposition that the public should be prohibited from challenging a rate proposal. Section 3662 provides:

Any interested person . . . who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.

39 U.S.C. § 3662(a). The reference to “this chapter” includes the ratesetting provisions in Section 3622. Subsection 3622(b) directs the Commission to respond “promptly” to such a complaint.

¹⁵ PostCom Comments at 2. PostCom also deplores the Commission’s proposed rule allowing public comment on notices of proposed rate adjustments. *Id.* at 2-3.

Nothing in Section 3662 imposes any limitation as to when an interested party may file a complaint. The statute requires only that the party believe that the Postal Service “is not operating in conformance” with the listed statutory requirements. Proposing rates that are not in conformity to Section 3622 and the ratesetting regime implemented thereunder falls squarely within the scope of matters subject to Section 3662 complaints.

PostCom rests its legal argument for such a prohibition on the Commission’s authority to prescribe the “form and manner” of a complaint.¹⁶ But “form and manner” concern the presentation and substance of a complaint, not its timing. Most importantly, the First Amendment’s guarantee of the right to petition the government for redress of grievances precludes the urged interpretation. The authority to prescribe “form and manner” may not be interpreted in a manner that would infringe this constitutional right. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems” (citations omitted)).

Furthermore, the absence of the term “time” from the provision allowing the Commission to prescribe the “form and manner” in which complaints may be filed indicates that the Commission’s authority does not extend so far as to allow

¹⁶ PostCom asserts that there is “no question” that the Commission has legal authority to limit the timing of consideration of a complaint, but cites no authority for that bald assertion. PostCom at 4. PostCom’s reliance on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) does not help its cause. That case held merely that a court cannot require a regulatory agency to adhere to procedures not found in the agency’s organic statute. Here, PostCom would have the Commission impose restrictions not found in its organic statute.

it to determine *when* complaints may be filed. When Congress has intended to permit an agency to determine the timing of a filing—in addition to the form and manner—it has had no problem stating so explicitly. See, e.g., 43 U.S.C. § 1845(d)(1) (“The Secretary shall . . . specify the time, form and manner in which claims must be filed.”). Here, it is noteworthy that Congress did not confer the Commission with authority to prescribe the “time, form and manner” – it provided for only the latter two.

PostCom rests its policy argument on the difficulty it presumes that the Commission would have in considering a complaint within the 45 day minimum period for review of a notice of rate adjustment. However, the statute provides no indication that Congress was troubled by PostCom’s purported concern. It is not obvious why a complaint could not be pending concurrently with a proposed rate change. Indeed, Congress gave the Commission a maximum period of 90 days in which to respond to a complaint;¹⁷ thus, it is possible under the statutory timetable for a rate adjustment to take effect while a complaint is pending. Indeed, in some instances the Commission might conclude that a complaint proceeding is the optimal route for considering whether certain rates comply with the statute; having a complaint already on file would promote administrative convenience.

Second, Section 3662 authorizes the filing of complaints averring violations of statutory provisions beyond merely those found in Section 3622. PostCom makes no attempt to explain how the filing of proposed rates under

¹⁷ PostCom incorrectly describes the 90 day period as a “minimum.” It is incorrect; Section 3662 allows the Commission to act on a complaint in a shorter period of time.

Section 3622(d) could cutoff interested parties' ability to file complaints regarding the proposed rates' noncompliance with those other statutory provisions.

Finally, PostCom grudgingly notes that the Commission "could" allow complaints to be filed during the notice period, but decline to consider them until after completing its review.¹⁸ However, PostCom says that such an approach "serves no purpose" other than burden the rate process. It is true that the statute gives the Commission up to 90 days to respond to a complaint; thus, if a complaint were filed on day 2 of the 45 day period, the Commission might choose not to turn its attention to the complaint until day 46, after completing its review under Section 3622. However, the filing of such a complaint would, in fact, serve an important purpose. In particular, it would start the clock ticking on review of a charge that a certain rate is unlawful, thereby accelerating the ultimate resolution of the challenge.

Forcing parties to wait for nearly two months after a notice of rate adjustment is announced is unauthorized by the statute, conflicts with a remedy provided by Congress, and would serve no useful purpose. PostCom's proposed should be summarily rejected.

IV. CONCLUSION

For the foregoing reasons, the Newspaper Association of America respectfully urges the Commission to preserve public comment on proposed special classifications, including the Section 3642 classification review, enforce

¹⁸ PostCom Comments at 5.

all provisions of Section 3622(c)(10), and avoid artificial limitations on the complaint process.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this 9th day of October, 2007, caused to be served the foregoing document upon the United States Postal Service and the Office of the Consumer Advocate in accordance with the rules of practice.

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