

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

MAIL CLASSIFICATION SCHEDULE CHANGE
(LIGHTWEIGHT COMMERCIAL PARCELS)

Docket No. MC2011-28

RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO PUBLIC REPRESENTATIVE COMMENTS
(August 24, 2011)

In the interest of clarifying the record, the United States Postal Service hereby responds to the comments of the Public Representative regarding the Postal Service's Notice of Minor Classification Change.¹ The Public Representative makes three arguments: (1) that the classification changes proposed by the Postal Service should be subjected to the procedures set forth in 39 C.F.R. 3020.30 *et seq.*; (2) that Lightweight Commercial Parcels should not be renamed "Commercial First-Class Package Service;" and (3) that the proposal to seal the Commercial Plus portion of Lightweight Commercial Parcels from postal inspection should be denied. The Postal Service responds to each argument in turn.

I. Appropriateness of the 39 CFR 3020.90 *et seq.* procedures.

The Public Representative first argues that the classification changes proposed by the Postal Service in this docket do not fall within the intended scope of the procedures set forth in 39 C.F.R. 3020.90 *et seq.*, and that the Commission should therefore subject the proposed changes to the more thorough procedures provided in 39 C.F.R. 3020.30 *et seq.* Without elaboration or support, the Public Representative

¹ Public Representative Comments Concerning Lightweight Commercial Parcels Classification Change, Docket No. MC2011-28 (Aug. 22, 2011) ("Public Representative Comments").

implies that the essential difference between the two sets of rules is that the § 3020.30 rules were intended for substantive changes while the § 3020.90 rules were intended for non-substantive changes. The substantive/non-substantive standard posited by the Public Representative, however, appears nowhere in the text of either the § 3020.30 rules or the § 3020.90 rules – even the word “substantive” is entirely absent.

Nonetheless, the Postal Service acknowledges that there is some ambiguity in the rules regarding their application to one of the changes proposed in this docket. Section 3020.30 states that the § 3020.30 procedures are intended for “a modification to the market dominant product list or the competitive product list,” with “modification” specifically defined in the provision as “adding a product to a list, removing a product from a list, or moving a product from one list to another.” Section 3020.91 states that the § 3020.90 procedures are intended for “corrections to product descriptions in the Mail Classification Schedule that do not constitute a proposal to modify the market dominant product list or the competitive product list as defined in § 3020.30.” The Postal Service has proposed two changes to the Lightweight Commercial Parcels product description in the Mail Classification Schedule (MCS): (1) clarify that the Commercial Plus portion of the product is outside the letter prohibition (and should consequently continue to be sealed from postal inspection); and (2) change the product’s name to “Commercial First-Class Package Service.”

Applying the language from § 3020.30 and § 3020.91 cited above to the two proposed changes yields three conclusions. First, because neither change constitutes a proposal to add a product to the market dominant or competitive list, remove a product from either list, or move a product between the two lists, neither change falls

within the § 3020.30 procedures. Second, because (as the Postal Service explained in its Notice of Minor Classification Change and in its responses to the questions contained in the Commission’s Notice and Order Concerning Classification Changes)² the proposal to remove the Commercial Plus portion of the product from the letter prohibition (and therefore seal it from postal inspection) is a correction to the product description, it properly falls within the § 3020.90 procedures. Third, because the proposal to rename the product does not necessarily constitute a “correction,” it does not fall squarely within the § 3020.90 procedures.

In other words, the only regulatory uncertainty is which set of procedures apply to the proposal to rename the product. The Postal Service believes that, because the proposal to rename the product certainly does not constitute an addition to, deletion from, or transfer between either of the two product lists, it would be more appropriate to subject it to the § 3020.90 procedures. Indeed, it is difficult to imagine how one could practically apply the § 3020.30 procedures, particularly the requirements of § 3020.32, to something as simple as the renaming of a product.³ And, just as it is impractical to apply the § 3020.30 procedures, it is impractical (and outside the spirit of the Postal Accountability and Enhancement Act) to require the Postal Service to submit to a new rulemaking whenever there is any ambiguity in the Commission’s rules regarding a Postal Service proposal. Therefore, on balance, it would be more appropriate to subject

² Notice of Minor Classification Change, Docket No. MC2011-28 (Aug. 12, 2011), at 1-2; Response of the United States Postal Service to Notice and Order Concerning Classification Changes, Docket No. MC2011-28 (Aug. 19, 2011) (“Response to Commission Questions”), at response to Question 4.

³ For example, would it make sense for the Postal Service to explain why the renaming will not result in a violation of 39 U.S.C. § 3633, explain why the renaming does not classify as competitive a product over which the Postal Service exercises sufficient market power that it can raise prices or degrade service without risking the loss of a significant level of business to competitors, provide a description of the availability and nature of competitive alternatives, provide information on the views of those who use the product, or provide a description of the impact of the renaming on small business concerns?

the changes proposed by the Postal Service in this docket to the procedures set forth in § 3020.90 *et seq.*

II. Appropriateness of the “Commercial First-Class Package Service” name.

The Public Representative next argues that Lightweight Commercial Parcels should not be renamed “Commercial First-Class Package Service” because the new name will mislead customers. The Public Representative reasons that, because the Commercial Base portion of the product cannot contain letters and will not be sealed against inspection, because there is no requirement to publish the product’s service performance, and because the product’s service standards can be changed without regulatory oversight, the product “does not receive First-Class Mail treatment.”⁴ The Public Representative implies that the Postal Service is trying to mislead customers into believing that the product has all of the characteristics of First-Class Mail.

The Postal Service explained its business decision to rename the product in its response to Question 2 from the Commission’s Notice and Order Concerning Classification Changes.⁵ The Postal Service stated in that response that “[t]he ‘Commercial First-Class Package Service’ name will better convey that the transferred product retains the same service treatment it had and continues to use the same transportation network it used prior to the transfer.”⁶ If it were the Postal Service’s intention to mislead its customers into believing that the product retains *all* of the characteristics of First-Class Mail, it would have tried to retain the First-Class Mail Parcels name when it requested the transfer of the commercial portion of First-Class Mail Parcels to the competitive product list. In the Postal Service’s experience, the two

⁴ Public Representative Comments, *supra* note 1, at 5.

⁵ Response to Commission Questions, *supra* note 2, at response to Question 2.

⁶ *Id.*

main concerns that most of its customers – particularly commercial customers – have regarding any mailing product are how much the product costs and how quickly the product reaches its destination. Prices are obvious to customers, but service treatment is not. It is therefore important, as a business practice, to signal to customers what a product’s service treatment is, and the Postal Service often uses product names to send this signal (e.g., Priority, Express).

In the Postal Service’s business judgment, including “First-Class” in the Commercial First-Class Package Service name will effectively signal that the product retains the same service treatment it had and will travel on the same transportation network it travelled on when it was part of First-Class Mail Parcels. Beyond service treatment, the product’s prices are tied to First-Class Mail Parcels prices,⁷ and it is eligible for the same Special Services for which First-Class Mail Parcels is eligible. In the Postal Service’s experience, Lightweight Commercial Parcels customers are generally not concerned with being able to include letter content in their mail pieces, because the vast majority of their mail pieces consist of merchandise fulfillment items. Therefore, the fact that Commercial Base will not be eligible for letter content will not negate the “First-Class” nature of the product for the vast majority of customers. In addition, because Commercial Base will be unsealed simply to facilitate the enforcement of the letter prohibition, the Postal Service does not believe that customers will object to associating Commercial Base with “First-Class,” even though it will be unsealed. Finally, the lack of service performance publication and the possibility of changing service standards should also not be issues for customers, because, like Priority Mail and Express Mail, Commercial First-Class Package Service will effectively

⁷ The product’s prices are essentially commercial discounts to retail First-Class Mail Parcels prices.

be regulated by the competitive marketplace. It would not be in the Postal Service's business interests to change the product's service standards or to lag on service performance because, as the Commission recognized in Docket No. MC2011-22, customers have ample competitive alternatives to Commercial First-Class Package Service.

Moreover, as the Postal Service stated in its response to Question 3 from the Commission's Notice and Order, there is nothing in title 39 or in the Commission's regulations preventing the Postal Service from using similar product names across the market dominant and competitive product lists, section 3642 makes it likely that similar product names would be used across the two lists, and, in one case, the same name is already shared by products on the market dominant and competitive lists.⁸ Therefore, while the considerations outlined above amply demonstrate that the Postal Service's decision to use the "Commercial First-Class Package Service" name is appropriate, the issue is fundamentally one of business judgment. And, while parties may reasonably disagree as to the advisability of particular business decisions, the exercise of business judgment properly falls within the purview of Postal Service management. The other points raised by the Public Representative in its discussion of the name change – such as potential confusion with the Package Services product line, and potential devaluation of the First-Class Mail trademark – also go toward business judgment and are therefore ultimately not pertinent to the instant legal proceeding.

III. Sealing of Commercial Plus from postal inspection.

The Public Representative's final argument is that the proposal to seal the Commercial Plus portion of the product from postal inspection has not been explained

⁸ Response to Commission Questions, *supra* note 2, at response to Question 3.

properly and “has far ranging legal ramifications” that merit more extensive review by the Commission. Before its transfer to the competitive product list, all of Lightweight Commercial Parcels (then First-Class Mail Parcels Commercial Base and Commercial Plus) was sealed against inspection. The Postal Service added a letter prohibition to facilitate the product's transfer to the competitive product list in Docket No. MC2011-22. The Postal Service's decision in Docket No. MC2011-22 to unseal the product from postal inspection was tied directly to the need for the letter prohibition – a product with a letter prohibition cannot be sealed against inspection. Because the Postal Service is now clarifying in the instant docket that the letter prohibition does not apply to Commercial Plus, it follows that Commercial Plus should be sealed against inspection, just as it was before transfer to the competitive product list.

Additionally, given that the Postal Service has not yet begun treating Lightweight Commercial Parcels separately from the market dominant First-Class Mail Parcels,⁹ neither Commercial Plus nor Commercial Base has even been unsealed yet. Therefore, to customers, the “re-sealing” of Commercial Plus in the MCS will not represent a change but rather a continuation of current practice. In this context, the Postal Service is unaware of what the far ranging legal ramifications alluded to by the Public Representative are. Moreover, given the straightforward reason for “re-sealing” Commercial Plus, it is difficult to imagine what practical benefit a § 3020.30 proceeding would have.

⁹ As stated in the Postal Service's response to Question 1 from the Commission's Notice and Order Concerning Classification Changes and further discussed in section IV. below, the Postal Service will not begin marketing and accounting for Lightweight Commercial Parcels as a separate competitive product until the beginning of Fiscal Year 2012.

IV. Other issues.

Apart from the three arguments addressed above, the Public Representative also points out that the product name proposed in this docket – “Commercial First-Class Package Service” – differs from the name listed in the Postal Service’s Federal Register notice published on August 18, 2011 – “First-Class Package Service.” This difference is not an oversight. The Postal Service believes that, in the MCS, it would be useful to preserve an indication that the product is exclusively a commercial product, because it was the commercial portion of First-Class Mail Parcels prior to its transfer to the competitive product list. Adding “Commercial” to the name will therefore keep clear, into the future, why there are Commercial Base and Commercial Plus prices but no retail prices. In contrast, in the Domestic Mail Manual (DMM) and in Postal Service marketing, it would be cumbersome to refer to “Commercial First-Class Package Service Commercial Base” and “Commercial First-Class Package Service Commercial Plus.” Therefore, in those contexts, the Postal Service intends to omit “Commercial” from the beginning of the product name. The Postal Service is not aware of any statutory or regulatory bar to its using varying product names in the MCS, the DMM, and marketing materials.

The Public Representative also notes that the effective classification change date of August 29, 2011, differs from the October 1, 2011, effective date listed in the Federal Register notice. To be clear, while the transfer of commercial First-Class Mail Parcels was approved by the Commission on April 6, 2011, the Postal Service cannot, as a practical matter, make the transfer effective immediately, in light of the need to change internal Postal Service systems, publish DMM revisions, and give mailers time to adjust

to new requirements. The October 1st date listed in the Federal Register notice is a consequence of such practicalities.¹⁰ The Postal Service stated that the MCS changes would take effect on August 29, 2011, because the MCS changes proposed in Docket No. MC2011-22 presumably took legal effect on April 6, 2011 (rather than being delayed until the Postal Service could practically effect the product transfer),¹¹ and therefore the MCS changes proposed in this docket should presumably take effect after the running of the 15-day notice period. However, the Postal Service is not opposed to delaying the effectiveness of the MCS changes proposed in this docket to October 1, 2011. Given that a final MCS has not yet been issued in Docket No. RM2011-8, the distinction between whether the MCS changes proposed in this docket take effect on August 29th or October 1st is largely semantic.

V. Conclusion.

As provided for in the Commission's rules, the changes proposed by the Postal Service should be incorporated into the MCS "[s]o long as such changes are not inconsistent with 39 U.S.C. 3642."¹² The Public Representative has not shown that the changes are inconsistent with § 3642. Therefore, the Postal Service submits that the proposed classification changes should be incorporated into the MCS.

¹⁰ The Federal Register notice lists October 1, 2011 as the date on which the Postal Service will begin accounting for the product as a competitive product because it is the first day of Fiscal Year 2012. The Federal Register notice states that mailers can begin using the new labeling and marking methods outlined in the notice on October 3, 2011 (rather than October 1, 2011) because October 1st is a Saturday.

¹¹ Order No. 710, issued on April 6, 2011 in Docket No. MC2011-22, added Lightweight Commercial Parcels to the competitive product list," and a Notice of Updates to Product Lists issued by the Commission on April 18, 2011 confirmed that the MCS had been updated.

¹² 39 CFR 3020.92.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Pricing and Product
Support

Nabeel R. Cheema

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1137
(202) 268-7178; Fax -5402
August 24, 2011