

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON DC 20268-0001**

NOTICE OF MARKET DOMINANT PRICE )  
ADJUSTMENT FOR FIRST-CLASS MAIL AND ) Docket No. R2011-5  
STANDARD MAIL )

**COMMENTS OF  
ALLIANCE OF NONPROFIT MAILERS  
(May 2, 2011)**

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Pursuant to Order No. 715, the Alliance of Nonprofit Mailers (“ANM”) respectfully submits these comments on the Postal Service’s proposal. The proposal—a temporary postage discount of three percent on mail carrying or containing a mobile barcode and entered in certain categories of First-Class and Standard Mail between July 1 and August 31, 2011—is the kind of low-risk experiment that the Commission should encourage. The Postal Service’s proposal to offer the discounts to mail entered at commercial Standard Mail rates, but not nonprofit Standard Mail rates, however, is inconsistent with 39 U.S.C. § 403(c).

Nonprofit mailers encountered this discrimination before in Docket No. MC78-2, when the Postal Service implemented presort discounts immediately for the commercial categories of third-class (now Standard) mail, but phased in the discounts for the corresponding nonprofit categories. In *National Easter Seal Society for Crippled Children and Adults v. USPS*, 656 F.2d 754, 760-762 (D.C. Cir. 1981), the Court of Appeals held that this disparity in treatment constituted undue discrimination in violation

of 39 U.S.C. § 403(c) “absent some reasonable ground for differential treatment.” *Id.*, 656 F.2d at 762.

The Postal Service’s April 12 Notice in the present docket offered no explanation for the exclusion of nonprofit mail from the promotional discount. Chairman’s Information Request No. 1, Question No. 7, sought an explanation for this omission. The Postal Service’s April 29 response to Question 7 offers essentially three supposed justifications: (1) 2D barcodes have more potential for commercial mail, because it involves the sale of products, than for nonprofit mail; (2) a more limited program would be quicker and simpler to implement; and (3) nonprofit Standard Mail rates are “already reduced.” USPS Response to CHIR No. 1, Question 7 (April 29, 2011). None of these justifications are adequate.

First, the Postal Service offers no support for the assumption that nonprofit mailers are less likely to have an interest in the 2D barcode. Many nonprofits use Standard Mail to market products, just as commercial mailers do. See DMM 703.1.6.4.d (substantial relatedness test). Other uses of nonprofit Standard Mail—including fundraising, education and other mission-related communications—would also be enhanced by the ability to offer access to other targeted on-line information through the use of 2D barcodes.

The second justification, if accepted by the Commission, would effectively nullify 39 U.S.C. § 403(c) and *National Easter Seals Society* by allowing discrimination against nonprofit mail in any circumstance. Limiting the scope of an experimental rate in order to expedite its implementation is certainly a permissible goal. If the Postal Service

chooses to limited an experiment for this reason, however, the restriction on access may not be accomplished by discriminating against nonprofit mail.

The third justification, if accepted by the Commission, would likewise nullify the protection of 39 U.S.C. § 403(c) for nonprofits. Nonprofit rates are, by definition, lower than the corresponding commercial rate categories. If that fact were sufficient to justify discrimination, discrimination against nonprofits would always be lawful—a position squarely rejected in *National Easter Seal Society*. In fact, the promotional program should not materially affect nonprofit revenue, contribution or coverage ratios. If the discount program diminished average revenue per piece by an amount greater than a rounding error, then 39 U.S.C. § 3626(a)(6) would entitle the Postal Service to adjust other nonprofit rates by an offsetting amount. The Postal Service has acknowledged, however, that the effect of the promotional program on the coverage ratios of even the commercial categories is likely to be *de minimis*. See USPS Notice (April 12, 2011) at 3

In the brief life of the proposed experiment, the foregoing discrimination issue is likely to be moot. Nonprofit mailers generally plan their mailing campaigns months in advance; and it is probably already too late to make use of a discount program that will end in August. The Commission should make clear, however, that that its approval of the promotional program proposed in this docket does not set a precedent for the exclusion of the nonprofit categories if the promotional program is extended or made permanent.

Respectfully submitted,

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