

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

RECEIVED
May 24 12 56 PM '99
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Periodicals Classification Change)

Docket No. MC99-3

OFFICE OF THE CONSUMER ADVOCATE
INITIAL BRIEF
(May 24, 1999)

The Office of the Consumer Advocate (OCA), pursuant to Presiding Officer's Ruling No. MC99-3/2,¹ hereby files its Initial Brief in the Periodicals Classification Change proceeding. OCA's discussion will focus on the argument raised by the Advertising Mail Marketing Association (AMMA) in its response to the Postal Service motion to forego hearings.²

AMMA Argument

AMMA argues that legal issues remain that must be resolved by the Commission, i.e., were the rates recommended by the Commission in PRC Op. R97-1, and implemented by the Governors on January 10, 1999, "invalid *ab initio*["?]"³ AMMA's reasoning is that the Governors' discretion to determine the timing of a rate change is

¹ "Presiding Officer's Ruling Scheduling the Dates for Filing Briefs," issued May 14, 1999.

² "Response of the Advertising Mail Marketing Association to Postal Service Motion to Forego Hearings," filed May 7, 1999. (Hereinafter, AMMA Response).

³ *Id.* at 2.

“predicated on the notion that the rates are valid in the first instance.”⁴ According to AMMA, the Nonprofit rates at issue in the instant proceeding were invalid from the outset, and the Commission “can and should . . . recommend that the Governors apply the refund program retroactively, to the date the invalid rates were first applied, to reverse the effects of the invalid rates.”⁵ It is AMMA’s position that “the Commission has ample authority to make this recommendation as part of its overall recommendation on the Postal Service’s proposed classification change.”⁶

The nature of the alleged invalidity of the rates, AMMA argues, is that neither the Postal Service nor the Commission ever intended that Nonprofit or Classroom rates be higher than corresponding commercial rates and, furthermore, that 39 U.S.C. §3626 signals a Congressional aim that Nonprofit mailers enjoy reduced rates, i.e., rates lower than those paid by commercial mailers. For AMMA to prevail in its challenge to the April 9 date for the commencement of refunds, by its own terms, it must establish the following legal principles:

- the Nonprofit and Classroom rates were invalid *ab initio* because either: (1) they were not *lower* than regular rates, and 39 U.S.C. §3626 requires that they be so, or (2) at the very least, they must not be higher than corresponding commercial, Regular rates; and
- the Commission has the authority to “reverse the effects of the invalid rates” by recommending that the Governors apply the refund program retroactively.

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.*

Position of OCA

It is OCA's position that AMMA has failed to establish the conditions outlined above and, therefore, the Commission should approve the Postal Service's proposal as filed, without making a formal recommendation that refunds be made retroactive to January 10, 1999. However, if the Commission wishes to exercise its discretion to make an *informal, non-binding* recommendation to the Governors that the refund be made retroactive, it is certainly free to do so.⁷

AMMA appears to construe the Revenue Foregone Reform Act (RFRA) to require that the rates of preferred subclasses be established at a level below that of the benchmark commercial subclass. The exact language of RFRA⁸ (in pertinent part) is:

[R]ates of postage for [an enumerated preferred subclass] . . . shall be established in a manner such that the estimated revenues to be received by the Postal Service from such class of mail or kind of mailer shall be equal to the sum of—

(i) the estimated costs attributable to such class of mail or kind of mailer; and

(ii) the product derived by multiplying the estimated costs referred to in clause (i) by the applicable percentage under subparagraph (B). . . .

(VI) one-half for any fiscal year after fiscal year 1998.

In other words, the rate for a preferred subclass is determined by first estimating the attributable costs of the subclass and then applying a markup that is half that for the

⁷ In the Summary of PRC Op. R97-1, at iii, the Commission informally urged the Governors to delay increasing rates until additional revenues were needed to offset actual (as opposed to planned) expenditures. This may have influenced the Governors who, indeed, deferred implementation of the rate increase until January 10, 1999, eight months after the R97-1 recommended decision was issued. In deciding to defer implementation, the Governors cited the R97-1 opinion. Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on Postal Rate and Fee Changes, Docket No. R97-1, at 21. However, the Governors maintained that the effective date of the increase was independently selected.

⁸ 39 U.S.C. §3626(a)(1).

corresponding commercial subclass. The current rates for Classroom and Nonprofit periodicals were determined by the Commission in that manner; as the Commission stated, “[t]he target cost coverage [for Nonprofits] is based on a markup one-half the size of the markup for Regular, as specified by RFRA.”⁹ In turn, Nonprofit rates were applied to Classroom mail, an extension of a remedy developed in Docket No. MC96-2.¹⁰

The attachment to a letter sent by Chairman Gleiman, Postal Rate Commission, and Chairman Dyhrkopp, Postal Service Board of Governors, to Chairman McHugh, Subcommittee on the Postal Service, on March 10, 1999, explained that it is difficult to configure rates for Nonprofit (and Classroom) periodicals that are uniformly lower than Regular rates when:

the cost characteristics of the two subclasses [i.e., the regular and preferred subclasses] are not identical, and Regular and Nonprofit rates are developed separately, each reflecting its own costs based on separate sets of special cost studies relating to the savings for presorting, prebarcoding, and drop-shipping.

It must be borne in mind that, even though one important aim of RFRA is to establish preferred rates that are lower than corresponding commercial rates, RFRA also provides that the attributable costs of the preferred subclass must be recovered through the rates devised by the Commission. If, in a future proceeding, the Postal Service were to present clear, convincing proof that the unit attributable costs of the preferred subclass were substantially higher than those of the regular subclass, it is

⁹ PRC Op. R97-1, ¶ 5838.

¹⁰ Id., ¶ 5867.

possible that the preferred rates would necessarily be higher than those of the commercial counterpart. This would not be a RFRA violation and, contrary to AMMA's contention, such rates would not be invalid. Therefore, under the guideline AMMA articulated for a successful challenge, the rates proposed by the Postal Service and those recommended by the Commission are not invalid either *ab initio* nor currently because there is no absolute principle that preferred rates must always be less (and never higher) than corresponding regular rates, regardless of underlying costs.

The guideline articulated by AMMA does prevail in some cases, however. For example, if an unexpectedly large unit cost for a small, preferred subclass results from "random variation," relief for the preferred subclass may be in order. In Docket No. R97-1, when such circumstances were present for the small Library subclass, OCA witness Collins proposed to use the stable unit attributable cost of Special rate as a proxy for the unstable unit cost resulting from insufficient sampling of Library mail.¹¹

The Commission did not adopt OCA's proposed remedy in that proceeding—instead, it extended the lower Special rates to all mailers eligible for Library rates.¹² This is the same course of action proposed by the Postal Service in the instant proceeding. Therefore, the Commission seemingly construes RFRA to allow preferred mailers to avail themselves of the lower rates of the corresponding commercial subclass, but does not interpret RFRA to require lower rates for preferred mailers when lower costs are not present to justify that result.

¹¹ Tr. 24/13093-97 (OCA-T-700 at 10-14).

¹² PRC Op. R97-1, ¶ 5743.

At the time the Commission recommended, and the Governors adopted, the rate schedule for the Nonprofit subclass in R97-1, the weighted average of all Nonprofit rates appeared to satisfy RFRA requirements. Schedule 1, Appendix G, PRC Op. R97-1, shows that Nonprofit costs in the test year were estimated to be \$362,693,000 and revenues in the test year were expected to be \$365,110,000, both covering attributable costs and yielding an approximate cost coverage of 100.7 percent.

Classroom costs, however, were so unstable and subject to random variation that any attempt to determine rates independently for Classroom mail were abandoned. The Nonprofit rates were extended to Classroom mail, a course first established in Docket No. MC96-2;¹³ and the related RFRA expectations of recovery of attributable costs and suitable cost coverage were thereby assumed satisfied for Classroom mail. While the anomalous rates that gave rise to the instant proceeding are certainly not desirable, nor the result intended by either the Commission or the Postal Service, they are not necessarily invalid.

Although the Commission has the authority to reconsider its earlier interpretation (that RFRA permits equal rates for preferred and regular subclasses when higher preferred subclass attributable costs warrant such a result), OCA believes that the current proceeding is not an appropriate vehicle for doing so. This proceeding is being actively litigated and followed by only a small subset of the intervenors from the last omnibus rate case. Since the interests of all other subclasses and services could potentially be affected by any re-interpretation of RFRA that causes a re-distribution of

¹³ *Id.*, ¶¶5865-68.

the attributable costs of preferred subclasses, procedural fairness requires that a change of such significance be addressed in the context of an omnibus rate case.

Furthermore, even if the Commission were to decide to revisit this issue in the current proceeding and found that the Nonprofit rates utilized from January 10-April 9, 1999, were invalid, it still lacks the authority to order a change in the size of the refund due affected Nonprofit and Classroom mailers since, according to the Commission, it lacks any refund authority.¹⁴ Therefore, AMMA's other chief contention, that the Commission has the authority to recommend a retroactive refund, also fails. At best, AMMA can only hope to induce the Commission to make a non-binding, advisory statement concerning the timing of the refund. If the Commission decides that such a statement is warranted, it certainly has the discretion to make it.

In conclusion, OCA suggests that the Commission determine that the Nonprofit and Classroom rates recommended in its R97-1 decision are valid (albeit anomalous) and defer consideration of the important issues concerning the unstable costs of small, preferred subclasses and the proper construction of RFRA to the next omnibus rate case. OCA remains of the view that the Postal Service should endeavor to supply accurate and reliable cost data for all subclasses, including preferred subclasses, in the next omnibus rate proceeding,¹⁵ and encourages the Postal Service to be responsive to

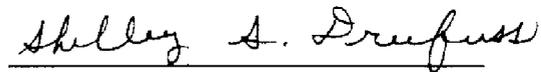
¹⁴ Order No. 1227, "Order Dismissing Complaint," Docket No. C98-1, issued January 27, 1999, at 8; see also remarks of Chairman Gleiman at Docket No. MC99-3 prehearing conference. Tr. 1/13-14.

¹⁵ "Office of the Consumer Advocate Response to Motion of the United States Postal Service for Expedition and to Forego Hearings as Provided for in P.O. Ruling No. MC99-3/1," filed May 14, 1999.

the Commission's expectation that a long range solution be devised before the next omnibus case is filed.¹⁶

Respectfully submitted,

OFFICE OF THE CONSUMER ADVOCATE

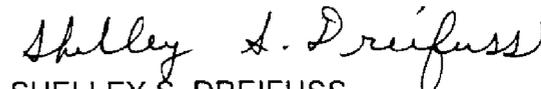


Ted P. Gerarden
Director

Shelley S. Dreifuss
Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.



SHELLEY S. DREIFUSS
Attorney

Washington, D.C. 20268-0001
May 24, 1999

¹⁶ Order No. 1243 at 7.