

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

)
Modification of Mail Classification)
Schedule Regarding Combined)
Mailings of Standard Mail)
and Periodicals)

Docket No. MC2011-5

COMMENTS OF THE PUBLIC REPRESENTATIVE

(November 24, 2010)

On November 5, 2010, the Postal Service filed a two paragraph notice with the Commission initiating this proceeding pursuant to 39 U.S.C. 3020.90 *et seq.*¹ Upon review of the skimpy Notice, the Public Representative speculates that the proceeding relates to a new program for comailing Standard Mail and Periodicals mailpieces within the same containers and bundles. Notice at 1. Even though it was filed pursuant to 39 U.S.C. 3020.90 *et seq.*, a section intended for minor, technical changes to the Mail Classification Schedule, the new program in this case appears to raise material issues concerning rate increase calculations, service standards and measurements, and product definitions.

Accordingly, the Public Representative urges the Commission require the Postal Service to refile the case under more appropriate Commission rules and with sufficient supporting information to allow the Commission and public to make informed decisions about whether the program conforms with the Postal Accountability and Enhancement Act (PAEA).

¹ Notice of the United States Postal Service of Classification Change Related to Combined Mailings of Standard Mail and Periodicals, November 5, 2010 (Notice).

Part I of these comments discusses the Postal Service's failure to provide sufficient information to allow interested parties to evaluate the proposed new program. Part II provides some supplemental information on the program that was absent from the Postal Service's initial filing. Part III addresses the price cap related issues as well as the proper filing procedures. Part IV makes suggestions on streamlining the Commission's rules implicated by this case. Part V discusses the merits of the case, including the service standard and "new product" implications. Part VI makes suggestions for the next steps.

I. The Postal Service Failed to Provide Sufficient Information to Allow Interested Parties to Evaluate the Actual Proposal

The Postal Service failed to provide enough information to allow interested parties to evaluate the merits of the actual proposal and whether the proposed program complies with the requirements and policies of the PAEA. The Postal Service's extremely short, two paragraph Notice informs the Commission that the Governors changed Postal Service classifications to allow mailers to use the Mixed Class preparation option and combine Standard Mail and Periodicals mailpieces within the same bundle (comail), or combine separate same-class bundles on the same pallet (copalletize). Notice at 1. As its entire justification in support of this change, the Postal Service states that the change is "to maximize presorting or to qualify for deeper destination entry discounts." *Id.* It then makes the conclusory statement that "the changes provide a fair price application for Mixed Class mailings of Standard Mail and Periodicals." *Id.* Attached to the two paragraph Notice is a page captioned as "Edits to the Mail Classification Schedule" that includes two new sentences to add to the Mail Classification Schedule explaining how to calculate the Periodicals bundle and container rates for bundles and containers that include both Standard Mail and Periodicals pieces.

The Public Representative submits that the Postal Service's filing in this case is unacceptable. From the scant filing, the Postal Service expects that the general public and the Commission will be able to infer and extrapolate the details of this program, the

benefits to the Postal Service and its stakeholders from the implementation, and how the program comports with the legal and regulatory requirements. However, the constraints of the current legal and regulatory framework set forth by the PAEA did not envision placing such a burdensome responsibility on interested stakeholders, and in fact, make such a monumental undertaking nearly impossible. In order for the public, the Commission, and other interested parties to provide meaningful comments on the merits of whether the request comports with the legal and regulatory requirements, this filing should have included the documents and information required by 39 CFR 3010.14 and 3020.32: An explanation of the merits of the proposal,² anticipated changes in the FY2011 Billing Determinants, the effect on the Periodicals and Standard Mail rate caps, and a discussion of the implications on data collection.³

If the Commission allows this scant filing to go forward as is – even with the potential issuance of multiple rounds of Commission or Chairman Information Requests to significantly expand upon the meager record in this case – the Public Representative is concerned that permitting such a filing sends the wrong message and will only encourage the Postal Service to make similar paltry filings in the future. If the Commission chooses to permit such a filing as is, it is effectively shifting the burden of proof and persuasion from the Postal Service to the Commission and interested parties. It then becomes others' responsibility to hunt down the details of such programs and determine what information needs to be provided on a case-by-case basis. Moreover, the Commission's current procedures for dealing with these cases do not provide a forum for parties to directly seek information from the Postal Service to supplement the record through depositions, interrogatories, requests for admission, or other means of discovery. All of the information in these types of cases is entirely within the Postal Service's control, and its release is exclusively within the Postal Service's discretion.

² This explanation should include, at a bare minimum, the current practice, the details of the proposal change, and how the proposed changes are expected to improve current practice.

³ See *generally, e.g.*, Docket No. R2010-1, United States Postal Service Notice of Market Dominant Price Adjustment and Classification Changes, October 15, 2009.

Furthermore, allowing this filing to proceed would fly in the face of the PAEA's mandate of increased transparency and accountability of the Postal Service. Simply, the less information that the Commission requires the Postal Service to submit in support of its cases, the less transparency and accountability exists, undermining some of the chief goals of the PAEA.

To illustrate the magnitude of the information lacking in the Postal Service's filing, one must only look to the analogous Commission cases dealing with the establishment of co-palletization dropship discounts for mixed Periodicals. The current case appears to be a logical outgrowth of these prior copalletization cases.⁴ While these prior cases were decided under the Postal Reorganization Act, the Postal Service submitted a level of detail, rationale, justification and analysis in support of those programs that is severely lacking here.

Even Postal Service requests under the PAEA for approval of temporary market test experiments (as opposed to the permanent request apparently being made here) typically include vastly more detail and supporting information.⁵ Indeed, even with the additional information filed in such market test cases, the Commission has found that more information is often necessary for it to determine compliance with applicable legal requirements. In the first market test case under the PAEA, the Commission specifically "sought additional details on the purpose, nature, and scope of the proposed market test."⁶ And yet in that case – where the Postal Service provided a greater level of information in its initial filing than it provided in this case – the Commission stated:

⁴ See Docket No. MC2004-1, Request of the United States Postal Service for A Recommended Decision on Experimental Periodicals Co-Palletization Dropship Discounts for High-Editorial, Heavy-Weight, Small-Circulation Publications, February 25, 2004; see *also* Docket No. 2002-3, Request of the United States Postal Service For a Recommended Decision on Experimental Periodicals Co-Palletization Dropship Discounts, September 26, 2002.

⁵ See *e.g.*, Docket No. MT2010-1, Notice of the United States Postal Service of Market Test of Experimental Product – Samples Co-Op Box, March 29, 2010; Docket No. MT2011-1, Notice of the United States Postal Service of Market Test of Experimental Product – Alternate Postage Payment Method for Greeting Cards, November 8, 2010.

⁶ See Docket No. MT2009-1, Order No. 211, May 7, 2009 at 2 (citing Order No. 199 at 3-4).

While the Commission approves the initial experimental market test, it concludes that the Postal Service has not prepared a model filing. The Postal Service has an affirmative duty to support how it satisfies the conditions of a market test under section 3641(b), not solely as a matter of form, but with sufficient substance to permit an informed finding on the record. Support for a market test will ordinarily need to be based upon reasonably comprehensive investigation of the characteristics of the product market.

Id. at 6.

While some of the information filed in these prior classification and market test cases may be unnecessary for the instant case as this case appears to request a permanent change (as opposed to a market test), these prior Commission cases demonstrate that the level of detail filed here is unacceptable. If anything, permanent changes should typically require increased information and data, rather than less.

Even in prior cases filed under 39 CFR 3020.90 *et seq.* – the procedural mechanism the Postal Service has used here⁷ – the Commission has noted that “the process of reviewing requested changes will be smoother and more effective if the Postal Service provides more explicit explanations for all proposals to modify the MCS in its initial filings. This information should explain the reasons for the proposed changes.”⁸ The Postal Service did not follow this Commission directive with respect to its initial filing in this case.

The Public Representative’s comments at this juncture are largely restricted to discussing the lack of information provided. To remedy these deficiencies and avoid having to reconfront such issues in the future, the Commission should require the Postal Service to refile the case and provide enough information to allow interested parties to evaluate the merits of the actual proposal and whether it complies with the requirements of the PAEA.

⁷ See Part III of these comments for a discussion of the reasons why CFR 3020.90 *et seq.* is not the proper procedural mechanism for submitting this new program for Commission approval.

⁸ Docket No. MC2009-16, Order No. 205, April 22, 2009, at 4.

II. Additional Information on the Program Obtained Through Due Diligence

Through due diligence, the Public Representative uncovered three additional relevant details about the Postal Service's proposed new program for mixing and comailing Standard Mail and Periodicals mailpieces within the same container or bundle that may aid the Commission in its decision-making process. First, it appears that as part of the Postal Service's Intelligent Mail Barcode (IMB) efforts, the Postal Service created a pilot program to test combined mailings of Periodicals and Standard Mail flats mailpieces.⁹ Unfortunately, the Public Representative was not able to obtain the data collected during the pilot program or a copy of an approved service agreement that the Postal Service's IMB guide states, "includes the mailing standards requirements for the Pilot Program Combined Mailings of Periodicals and Standard Mail Flats that defines the mail preparation, the standardization documentation, and the postage calculations." *Id.* The Public Representative believes that such information would prove helpful in understanding the pilot program and the proposal at issue here.

Second, it appears that the pilot program requires all Mixed Class comailing mailpieces to be Full Service IMB automation pieces and to be machineable. It is unclear from the information filed in this case if these requirements will be maintained. Finally, it appears that during the pilot program, ADC and NDC entry were not available for Mixed Class comailings. MTAC sources indicate that NDC entry is expected to be available upon full implementation.

While the Public Representative's due diligence on this matter has uncovered some information on the Mixed Class comailings for Standard Mail and Periodicals mailpieces, it does not provide a complete picture. In the absence of information from the Postal Service, it is included to demonstrate some useful starting points. The Public

⁹ See USPS – A Guide to Intelligent Mail for Letters and Flats – Version 7.3.4, October 15, 2010, at Section 3.4 (Pilot Program: Combined Mailings of Standard Mail and Periodicals).

Representative requests that the Commission require the Postal Service to clarify and supplement the information discussed here and above in Part I of these comments.

III. This Proceeding has Price Cap Implications Under 39 U.S.C. 3622(d)

As discussed above, the Postal Service's initial filings in this case were wholly inadequate. Part of the reason for the filing deficiencies is that the Postal Service inappropriately filed this case under 39 CFR sections 3020.90 *et seq.* Those sections were designed to allow the Postal Service to have increased flexibility in making relatively minor corrections or changes to the Mail Classification Schedule. They were not designed to allow the Postal Service to create new mailing programs with far-reaching effects such as the one at issue here. A brief review of the Commission's findings with respect to 39 CFR 3020.90 *et seq.* is instructive.

As the Commission noted in its Notice of Proposed Rulemaking on proposed 39 CFR 3020.90 *et seq.*:

There are inherent limits on the scope or magnitude of any update allowable under subpart E [39 CFR sections 3020.90 *et seq.*]. 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.

Docket No. RM2007-1, Order No. 26, August 15, 2007 at para. 4041 (emphasis added). Thus, the Commission recognized, early on, that there were significant limits on the changes made that could be made through 3020.90 *et seq.* In a subsequent proceeding regarding the application of 39 CFR 3020.90 *et seq.* that involved a request

for an extension of the flat rate Letter Post options to new countries, the Commission further clarified the scope of 39 CFR 3020.90 *et seq.* It stated:

The instant proceeding involves a minor change extending flat rate Letter Post options to three destinations. The Commission's finding, however, should not be read to imply that all service changes may be appropriately filed under rule 3020.90 *et seq.* Whether those procedures are appropriate will turn on the facts presented.

Docket No. MC2009-16, Order No. 204, April 22, 2009, at 4.

Additionally, in promulgating the Final Rules on 39 CFR 3020.90 *et seq.*, the Commission took comfort in the fact that in response to concerns about the potential breadth of these sections, the Postal Service assured the Commission that

it will initially provide an opportunity for formal public comment on important and complex changes to its processes and products. Postal Service Reply Comments, October, 9, 2007, at 27-29. Thus, it [the Postal Service] contends, the public will have notice and an opportunity for comments on proposed changes provided by the Postal Service.

Docket No. RM2007-1, Order No. 43, October 29, 2007 at para. 4028. The Public Representative is aware of no such action being taken in this case.

Currently pending before the Commission is a new program that appears to allow mailers to comail Standard Mail and Periodicals mailpieces in the same bundle or container. This mixing of mail classes within a bundle or container is new and raises issues such as the service level and standards that such mixed Standard Mail and Periodicals mail will receive. These potential service standard differences raise questions as to whether the Postal Service is effectively seeking to create a new product in this case which would be subject to 39 U.S.C. 3642 and 39 CFR 3020

subpart B.¹⁰ Such a concept was never intended to follow the extremely streamlined procedures of 39 CFR 3020.90 *et seq.* When, as here, the relationship between rates and service, and the definition of a product are at issue, the Postal Service must provide more rigorous background information.¹¹

Instead, this new program, which the Postal Service's Notice categorizes as a "classification change" has much broader and further reaching consequences. Allowing mailers to mix Standard Mail and Periodicals mailpieces within a bundle or container appears to lead to changes in the Periodicals rate structure and the calculation of mailing costs for Periodicals mailpieces because it requires only a certain proportion of the bundle or container charge to be paid by those Periodicals mailers. Such a change in the rate structure would undoubtedly lead to changes in the billing determinants. Indeed, the Postal Service's Notice concedes as much when it states that the very purpose of the change is "to maximize presorting or to qualify for deeper destination entry discounts." Notice at 1. Deeper destination entry and increased presorting will change the current makeup of the billing determinants. Billing determinant changes of this magnitude will have an effect on the accuracy of future cap calculations, especially in the near term as adoption of mixed-class comailing begins.¹² The Postal Service has not filed estimated volumes (or volume shifts) for this program, preventing a meaningful discussion of the price cap effects of the program. Further, the Postal Service has not provided information concerning how it will record volume and rates paid for Mixed-Class comailings.

The Commission's price cap regulations are found in 39 CFR 3010 subpart C. Accordingly, under the Commission's modern system of rate regulation rules, the Postal

¹⁰ See Part V of these comments for a more thorough discussion of this issue.

¹¹ See Part V of these comments for a more thorough discussion of the service standard implications and the new product issues raised by this proceeding.

¹² As mailers increase their use of this program, mail is expected to shift to less expensive rate categories. This shift, if not accounted for with a billing determinant adjustment, can create additional "space" under the price cap. As comailed pieces, containers, bundles, and pounds shift to more presorted and dropshipped rates, the actual effect of a rate increase on mailers will be masked.

Service should file this case under 39 CFR part 3010 because of its price cap effects. Within part 3010, the Commission explicitly states that there are only “four types of rate adjustments for market dominant products.” 39 CFR 3010.2(a). It does not allow such changes to be made under 39 CFR 3020.90 *et seq.* With respect to this case, the Postal Service should choose the correct type of adjustment that this program triggers (Type 1-A, 1-B, 2, or 3) and refile following the requirements of the appropriate section. In terms of similarity, this case is more analogous to the Move Update case (Docket No. R2010-1) filed under 39 CFR part 3010 than an extension of the flat rate Letter Post options in Docket No MC2009-16.¹³ The Postal Service could also choose to consolidate this case with Docket No. R2011-1.

The Public Representative concedes that the requirements for price cap-related rules for market dominant products may be considered burdensome for this type of case. However, the Commission’s rules do not currently provide for more streamlined procedures or filing requirements in cases such as this one. As discussed above in Part I, the procedures and filing requirements for 39 CFR 3020.90 *et seq.* as interpreted by the Postal Service are far too abbreviated for this type of change. They also, as discussed above, have consequences with respect to the price cap calculation. The Public Representative submits that in instances of any uncertainty, PAEA’s goals require the Postal Service and the Commission to error on the side of increased transparency, accountability, and information exchange. Part IV of these comments discusses altering the Commission’s rules to accommodate this and similar requests under streamlined procedures.

IV. If the Postal Service Believes that the Current Price Cap Rules are Unduly Burdensome, It Should Petition the Commission to Consider Adding Streamlined Procedures

If the Postal Service believes that the appropriate Commission rules for considering this new program are inadequate or unduly burdensome, it would be proper

¹³ Compare Docket No. MC2009-16 with PRC Docket No. R2010-1. Cf Docket No. MC2008-3.

for the Postal Service to petition the Commission to adopt new rules for more streamlined procedures. On the other hand, it is not appropriate for the Postal Service to attempt to broaden and exploit other Commission procedures as an end run around of the proper procedural rules.

The Public Representative would not be opposed to such new, streamlined procedures for cases such as these, provided that the Postal Service is required to file sufficient information to allow the general public to comment on the appropriateness of the proposals. A hybrid, middle ground approach between the procedures of 39 CFR 3010 part B and 39 CFR 3020.90 *et seq.* may be worthy of exploration. Other approaches could also have merit.

V. On its Merits, the Mixed Class Comailing Program Raises Additional Questions

Notwithstanding the dearth of information and filing issues discussed above, the Public Representative believes that the underlying program being proposed here has considerable merit. Such a program, if managed and implemented properly and effectively,¹⁴ could encourage the laudable goal of increased presorting and deeper destination entry for Periodicals mailpieces. The Public Representative commends the Postal Service for its ingenuity with respect to this program. However, the program raises a number of fundamental questions that the Public Representative believes should be answered before permanently implementing the comailing of Periodicals and Standard Mail mailpieces within the same bundles or containers.¹⁵

First, the Public Representative has questions regarding whether service standards to be provided to the comailed Standard Mail and Periodicals mailpieces sent under this program create a “new product” for purposes of 39 U.S.C. 3642. Currently,

¹⁴ As discussed in Parts I and III of these comments, additional information is needed to determine the management and implementation plans with respect to this program.

¹⁵ The following are preliminary questions. If more information is provided in this case, additional questions may be raised.

Standard Mail mailpieces have a much slower service standard than Periodicals mailpieces. If the Standard Mail mailpieces comailed under this program receive better service than they would normally receive as Standard Mail mailpieces, or, alternatively, if Periodicals mailpieces comailed under this program receive a lower level of service than they would otherwise receive as Periodicals, the program could then raise concerns under 39 U.S.C. 3691 and 3652(b)(2) as well as the Commission's implementing regulations. A difference in service standards also may be reason to treat these comailed mailpieces as a "new product" under 39 U.S.C. 3642.

Second, the Public Representative has questions as to the mailing requirements for Mixed Class comailed Standard Mail and Periodicals pursuant to this program. For example, Standard Mail requires 10 pieces for a bundle while Periodicals only requires 6 pieces to a bundle. The Public Representative believes it is important to know how mailing requirements for Mixed-Class comailing programs will be codified and implemented, as well as the potential effects of any such changes.

Finally, the Public Representative has questions regarding how these mixed Standard Mail and Periodicals containers and bundles will be recorded for costing.¹⁶ Depending on how these changes are documented in the Postal Service's costing and accounting systems, this could have an effect on the data reporting and compliance requirements of 39 U.S.C. 3652-3653 and the Commission's implementing regulations.

VI. Additional Proceedings

As discussed above, the Public Representative believes that the Postal Service's filing in this case is improper and incapable of being cured. The proper Commission response is to require the Postal Service to refile the case under the appropriate procedures of 39 CFR part 3010. For these reasons, the Public Representative urges the Commission to dismiss this proceeding and direct the Postal service to refile this

¹⁶ For example, the attribution of IOCS bundle tallies to a given class of mail would likely be affected by this program.

case under the appropriate Commission rules providing sufficient information to allow the Commission and the public to make reasonably informed decisions about the program.

Notwithstanding, the Chairman has recently issued an information request in this case (CHIR#1).¹⁷ It appears that the deadline for a Postal Service response to this CHIR#1 is December 1, 2010 – one week after the comment deadline for this case. The Commission did not set any procedures for filing supplemental comments in this case after the November 24, 2010 comment deadline. In the interest of providing appropriate due process, the Public Representative respectfully requests that, if the Commission does not dismiss this proceeding as requested above, the Commission issue an order setting procedures for the submission of supplemental comments when it completes its discovery in this case.

VII. Conclusion

The Public Representative offers the foregoing comments for the Commission's consideration. If the Commission does not follow the Public Representative's primary recommendation of requiring the Postal Service to refile this case under the proper procedural mechanisms, the Public Representative respectfully requests that the Commission accord the Public Representative adequate due process and reopen the comment period for supplemental comments when the Commission completes its final round of discovery. This will ensure that all public comments are made on the complete record.

¹⁷ See Chairman's Information Request No. 1, November 22, 2010.

Respectfully Submitted,

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