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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Before Commissioners:

Edward J. Gleiman, Chairman;
George W. Haley, Vice Chairman;
Ruth Y. Goldway; W.H. "Trey" LeBlanc III;
and George A. Omas

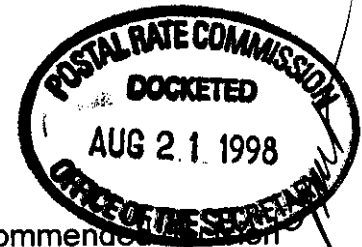
Mailing Online Service

Docket No. MC98-1

ORDER GRANTING IN PART POSTAL SERVICE MOTION TO
WAIVE CERTAIN PROVISIONS OF RULES 64(h), 67, and 161

(Issued August 21, 1998)

A. Postal Service Motion



The Postal Service accompanied its Request for a recommendation approving its proposed Mailing Online Service with a pleading captioned Motion Of The United States Postal Service For Expedition, And For Waiver Of Certain Provisions Of Rule 161 and Certain Provisions of Rule 64(h) (hereafter "Motion"). In this pleading, the Service asks the Commission to shorten the 150 day period provided in 39 CFR § 3001.67 for consideration of its proposal as an experimental service. It argues that it needs to have a recommended decision approving its proposal by the end of November 1998, in order to "explore the possibility that major software developers could integrate Mailing Online into impending updates of software in order to make the service widely and easily available to individual, small-office, and home-office mailers." Motion at 2. Additionally, the Service notes, a Commission decision at the end of November would accommodate the Service's planned deployment schedule that calls for nationwide

customer access to Mailing Online Service in January 1999, at the time that new postal rates generally are scheduled to take effect. Ibid.

The Service's Motion also requests that parts of § 161 of the Commission's rules be waived in this case. Section 161 states that it applies "in cases in which the Postal service requests a recommended decision pursuant to § 3623 preceded by testing in the market in order to develop information necessary to support a permanent change." The Postal Service requests a waiver of that requirement so that it may go forward with a market test at interim fees to be recommended by the Commission "in the context of a request for an experimental classification." The Postal Service argues that if the market test were followed by an experiment, and then by a request for permanent change, the market test would ultimately provide support for a request for a permanent classification change. Motion at 2-3. This sequence of procedural steps, it argues, "would constitute a more logical evolution of the service, given the rapidly emerging market and technological environment" than would market testing in the context of a request for a permanent change. Id. at 4. Consistent with this view, it supports bifurcation of this proceeding into phases that would allow market test issues to be resolved and a recommended decision issued before issues raised by the experimental classification are resolved, as proposed in Presiding Officer's Ruling No. 2. Tr. 1/28. The Postal Service argues that this approach would provide two stages at which it could make modifications of its proposed service, rather than forcing it to commit itself to a permanent service that was in need of adjustment. It also argues that it would also permit the Commission to track product development more closely. Motion at 4.

The Postal Service also requests waiver of those portions of the market test rules "that contemplate suspension of a request for a permanent (here experimental) classification change pending completion of the market test." The Postal Service proposes that the market test go forward while its request for an experimental classification is being processed, in order to meet its objective of receiving a

recommended decision approving the experimental classification by late November. Ibid.

B. Parties' Responses

Answers to the Postal Service's motion were filed on August 12, 1998, by Pitney Bowes Inc. ("Pitney Bowes") and by AccuDocs L.L.C. ("AccuDocs"). The Mail Advertising Service Association International ("MASA") addressed these issues orally at the prehearing conference held on August 14, 1998, and in its Comments of Mail Advertising Service Association International on OCA and Pitney Bowes Proposals, filed on August 19, 1998 ("MASA Comments").

Pitney Bowes shares the Postal Service's view that as a new service evolves, a logical sequence of procedural steps may be to consider it first in the context of a market test, then as a proposed experiment, and finally as a permanent classification change. It explains that limiting the market test in scope and duration will tend to minimize factual issues and require only a brief hearing. If, as an experiment, the proposed service becomes better defined, is broadened in scope and duration, it will generate more relevant data, and its impact on the Postal Service and competitors will take on increased significance, all of which is likely to require more extensive hearings. As a proposed new service takes its permanent form, and is implemented system-wide, still more relevant data is likely to be available, and the potential impact on the Postal Service and its competitors will be greater still, all of which is likely to require more extensive hearings. It therefore supports the suggestion in Presiding Officer's Ruling No. 2 that the market test and experimental service be considered separately. Tr. 1/26.

Pitney Bowes does not object to the Postal Service's request for waiver of the *portion of the market test rules that requires that they be proposed in the context of a request for a permanent classification change*. It concedes that a market test may appropriately serve as a precursor to an experimental classification as well as

permanent classification, as long as the market test is designed and implemented in a manner that will provide the Commission with information that is helpful in evaluating the propriety of its proposed classification. Pitney Bowes Answer at 2; Tr. 1/79-80. Pitney Bowes bases its conclusion on the core purpose underlying the Commission's market test rules. This purpose, it argues, is to obtain "information that could shed light on the prospects of potential service innovations through limited testing in the marketplace." Pitney Bowes Answer at 2, citing Notice of Proposed Rulemaking 60 FR 54981 (October 27, 1995).

Whether the market test is appended to a request for an experimental or a permanent classification change, Pitney Bowes argues, the Commission's rules contemplate that the period for considering the experimental or permanent classification change does not begin until the market test is concluded. It notes that the Postal Service is urging the Commission to authorize a market test in time to permit the Postal Service to implement it in early October 1998, and to authorize an experimental classification for Mailing Online Service by the end of November. Since, in its view, the market test rule intends that the period for considering the Postal Service's proposed experiment begin after the market test is concluded, granting the Postal Service's request for a November recommended decision on its proposed experiment would drastically shorten the 150-day period that the rules provide for litigating the proposed experiment. *Id.* at 2-3. During the prehearing conference held August 14, 1998, Pitney Bowes noted that under the Postal Service's proposed plan to provide market test data at the end of each accounting period, it is unlikely that any relevant market test data will be available in time to be considered on the record before the Commission would have to begin drafting a recommended decision to be issued in November 1998. Therefore, Pitney Bowes contends, if the purpose of the market test is to provide data to help the Commission evaluate the proposed experiment, it will not serve that purpose under the truncated schedule that the Postal Service requests. In order to make the data generated by the market test available to support the experimental proposal, Pitney

Bowes argues, consideration of the experimental proposal must be stayed until the market test results are in. Tr. 1/75.

MASA opposes bifurcation of these proceedings in order to consider and resolve market test issues prior to the litigation of issues raised by the proposed experimental classification. It insists that the market test rules are misused by the Postal Service's request. It concludes that the market test is not designed to gather data in support of the proposed experimental classification. It argues that the market test is not designed to test options being considered for the experimental classification, and its results are not intended to affect the experimental classification proposal, since the test is intended to end before there is time for the Postal Service to modify its proposed experiment before the Commission. It asserts that the market test is merely designed to serve as the ramp-up phase of the experimental classification. Tr.1/49-50, 62, 72. MASA Comments at 2-3.

AccuDoc agrees with MASA that the Commission's market test rules and its experimental classification rules are intended to be separate, mutually exclusive procedures. AccuDocs urges the Commission to reject the Postal Service's "proposed hurry up schedule" because it is unlikely to provide enough time for a careful examination of the competitive impacts of Mailing Online Service. AccuDoc Answer at 3. It notes that under the Commission's rules, proposed experimental classifications may be considered independently, but market tests must be proposed in the context of a request for a permanent classification change. *Id.* at 4. It complains that if the Postal Service were allowed to conduct a market test outside the context of a request for a permanent classification change, "full-fledged Commission scrutiny of its proposed service under § 3623 would be postponed for years, long after injury to private-sector competitors could be irreparable." *Id.* at 5.

C. Commission Conclusions

A waiver of the requirement of that a market test be appended to a request for a permanent classification change is available. The Commission's view of the relationship between its rules for considering experimental classification proposals and its rules for considering market tests is similar to that of the Postal Service and Pitney Bowes. While it is explicitly stated only in the Commission's market test rules, it is the ultimate purpose of both sets of rules to facilitate the gathering of operating and market experience that will help the Commission evaluate a new, permanent service classification if the test or experiment indicates that the new service is likely to promote the objectives of § 403(2) and other policies of the Act.

Depending on its nature, and the factual issues that it raises, it may be logical and appropriate to consider a proposed new service first as a market test of very limited scope and duration, then to consider a refined proposal that is wider in scope and duration as an experiment, and then to consider a further refined proposal of system-wide scope as a permanent classification. Where the facts warrant such an approach, the Commission's rules concerning market tests and classification experiments should not be viewed as necessarily prohibiting consideration of a market test as a precursor to a request for an experimental classification. The Commission agrees with Pitney Bowes that the basic purpose of allowing a market test to proceed after an abbreviated hearing is to gather data that would help the Commission evaluate the issues surrounding a follow-on proposal of wider scope and impact.¹ Therefore, it is not fatal if the follow-on proposal is formulated as an experiment, rather than the permanent new classification assumed by the market test rules.

¹ The scope of data collection during the market test has been put in focus by the currently pending Motion of the Office of the Consumer Advocate Concerning a Data Collection Plan for a Market Test of Mailing Online, filed August 17, 1998.

As noted above, AccuDoc and MASA contend that the purposes of the Commission's rules for considering proposed market tests and for considering proposed experimental classifications are fundamentally different, and the two sets of procedures should be regarded as mutually exclusive. While these rules contain different procedural requirements, they have a common basic purpose. That is to provide an accelerated evaluation of proposed novel services where the absence of relevant operating and market experience, and the limited scope and impact of the proposals, might allow abbreviated hearings without violating parties rights to due process. The essential difference between the two sets of rules is not their ultimate purpose, but the recognition that market tests involve less potential harm to third parties, a more limited scope of factual issues that are likely to be addressed, and therefore less hearings necessary to address them.

The market test rules contemplate a very abbreviated hearing on the assumption that the scope of the test is narrow, and the duration of the test is brief. The experimental classification rules contemplate a more thorough hearing of factual issues on the assumption that the scope of the experiment can be system-wide, and can last twice as long as a market test. Because the Commission rules for considering market tests and for considering experimental classifications have the same basic purpose, and differ primarily in the scope of factual issues that they are likely to present, and the thoroughness of the hearing of factual issues that they are likely to require, it would not necessarily violate the basic purpose of those rules to allow a market test to be appended to an proposed experimental classification.

It is important that a market test be designed to help the Commission evaluate a broader follow-on proposal to provide a new service. Whether it is so designed is a question of fact. With respect to the Mailing Online proposal, the facts relevant to this determination are still in flux. Key facts that are still undetermined are the likely starting date for the market test, and the data collection plan that will ultimately be adopted. Accordingly, whether the market test proposed by the Postal Service is likely to help the

Commission evaluate the Postal Service's proposed experimental classification is a factual determination that will have to be made by the Commission after the record on the market test has been developed. The Commission waives the requirement in our rules that a market test be appended to a permanent classification because it appears the market test should be of some modest value in evaluating the proposed experiment, at least with respect to market demand. If the Commission should subsequently determine that the market test is not likely to be of some value to the Commission in evaluating the proposed experimental classification, a recommendation that the market test be implemented is very unlikely.

The market test and the experimental classification may be considered concurrently, according to the Postal Service's proposed accelerated schedule, if the factual issues permit. As noted, Pitney Bowes, contends that the Postal Service proposes to conduct its market test for less than three months before implementing its experimental classification. It argues that this would not allow market test results to be considered on the record prior to the Commission issuing a recommended decision on the experimental classification in late November. Pitney Bowes argues that in order for the market test to serve its purpose of providing data in support of the proposed experimental classification, consideration of the proposed experimental classification must be suspended until completion of the market test, as § 166 of the market test rules contemplates. Pitney Bowes Answer at 3-4.

MASA argues that because the market test is an experimental classification proposal in disguise, the issue of the impact of the experimental classification on private competitors is relevant to the market test. It argues that these issues cannot be adequately considered in the time that the Postal Service contemplates for considering the market test. Tr. 1/72-73. AccuDoc also argues that there is not enough time to adequately consider competitive impact issues in the time that the Postal Service contemplates for considering either the market test or experimental classification. AccuDoc Answer at 3. In contrast, Pitney Bowes contends that the market test is too

restricted in its scope, impact, and duration to raise significant competitive impact issues. It argues that the only significant issue raised by the market test is the price term of the printing contract, and whether it is facially reasonable. Tr. 1/25. If the Presiding Officer agrees, the brief hearings contemplated by the Postal Service for the market test could be adequate.

If the proposed market test and the proposed experiment are considered concurrently, it will be a challenge to litigate them in the short period required by the Commission's rules without violating the parties due process rights. A more reasonable procedure is to defer evaluation of the nationwide experiment. If the schedule for decision set out in rule 67 is inadequate, more time can be used to consider the Postal Service request. Accordingly, this docket will be bifurcated to consider potential market test issues first. If the Commission finds that because of its short duration, or lack of an adequate data collection plan, the proposed market test is not likely to help the Commission evaluate the experimental proposal, this negative finding will support an opinion rejecting the Postal Service's invocation of the market test rules. If the Commission recommends and the Governors approve a market test, the existence of the test should assist the Commission to evaluate the nationwide experiment without significantly delaying the experiment.

The filing requirements of §§ 54(b)(3) in part, 54(f)(2), 54(f)(3), 54(h), 54(j), and 54(l) are waived. The Postal Service asks to be relieved of its obligation to produce certain information regarding cost and revenue effects of its proposal. Specifically, the Service seeks waiver of §§ 54(b)(3) in part, 54(f)(2), 54(f)(3), 54(h), 54(j), and 54(l) in part. Motion at 8-9. Rule § 64(h)(3) authorizes the Commission to waive these requirements if it finds that the Postal Service's proposal would not change any existing rates or fees, or produce a significant impact upon the cost-revenue relationships of existing postal services. The Postal Service's proposal would not change any existing rates or fees, and since no party has objected to the waiver of these portions of the


Commission's filing requirements, the motion of waiver of these requirements will be granted.

It is ordered:

The Motion of the United States Postal Service for Expedition, and for Waiver of Certain Provisions of Rule 161 and Certain Provisions of Rule 64(h), filed July 15, 1998, is granted in part, as described in the body of this Order.

By the Commission.

(S E A L)


Margaret P. Crenshaw
Secretary