

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20628-0001

Amendments to Commission Publishing Rules )

Docket No. RM2016-5

**COMMENTS OF THE ASSOCIATION FOR POSTAL COMMERCE  
(February 26, 2016)**

Pursuant to Order No. 3039, the Association for Postal Commerce (“PostCom”) submits these comments on the Commission’s proposed changes to its procedural rules governing changes to the product lists published in the Mail Classification Schedule (“MCS”). PostCom believes that in pursuing the laudable goal of streamlining the publication procedures related to changes in the product lists, the Commission has, perhaps inadvertently, eliminated important procedural protections provided by the existing rules. Specifically, by eliminating the requirement that the Commission call for comments after initial publication of a change in the product lists, the Commission has deprived mailers of an important opportunity to voice concerns that the proposed changes do not comply with the law. This change is particularly detrimental with respect to transfers between the market dominant and competitive product lists, as such transfers have immediate and significant impacts on the degree of regulatory oversight the Commission may exercise over the products in question. PostCom therefore urges the Commission to revise its proposed rules to retain the requirement that the Commission will call for comments when any change to the product lists is requested.

**I. THE PROPOSED RULES**

The proposed rules modify 39 C.F.R. §§ 3020.33, 3020.53, 3020.82, and 3020.91. The Commission describes its proposed rules as “minor changes” to rules requiring the Commission to publish proposals to modify the product lists established in the MCS to the Federal Register. Order No. 3039 at 1. It specifically identifies two currently required publications the rules will

eliminate: “(1) the initial notices and orders identifying a Postal Service request to modify the MCS, which are duplicative of the Postal Service notices/requests to modify the MCS; and (2) the orders identifying draft MCS changes approved by the Commission but not yet finalized in a modification to the MCS, which are duplicative of the quarterly MCS update.” *Id.* at 1-2.

There is a further change to the existing rules, however, that the Commission does not identify in its introduction to the proposed rules and does not fully explain in the body of its order. Currently, each of the rules regarding “Docket and Notice” for proposed modifications to the product lists requires the Commission to establish “A specified period of public comment.” *See* 39 C.F.R. §§ 3020.33(e) and 3020.53(e); *see also* 39 C.F.R. § 3020.82(e) and 3020.91(e) (requiring the Commission to “[p]rovide interested persons with an opportunity to comment on whether the proposed [changes/corrections] are consistent with title 39 and applicable Commission regulations”). The Commission has proposed to eliminate this period of public comment in each of these rules. These are the changes that concern PostCom.

## **II. THE RIGHT TO COMMENT ON PROPOSED CHANGES MUST BE PRESERVED**

The Commission does not clearly explain why it has removed the requirement to allow a period of public comment on proposals to modify the product lists. One possible rationale appears in the Commission’s statement that “because the MCS is an interpretive rule, the Commission is not obligated to provide notice-and-comment for modifications proposed by itself or third parties.” Order No. 3039 at 3. If this statement is intended to justify the elimination of the comment requirement, PostCom contends that it does not do so.

Regardless of whether the MCS itself is an interpretive rule, the Commission must make substantive determinations as to whether requests to modify the product lists comply with Title 39 and Commission regulations before any such changes will be reflected in the MCS. These

determinations have effects beyond just how the products are reflected in the MCS. Most significantly, a decision to allow a product to move from the market dominant to competitive product list alters the entire regulatory scheme applied to that product. The rules at issue in this proceeding govern those determinations, not the MCS itself. By eliminating the comment requirement in these rules, the Commission may be depriving itself of valuable information regarding whether a proposed change to the product lists comports with legal requirements.

The case of the Postal Service's request to transfer First Class Mail products from the market dominant to competitive list in Docket No. MC2015-7 is instructive. The Postal Service filed its request pursuant to 39 C.F.R. § 3020.30 *et seq.*<sup>1</sup> The Commission established a docket to consider this request and, as required by § 3020.33(e) of the Commission's rules, provided a period for public comment on the request. Both the Public Representative and an interested mailer, GameFly, Inc., filed comments arguing that the request did not comply with the statutory requirements for such a transfer. In a decision that is currently on appeal before the D.C. Circuit, the Commission agreed with the commenters and denied the Postal Service's request. *See* Order No. 2686 at 25.

If the Commission had been operating under its proposed rules, however, it may never have opened the request for comment and never learned that a mailer and the Public Representative opposed the transfer (or the reasons for their opposition). The Commission would have been deprived of valuable information, information that arguably led it to reject the proposed transfer.

While the Commission notes that it is not prohibited from "choosing, on its own accord, to publish such proposals to give the public opportunity for notice-and-comment," it does not

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<sup>1</sup> Docket No. MC2015-7, Request of the United States Postal Service to Transfer First-Class Mail Parcels to the Competitive Product List at 1 (Nov. 14, 2014).

provide any guidance as to when it will allow comment and when it will not. Order No. 3039 at 3 n.6. As it is difficult to know at the outset which proposed changes will prove controversial and which will not, PostCom believes that all proposed changes should be accompanied by an opportunity for public comment, whether legally required or not. A period of public comment will ensure that the Commission is fully informed of the potential impact of a proposed change. Where the changes are not controversial, no comments will be filed, and the provision of a comment period will not result in unnecessary delay.

Ultimately, PostCom is concerned that the proposed rules improperly conflate the need for comment on the *publication* of changes to the MCS and the need for comment on proposals to *change* the MCS. PostCom agrees that there is no need to allow public comment at the point the Commission publishes changes to the MCS as at that time, the decision has already been made. But, as demonstrated in Docket No. MC2015-7, public comment can be vitally important to the Commission's decision whether to approve changes to the product lists.

### **III. CONCLUSION**

Changes to the product lists are not simply ministerial acts—they can have profound impacts on mailers, especially when the change in question is a transfer of a product from the market dominant to competitive product list. Accordingly, the public, including mailers, should have an opportunity to comment on any proposed changes to the product lists. The Commission should therefore modify its proposed rules to retain the requirement that the Commission establish a period for public comment when noticing a proposed change to the product lists.

Respectfully submitted,

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