

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

Regulations Establishing System of Ratemaking

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Docket RM2007-1

**Reply Comments of DFS Services LLC
In Response to Order No. 26
(October 9, 2007)**

DFS Services LLC (“DFS”) hereby submits these Comments in response to Order No. 26 and Order No. 30.

The initial Comments filed in response to Order No. 26 tend to break down into two relatively predictable groups. On the one hand, the majority of commentators generally support the draft rules as an appropriate and straightforward reflection of Congressional intent, although many have suggested minor changes.¹ On the other hand, a handful of commentators obviously have not accepted the fact that Congress gave the Postal Service, in the Postal Accountability and Enhancement Act (“PAEA”), substantial pricing flexibility. Nor have these parties accepted the fact that Congress also decided in that Act to “radically reduce” the degree of litigation that surrounds changing postal rates. These Commentators clearly believe, regardless of what Congress has decreed, that pricing flexibility is inappropriate and that more rate litigation, rather than less, is desirable. Their comments predictably reflect that agenda

¹ One such clarifying suggestion was made by DFS in its Initial Comments concerning the interplay of Sections 3100.40-3100.43, 3110.5, and 3642 of the proposed rules regarding NSAs. That point was also taken up in various forms by the Postal Service, and a number of other parties. See e.g., Comments of Advo Inc in Response to Proposed Regulations Establishing a System of Ratemaking, September 24, 2007, at 2-3.

to different degrees. The Commission should reject those calls for pricing rigidity and increased complexity and litigation.

I.
**The OCA Argument that the PAEA Creates a
“More Stringent” Standard for NSAs is Simply Wrong.**

The Office of the Consumer Advocate (OCA) makes an argument that under the PAEA, standards for the Commission to “approve” Negotiated Service Agreements (“NSAs”) are stricter than they were under the Postal Reorganization Act. OCA Initial Comments in Response to Order No. 26 at 4. That assessment is inaccurate.

The Commission’s standard for NSAs, prior to the passage of the PAEA was that every NSA had to bring a financial benefit to the Postal Service. That standard was carried forward under the PAEA in new Section 3622(10)(A)(i) of title 39 which says that an NSA is desirable if it improves the net financial position of the Postal Service. The very next section, however, *creates an alternative* standard that has nothing to do with profitability for the Postal Service. It says that an NSA is desirable if it enhances “the performance of mail preparation, processing, transportation, or other functions.” 39 U.S.C § 3622(10)(A)(ii).² This addition of an alternative standard for NSAs loosens the standards. It does not tighten them.

II.
Administrative Procedures Act Issues.

In its Comments, Medco Health Solutions makes an elaborate argument that the Commission’s draft regulations are deficient under the rulemaking provisions of the Administrative Procedures Act (APA). Medco Comments at 2-8. While Medco’s

² Section B of 3622(1) adds an unreasonable competitive harm overlay to both subsections, which is essentially a restatement of part of the NSA standard under the Postal Reorganization Act.

arguments sound impressive, their assessment is not accurate. The requirements of the APA are simply not that complicated.

Section 553 of the APA requires four items: 1) that specific notice be given, 2) that interested parties be given an opportunity to comment, 3) that an agency produce a concise general statement of the basis and purpose for any ruling, and 4) that the publication of a substantive rule be made not less than 30 days before its effective date, unless the agency otherwise provides for good cause found.

There is no question that the Commission's draft regulations provide for adequate notice (including Federal Register publication) and an opportunity for any one to be heard, and Medco has not shown otherwise. The statement that the Commission will release concerning the consistency of the rate adjustment with the rate cap surely should include a short concise general statement of its basis and purposes in doing so. With these elements in place in the proposed rules, the first three of the four requirements of the APA are met. That leaves the final requirement, which is that the agency should publish a substantive rule not less than 30 days before its effective date.

Proposed Section 3100.13 provides the following timeline, assuming posting on the Commission's website the day after the Postal Service gives its Notice of a rate adjustment:

Notice Date	USPS Gives PRC Notice
Notice Date plus one	Notice posted on website, start of 20 day comment period.
Notice Date plus 21	Comment period closes
Notice Date plus 35 days	Deadline for issuance of Commission's statement concerning the consistency of the rate adjustment with the rate cap
Notice Date plus 45 days	New rates take effect.

If one assumes that the statement of the Commission regarding the consistency of the Postal Service's rate adjustment is indeed a substantive rule,³ and if one also assumes that "publication" of that rule is not effective until sometime between 21 and 35 days after the Notice Date when the Commission publishes its statement, then it does appear that the Commission's proposed rules might result in the publication of a substantive rule in a time period less than 30 days before the rule's effective date.

However, by its own terms, Section 553(d) provides that an agency can "otherwise provide" and make a finding that good cause exists to allow a substantive rule to be published less than 30 days before its effective date, so long as the agency publishes that good cause with the rule. See 5 U.S.C. § 553(d)(3). DFS would urge the Commission to do just that. The PAEA has placed a very high priority on creating a rate system that allows the Postal Service to change rates simply, flexibly, and quickly. Consequently, the Commission can easily find—grounded in the legislative intent of the PAEA—that it has good cause to adopt a procedural schedule that allows the Postal Service to adjust rates 45 days after giving the PRC Notice, even if "final publication" of the PRC's statement occurs less than 30 days before the new rates take effect, provided the rate adjustment is consistent with the rate cap of Section 3626(d)(1)(A). The Commission would need to publish this finding of good cause with the rules, pursuant to 553(d)(3).

³ It is not all clear that the document that the Commission will release concerning the consistency of the rate adjustment with the rate cap is a "rule" within the meaning of the APA. However, this is a question that the Commission need not reach for, as explained below, in order to bring its rules into compliance with the APA, the Commission need only make a finding that it has good cause to allow the publication of its statement less than 30 days before rates take effect.

III.
**The “Objectives” and “Factors” of Section 3622 Under the PAEA
Play a Much Different Role than did the “Factors” of Sections 3622
and 3623 under the Postal Reorganization Act.**

Several Commentators have suggested that the Postal Service justify its pricing decisions by considering to a greater degree the Objectives and Factors found in Section 3622.⁴ Indeed the Commission’s rules in one area allude to these factors and suggest that the Postal Service should discuss how it took them into account in modifying its product list. See proposed Sections 3200.32(b); 3200.52(b); and 3200.72(b) DFS respectfully submits that such a use of these factors is inappropriate in light of the changed purpose of the factors in Section 3622 under the PAEA as compared to Section 3622 under the Postal Reorganization Act.

Under the Postal Reorganization Act of 1970, each time the Postal Service requested a recommended decision from the Commission, the Commission was legally bound to make its decision in accordance with the nine factors listed in former Section 3622, balancing each against the others, in order to reach an appropriate pricing decision. Consequently, these factors were the factors that the Postal Service used as the building blocks in designing and requesting recommended rate changes.

These factors were largely incorporated into the current Section 3622 through the PAEA, with one extremely important and fundamental change. Instead of being factors for the Commission to examine when considering a “request for a recommended decision,” the former factors have been converted by the PAEA into new factors for the Commission to examine in “establishing or revising” a modern system for regulating

⁴ See e.g., Comments of ValPak In Response to Order 26, September 24, 2007 at 9-10.

rates and classes for market-dominant rates.⁵ The difference is significant. No longer are the Section 3622 factors to be considered each time the Postal Service raises rates, but only when the Commission establishes and changes the rate-setting system. This point seems to have been missed (or ignored) by a number of commentators, and it is a very important point.

If Congress had intended the Postal Service and the Commission to take all the items of Sections 3622(b) and (c) into account each time a rate was changed, then it would have said so. The language of those sections is quite plain. The terms specifically refer to the design of the new rate setting system, and not to the design of rate adjustments. As the leading legal treatise in this area states, “When the intention of the legislation is so apparent from the face of the statute that there can be no question as to its meaning, there is not room for construction.” 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 46:01, pp. 118-120 and authorities cited therein. The PAEA is unambiguous.

This fundamental change is inherently consistent with the new pricing philosophy embodied in the PAEA. Under the PAEA, the Postal Service should be guided in determining its prices—once rates cover costs—by its strategic focus and market factors. Under the PAEA, prices need not be determined by the factors enumerated in former Section 3622 of the Postal Reorganization Act, including the “fairness” of the distribution of institutional costs among market-dominant classes and products, except to the degree that consideration of such factors furthers the Postal Service’s strategic

⁵ The PAEA also adds ten objectives to the Commission list of items to be considered when designing the new system, and gives them precedence over the factors. Compare current 39 U.S.C 3622(b) (Objectives) with current 39 U.S.C 3622(c) (Factors).

focus and its marketing needs.⁶ In any case, the Commission should not permit any one to second-guess the pricing decisions of the Postal Service through the rate-setting process. Should any person or party believe that the Postal Service's pricing decisions violate the law, or that the Postal Service's actions rise to the level of a Section 403 undue or unreasonable discrimination violation, then their remedy lies in the complaint process, not the rate-setting process.

IV. Exigent Rate Increases.

DFS' position on exigent rate increases is that the Commission's rules should not specify what circumstances would justify adjusting rates above the rate cap due to "extraordinary or exceptional circumstances." If this authority were ever to be used, the Postal Service and the Commission would need to base their actions on a strong factual record. Making any sort of preliminary judgment or determination now, without a factual record before it, could open a Pandora's box of litigation and appeals over the regulations.

The Comments of the National Postal Mail Handlers Union (NPMHU), which sets forth an excellent legislative history on this issue, is right on point in this matter. As its Comments state: "Rather than addressing this issue in the abstract, the NPMHU agrees that it is preferable to allow the statutory terms to gather meaning through adjudication in the context of specific factual situations." Comments of the National Postal Mail Handlers Union on Proposed Regulations, September 24, 2007 at 2. We agree.

⁶ Indeed, the word "fair" has been struck from the postal lexicon of Section 3622.

Finally, DFS additionally submits that the question of whether exigent rate increases should be permanent or temporary is also the type of issue that should not be addressed in the rules but allowed to develop over time, in the context of concrete facts and specific requests.

Thank you for considering our views.

Respectfully submitted,

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