

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

TREATMENT OF RATE INCENTIVES
AND DE MINIMIS RATE INCREASES
FOR PRICE CAP PURPOSES

Docket No. RM2014-3

**COMMENTS OF
THE NATIONAL POSTAL POLICY COUNCIL**
(March 18, 2014)

The National Postal Policy Council hereby respectfully submits these comments on the notice of proposed rulemaking in this proceeding to resolve the treatment of rate incentives under the price cap regulatory regime.¹ NPPC:

- Supports the distinction between incentives of general applicability and those not of general applicability;
- Suggests that the Commission elaborate on its definition of a rate incentive of general applicability;
- Recommends that if the Postal Service desires to receive unused rate adjustment authority, it should be required to so indicate at the time it establishes the rate incentive and “bank” any authority thereby created in a manner consistent with existing rules regarding unused rate authority;
- Recommends that the Commission clarify the proposal regarding the treatment of deleted rate cells in price cap calculations; and
- Urges the Commission to clarify that existing rules designed to prevent the Postal Service from manipulating the price cap would continue to apply.

¹ *Notice of Proposed Rulemaking on the Treatment of Rate Incentives and De Minimis Rate Increases for Price Cap Purposes*, Docket No. RM2014-3, 79 *Fed. Reg.* 5355 (January 31, 2014)(“NPRM”). These comments were originally due on March 17, but the federal government was closed on that date and these are being filed on the next business day.

I. THE PROPOSED DISTINCTION BETWEEN INCENTIVES OF GENERAL APPLICABILITY AND THOSE NOT OF GENERAL APPLICABILITY SHOULD BE ADOPTED

The *NPRM* proposes that general applicable Postal Service rate incentives should be eligible for offsetting increased “credit” under the price cap, while rate incentives that are not of general applicability should not be eligible for such an offset. NPPC supports this proposed approach.

As a general matter, when the Postal Service establishes rate changes under the price cap regime, it has flexibility to raise some rates more than others, or to reduce some rates and raise others still more, within the classwide cap. This is inherent in a price cap regime. Nothing prohibits a mailer from availing itself of the lower rates.

In principle, a generally applicable rate incentive is simply an instance of such a rate reduction, which may be of whatever duration the Postal Service specifies. Accordingly, it appears reasonable to allow the Postal Service to offset such a generally applicable rate incentive with offsetting cap authority.

Conversely, where a rate incentive is *not* generally available, this is because the Postal Service has decided, as a business matter, to discriminate in favor of a limited number of mailers by offering to them a reduced rate, and to control the access to that rate. It may do so for a variety of reasons, such as to increase volume or encourage particular mailing preparation, but the incentive of the reduced rate would be available only to some mailers. Other mailers would never be eligible.

The intent of the proposal is that negotiated services agreements would not be eligible for offsetting cap authority. See Proposed section 3010.24.

Similarly, the *NPRM* notes that the Tech Credit that the Postal Service proposed in 2013 would not have been eligible for an offsetting increase, because eligibility was premised on whether a mailer had mailed a sufficient quantity of a particular category of mail in the preceding year and there would have been no opportunity for a mailer to make itself eligible for the proposed credit.

As the *NPRM* notes, the important distinction is that the reduced rate is made available not simply on the basis of the mailer's characteristics, but at the discretion of the Postal Service. If the Postal Service were allowed to claim incremental cap authority to offset a negotiated services agreement or other rate incentive that is not generally available, ineligible mailers would pay the cost without any opportunity to enjoy the benefit. The proposed rule properly would prohibit the Postal Service from seeking to recover revenues lost from rate incentives that are not generally available from ineligible mailers.

II. THE DEFINITION OF "GENERALLY APPLICABILITY" SHOULD BE IMPROVED

The critical distinction in the proposed treatment of rate incentives is that between rate incentives that are "generally applicable" and those that are not. The *NPRM* proposes to distinguish between the two via a definition of "generally applicable" as follows:

A rate applicable to all mail meeting standards established by the Mail Classification Schedule and the Domestic Mail Manual.

Proposed section 3010.1(g). The definition of a "rate of general applicability" then goes on to state three types of rates that are not of general applicability:

A rate is not a rate of general applicability if eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies. A rate is not a rate of general applicability if it benefits a single mailer. A rate that is only available upon the written agreement of both the Postal Service and a mailer or group of mailers is not a rate of general applicability.

Id.

NPPC supports the Commission's approach, but the proposed definition, perhaps necessarily, leaves some ambiguity regarding what types of rate incentives would be eligible for offsetting cap authority and which would not. For example, even routine matters such as eligibility for non-profit or Periodicals status requires at least a ministerial approval by the Postal Service, which might be considered discretionary to some degree. For another, what would be the status of a niche classification designed by the Postal Service so narrowly defined as to be available, in practice, to only a very small number of mailers, but for which no contract is available?

It may not be possible to anticipate, and address in a definition, how each of these scenarios would be resolved. However, the Commission should provide an discussion (but not in the text of the rule) of how its definition might apply to such situations.

III. THE POSTAL SERVICE SHOULD BANK ANY UNUSED OFFSETTING CAP AUTHORITY AT THE TIME THAT A TYPE 1-C FILING IS MADE, SUBJECT TO THE NORMAL “FIRST-IN FIRST-OUT” RULE

Proposed section 3010.23(a)(1)(iii) would allow the Postal Service the option to elect whether to claim any unused offsetting rate adjustment authority immediately at the time of offering a rate incentive, or to wait until a subsequent rate adjustment proceeding. This option appears unnecessary and needlessly introduces an extra layer of uncertainty. It would be preferable to require the Postal Service to announce whether it will claim any offsetting cap adjustment at the time that it provides notice of an upcoming rate incentive. The Postal Service need not use that cap authority immediately or in its next Type 1-A or Type 1-B adjustment, but any such unused cap authority should simply be banked and treated the same way as other unused cap authority. This would include, for example, application of the first-in, first-out principle.

Requiring the Postal Service to indicate its intentions regarding any incremental cap authority created by a new rate incentive of general applicability at the time it notices the rate would give mailers greater predictability regarding the cap than the proposal in the *NPRM*. Mailers would know from the outset whether the Postal Service might later seek to recoup the value of the rate incentive through higher rates, which is preferable to uncertainty. Of course, nothing would require the Postal Service actually to use such incremental cap authority in any particular rate adjustment, subject to the five-year expiration established by current 39 C.F.R. §3010.27 and recodified under the *NPRM* as 39 C.F.R. §3010.27(b). But knowing whether it has chosen to reserve the right to do so would be preferable to leaving the matter uncertain.

IV. THE COMMISSION SHOULD CLARIFY THE SCOPE OF THE PROPOSED TREATMENT OF DELETED RATE CELLS

Proposed section 3010.23(d)(4) would provide, where a rate cell is deleted and “an alternate rate cell is not available,” that the Postal Service in its price cap calculations should adjust the billing determinants for the deleted cell to zero. The *NPRM* indicates that the purpose of this provision is to protect mailers within a class from large increases when the Postal Service deletes a cell. As an example, it cites approvingly the Postal Service’s deletion of Parcel Post billing determinants from its market-dominant rate calculations as a result of the transfer of that product to the Competitive category. In that situation, no alternative rate cells remained available in the market-dominant category.

The Commission should state, however, that proposed section 3010.23(d)(4) would not apply in the type of situation addressed in Order No. 1890, where the Commission held that the Postal Service had redefined or deleted rate cells in its effort to impose a mandatory Full Service Intelligent Mail Barcode requirement. *Market-Dominant Price Adjustment*, Docket No. R2013-10, Order No. 1890 at 5-37 (Nov. 21, 2013), *petition for reviewing pending sub nom. United States Postal Service v. Postal Regulatory Commission*, No. 13-1308 (D.C. Circuit). In that case, “alternate rate cells” were in fact available – which is why the mandatory Full Service IMb requirement exceeded the cap when the volumes in the deleted cells were reassigned to other cells for the purpose of the cap calculations.

V. THE COMMISSION SHOULD CLARIFY THAT THE POSTAL SERVICE MAY NOT CREATE EXCESSIVE CAP SPACE BY MANIPULATING THE TIMING OF TYPE 1-C RATE INCENTIVES

Proposed section 3010.23(b)(2) would establish how to perform the calculation of the percentage change in rates for Type 1-C rate adjustments, and proposed section 3010.27 would establish how unused rate authority for Type 1-C rate adjustments is to be calculated.

The Commission should clarify that existing rules designed to prevent the Postal Service from creating excess cap space by manipulating the timing of rate decreases would continue to apply. In particular, current section 3010.23(a) provides that seasonal or temporary rates are identified and treated as rate cells separate and distinct from permanent rates when calculating the percentage changes in rates. This prevents the Postal Service from manipulating the cap by introducing a rate incentive in the eleventh month and using that rate, rather than the higher rate that was in effect for the prior months, in calculating the percentage changes in rates.

The *NPRM* proposes to relabel that provision of section 3010.23 as section 3010.23(a)(2). Nothing indicates that this change is intended to have a substantive effect. The Commission should confirm this understanding.

VI. CONCLUSION

For the foregoing reasons, the National Postal Policy Council respectfully urges the Commission to adopt the proposed rules in a manner consistent with these comments.

Respectfully submitted,

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