

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Periodic Reporting Rules)
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Docket No. RM2008-4

INITIAL COMMENTS OF THE PUBLIC REPRESENTATIVE

(October 16, 2008)

With limited exceptions, the general public believes that the proposed periodic reporting rules will allow the Commission to meet the additional requirements and challenges of its enhanced responsibilities under the Postal Accountability and Enhancement Act.

I. INTRODUCTION

The Postal Accountability and Enhancement Act (PAEA) tasks the Commission with significantly increased oversight and reporting responsibilities that require the Commission to obtain significant amounts of information from the Postal Service to fulfill those Congressionally mandated tasks.

Most significantly, the PAEA requires the Commission to submit a yearly report, the Annual Compliance Determination, which addresses the results of Postal Service operations. This report requires a determination by the Commission as to whether the Postal Service has met the rate setting, service, and other objectives of the PAEA for the preceding fiscal year. This analysis uses a backward-looking perspective, using

actual revenue, cost, and volume data for the most recently completed fiscal year. The proposed rules comprehensively detail the annual data the Postal Service should supply the Commission for its Annual Compliance Determination.

The Postal Service's accounting period and quarterly reports required by the proposed rules are also important to understanding ongoing Postal Service operations. They allow the Commission and other interested persons to stay current regarding new programs, unexpected developments, and other issues which may impact their interests and responsibilities in the future. They provide an early warning system and act as a learning tool. Interested persons will be able to use this information to consider whether or not complaint procedures are justified under the applicable provisions of the PAEA. They also help provide the transparency envisioned by the governing legislation. The proposed rules appropriately include the requirement that these data be filed on a timely basis.

However, there is one area where the Commission's proposed rules can be improved, that of current year estimates.¹ The Public Representative believes that requiring the Postal Service to provide additional information regarding current year estimates would allow the Commission to better meet its obligations under the PAEA. In the current economic and political climate, it is in the public's best interest for the Commission to have all the tools it needs in order to provide appropriate levels of oversight for the greater transparency and accountability envisioned by Congress. This is especially true in circumstances where, as here, the increased transparency and accountability will not hinder the Postal Service's flexibility. Indeed, the additional data requested is information that the Postal Service already develops for its own planning purposes; it would not place a measurable additional burden on the Postal Service to produce this information.

¹ As discussed in this filing, the current year is the year in which the report is issued. Projections for the current year would be based on anticipated conditions as of the end of the recently completed year. The evaluation of the regulatory format analysis required by section 3651 would take into account these projections as well as actual past years' data. In contrast, the Annual Compliance Determination would focus solely on the previous year.

The Public Representative also provides comments on the Commission's proposed definitions, the timing of appointing a public representative in cases where the Commission is considering changing analytical principles, the status of the "Products and Categories" appendix, and an implementation schedule.

II. COMMENTS

The Public Representative believes that the Commission's periodic reporting rules establish a comprehensive system for filing periodic reports that will benefit the general public and allow the Commission to meet its enhanced responsibilities under the PAEA. This is an important step in developing the new oversight process assigned to the Commission by the PAEA.

Nonetheless, the Public Representative believes that several improvements can be made to the Commission's proposed periodic reporting rules. These comments focus on the following five areas: current year estimates, the definitional rules, the appointment of a public representative, the Appendix entitled "Products and Categories," and a proposed implementation schedule.

A. Current Year Estimates

Allowing the Commission access to current year estimates is reasonable and appropriate. The new legislation did not intend for all the required analyses to have an exclusively backward-looking focus. Section 3651 mandates an annual evaluation by the Commission of the regulatory system itself. That section provides that the Commission's analysis is to consider, among other issues, "the extent to which regulations *are achieving* the objectives under sections 3622 and 3633, respectively." (emphasis added); *accord* PRC Order No. 104 (August 22, 2008) at 3. Section 3651 tasks the Commission with the responsibility of evaluating the extent to which its regulations are achieving their statutory objectives. This implies that the Commission should be reviewing such information on a current basis as well as looking at the past

year's actual results. Sections 3622 and 3633 cross-referenced in section 3651 refer to the Commission's regulations for market dominant products and competitive products. Although as enumerated in sections 3622 and 3633, the Congressional objectives with respect to market dominant and competitive products differ somewhat, they both address the rate, classification, and other issues that Congress expects the Commission to explore on a current basis. These include the requirements that all products cover their attributable costs and market dominant products cover appropriate portions of institutional costs. See 39 U.S.C. §§ 3622(b), (c), 3633. The market dominant regulations have additional objectives, including the maintenance of high quality service standards. See 39 U.S.C. § 3622. These objectives require the Commission to have current information and current year projections to fully meet these statutory goals. If reviewed solely in a backward-looking manner, this data would be outdated.

Additionally, section 3633(a)(3) requires the Commission to determine an appropriate contribution for the competitive classes as a whole to the Postal Service's institutional costs. Because this determination must take into account "all relevant circumstances, including the *prevailing* competitive conditions in the market," 39 U.S.C. §3633(b) (emphasis added), this determination should be read to apply to current and future years.

These statutory provisions demonstrate that Congress intended for the Commission to also review current year projections and estimates in order to give effect to the transparency and accountability objectives of the PAEA. Accordingly, the Commission's periodic reporting rules should require the Postal Service to provide current year projections. These data will better enable the Commission to perform the expanded reporting functions assigned to it by Congress.

Accordingly, to fully perform its mission under the PAEA, the Commission's rules should require a Postal Service projection of cost, volume, and revenue for the current year. This information will allow the Commission to more fully assess the regulatory framework in terms of the rate and classification objectives of sections 3622 and 3633,

as contemplated by section 3651. Thus, on the one hand, the Commission will be able to analyze the regulatory system in place by examining what happened historically utilizing the provisions of the currently proposed periodic reporting rules while on the other hand, supplementing that data analysis with Postal Service forecasts of what is expected to occur in the current year. These data are integral for the performance of section 3622 and section 3633 analyses required by PAEA.

The projections will allow the Commission and interested persons to review estimated current year attributable costs by product and rate category. Thus, interested persons will be able to analyze estimated cost functions to identify those that change disproportionately. Interested persons will also be able to analyze data relating to mail products and categories for unusual changes in attributable costs, as well as ensure that their costs are covered by revenues.

It will likewise permit examination of anticipated institutional cost contributions by product. It will enable all interested persons to evaluate these contributions in terms of the objectives of sections 3622 and 3633 criteria as required by section 3651.

In addition, a current year projection will present the Commission and interested persons with an overall view (albeit an estimate), as well as some details, of the Postal Service's present position. It will assist interested persons in planning for the future, in particular, to draw their own conclusions regarding the need for rate increases. It will enable interested persons to focus on trends in operations and provide an early warning system for issues affecting them. This allows an interested person to determine if a complaint is warranted under section 3662. A complete analysis will also enhance the openness and transparency objectives contemplated by section 3651.

Obviously, current year projection data are already available since the Postal Service must prepare long-term as well as short-term projections for its budgetary and planning process. It is reasonable to assume that responsible management would have much more detailed projections of the current year than those that the public suggests should be disclosed here. Accordingly, any burden on the Postal Service to prepare such information for submission to the Commission should be *de minimus*.

These current year projections should presume current rates are in effect for the entire year. The intent of this proposal is to promote transparency for the Commission, mailers, and interested parties. There is no interest in interfering with Postal Service discretion regarding the timing of rate increases, nor is there any intent to force the Postal Service to disclose their internal planning regarding the next rate change.

It is understood that conditions change and forecasts require adjustment. Revised forecasts occurring in the current year need not be provided under this proposal. The intent is to comply with the provisions of the PAEA that require a current evaluation of regulatory procedures. A one-time projection for the current year, performed at the same time the Postal Service is providing material for the most recently completed year, is a reasonable requirement. Projections would reflect current conditions as of the end of the most recently completed year.

The proposed current year projections should present the same level of detail concerning products and rate categories as required in the currently proposed data reporting rules. It should utilize the same analytical principals included in that analysis, since there is no intent to predict the results of potential proceedings focused on changing those principles. Documentation should include the volume projection factors used and any other analytical data unique to that report.

B. Placement of Definitional Rules

The Commission's proposed rule 3050.1 addresses the definitions that are applicable to part 3050. The Public Representative believes that the definitions are acceptable as written. However, the Public Representative suggests that the Commission place some or all of these definitions in the main definitions section of the Commission's rules – section 3001.5. Placing these definitions in the main definitions section would ensure uniformity of definitions throughout the Commission's rules. For example, the term "product" is already defined in section 3001.5. The definition of product proposed in section 3050.1(f) is slightly different than the definition listed in section 3001.5. The difference in definitions could cause some confusion. Accordingly,

the Commission should either move these definitions to the main definitions section or explain why the definitions should be applicable only to part 3050. If the Commission does not believe that it is appropriate to move the definitions to section 3001.5, at the very least, the Commission should not use subsection letter designations for each definitional term. This will allow the Commission to have flexibility in the future when it adds new definitions in alphabetical order without having to renumber the entire subsections. See, e.g., 49 CFR § 659.5.

C. Appointment of a Public Representative

In section VII.D. of the Commission's explanation, the Commission discusses the Form and Content that is to be used when a participant seeks changes in Analytical Principles. The Commission envisions that such actions will take place as informal rulemaking proceedings after the proposal reaches a stage where it is "well defined, adequately documented, and ready for final evaluation." PRC Order No. 104 at 35. Prior to that stage, the Commission's explanation suggests that it may open a review docket or initiate a technical conference to explore issues raised by the proposed alternative analytical principle.

The proposed rules do not discuss the timing for appointing an officer to represent the interests of the general public with respect to proposed changes to analytical principles. The Public Representative believes that it is in the public's best interest for it to be involved in this process as early as possible. If a public representative is not appointed until a notice of proposed rulemaking is issued, it may be too late for the public representative to participate in technical conferences, other informal gatherings, or to otherwise make meaningful informal comments to shape any notice of proposed rulemaking. Accordingly, the Public Representative requests that the Commission include a rule that provides for the appointment of a public representative as soon as the Commission makes a determination that it will consider a proposed change to an Accepted Analytical Principle.

D. Status of the Appendix

PRC Order No. 104 includes an Appendix entitled “Products and Categories” which provides the alternative, disaggregated format that the Commission requests the Postal Service to provide for its annual report submission. The status of this Appendix is unclear. Is this Appendix a suggested alternative format, or is it mandatory that the Postal Service use the exact format of products and rate categories listed in that Appendix? The Commission should clarify the status of the Appendix. The Commission should also consider elevating the status of the Appendix to a formal Appendix to Part 3050 for inclusion in the Code of Federal Regulations or, at the very least, issue the Appendix as a guidance document. See OMB Bulletin 07-02, 72 FR 3432 (January 25, 2007) (providing policies for the issuance of agency guidance documents). While the inclusion of the Appendix solely as part of the Commission’s explanation and preamble is helpful, it has the drawback of requiring participants to go back to Order No. 104 to determine the specifics of the Appendix. Participants unfamiliar with the process may not realize that such an important Appendix exists. On the other hand, if the Commission issues the Appendix as an Appendix to Part 3050 in the Code of Federal Regulations, or issues it as a guidance document published on the Commission’s website, it will be much easier for participants to find and use. Placing the Appendix on the Commission’s website as a guidance document also has the added benefit of allowing the Commission to change the product and rate category lists without going through the time consuming notice and comment rulemaking requirements, particularly if the status of the Appendix is merely illustrative. See *e.g.*, 21 CFR § 10.115(d).

E. Implementation Schedule

The proposed rules set up special procedures for changes in analytical principles to be reflected in the Annual Report. Many changes in data collection methods would be considered a change in analytical principle. An example is the case of a proposed

change in an on-going data system like the In-Office Cost System. The lead time associated with such changes would typically be lengthy due to the need to implement changes at the first of the year. If that deadline is missed, a whole year elapses before a change can be implemented. The process might be improved, at least for procedural planning purposes, if a detailed implementation schedule were to be included in the request for a change in an analytical principle. It would also allow interested parties and the Commission to know how much time the Postal Service requires, from a practical standpoint, before it can begin using a newly accepted analytical principle. The proposed implementation schedule should include training, material acquisition and preparation, and any other time consuming activities.

III. CONCLUSION

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully Submitted,

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Docket No. RM2008-4

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October 16, 2008