

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Rule on Motions Concerning  
Mail Preparation Changes

Docket No. RM2016-6

PUBLIC REPRESENTATIVE COMMENTS

(September 2, 2016)

I. INTRODUCTION

Pursuant to Commission order issued January 22, 2016, and subsequent notice reinstating this rulemaking, the Public Representative hereby responds to the Commission's request for comments on its proposed change of the Commission's rules of practice to amend its motions rules at 39 C.F.R. § 3001.21 by adding a new paragraph (d) styled "Motions concerning mail preparation changes."<sup>1</sup>

On February 23, 2016, the Commission ordered this proceeding held in abeyance pending its resolution of a Postal Service's motion for reconsideration of Order No. 3047 in a related proceeding, Docket No. R2013-10R.<sup>2</sup> The Commission ruled on the Postal Service's motion,<sup>3</sup> and reinstated this proceeding.<sup>4</sup>

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<sup>1</sup> Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, Order No. 3048, January 22, 2016 (Notice).

<sup>2</sup> Order Holding Rulemaking in Abeyance, February 23, 2016 (Order No. 3096) at 1.

<sup>3</sup> Docket No. R2013-10R, Order Resolving Motion for Reconsideration of Commission Order No. 3047, July 20, 2016 (Order No. 3441). The Postal Service filed petitions for review of Commission order Nos. 3047 and 3441. *U.S. Postal Service v. Postal Regulatory Commission*, No. 16-1284 (D.C. Cir. filed August 11, 2016).

<sup>4</sup> Notice Reinstating Rulemaking, July 27, 2016. Comments are due September 2, 2016, 30 days after publication of the reinstatement notice in the federal register. 81 Fed. Reg. 51145 (August 3, 2016).

## II. BACKGROUND

### A. Procedural History

The genesis of this rulemaking arises from a series of events following a Postal Service notice of operational changes published in its Domestic Mail Manual (DMM) to modify the eligibility requirements for mailers to qualify for automation First-Class, Standard, Periodicals, and Package Services rates. 78 Fed. Reg. 23137 (April 18, 2013). On September 26, 2013, the Postal Service filed notice with the Commission of a planned price adjustment for market dominant products.<sup>5</sup> In its Notice, the Postal Service failed to account properly for the planned implementation of its changed mail eligibility requirements. The Postal Service did not adjust its billing determinants to reflect the impact on its rates resulting from the DMM changes.

On November 21, 2013, the Commission determined that the Postal Service failed to take into account the impact of announced operational changes and so did not properly utilize historical volumes for its billing determinants.<sup>6</sup> The Commission ruled that the Postal Service's new mailing requirements "constitute a classification change with rate implications pursuant to 39 U.S.C. § 3622(d)(1)(A) and 39 C.F.R. § 3010.23(d)." Order No. 1890 at 2.

The Postal Service appealed Order No. 1890 to the D.C. Circuit Court of Appeals. On May 12, 2015, the court affirmed the Commission's authority to determine when mail preparation changes affect the application of the price cap under 39 U.S.C. § 3622(d).<sup>7</sup> However, the court further concluded that Order No. 1890 failed to "articulate a comprehensible standard for the circumstances in which a change to mail

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<sup>5</sup> Docket No. R2013-10, United States Postal Service Notice of Market-Dominant Price Adjustment, September 26, 2013 (Notice).

<sup>6</sup> Docket No. R2013-10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013 (Order No. 1890) at 23-24.

<sup>7</sup> *United States Postal Service v. Postal Regulatory Commission*, 785 F.3d 740, 744 (D.C. Cir. 2015).

preparation requirements will be considered a “change in rates.” *USPS v. PRC*, 785 F.3d at 753. Accordingly, the court remanded the case to the Commission to “enunciate an intelligible standard....” *Id.* at 756.

On January 22, 2016, the Commission issued an order to resolve the matters raised by the court’s remand.<sup>8</sup> The Commission’s order articulated a standard to determine when mail preparation changes affecting market dominant mail require compliance with § 3010.23(d)(2). That standard is stated as,

[A] mail preparation change has rate effects where it results in either the deletion or the redefinition of a rate cell. A rate cell will be considered “redefined” where the mail preparation change results in a significant change to a basic characteristic of the mailing. *Id.* at 59.

Order No. 3047 also expressed the Commission’s intention to initiate a rulemaking to establish procedural rules “governing mail preparation changes that require price cap compliance.” *Id.*

#### B. Proposed rule

Accordingly, on January 22, 2016, the Commission issued its notice to establish a procedural rule in this docket and requested comments.

The proposed rule states:

*(d) Motions by interested persons concerning mail preparation changes.* Motions regarding mail preparation changes are challenges to instances where an announced mail preparation change does not contain a Postal Service indication that the change has a rate effect requiring compliance with § 3010.23(d)(2) of this chapter. Motions may be filed by any interested party and shall set forth with particularity the mail preparation change at issue and the grounds by which the mail

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<sup>8</sup> Docket No. R2013-10R, Order Resolving Issues on Remand, January 22, 2016 (Order No. 3047).

preparation change must comply with § 3010.23(d)(2) of this chapter. Motions concerning mail preparation changes must be filed at least 30 days after a party has actual or constructive notice of the implementation date of the change. Notice at 7.

No other change in Commission rules is proposed in this proceeding.

### III. DISCUSSION

#### A. Practical Procedural Difficulty

The Public Representative appreciates the practical procedural difficulty facing the Commission in undertaking this rulemaking. Almost any change in mail preparation requirements may alter, to some degree, the future volume of mail in certain rate cells. In some cases, the impact on volumes may be due to an effective redefinition of a rate cell and the effect on volume in various rate cells will be unknown. The impact can vary with the particular circumstances and the mailing choices of each mailer. The potential overall impact of a mail preparation change will be difficult to assess in advance of implementation. There is a potential that resultant changes in rate cell volumes due to elimination or redefinition of rate cells could alter revenues and require an adjustment of the annual limitation or cause revenues to exceed the permissible annual price cap limitation. Although procedures to ensure that rate change filings are submitted when necessary might be burdensome and cumbersome, the Commission is obligated to apply appropriately the annual limitation and to review and enforce against a breach of the price cap. Order No. 3047 at 39. Whether the proposed rule will sufficiently alert the Commission of a potential rate effect due to a mail preparation change is problematic.

#### B. Limited scope of proposed rule in 39 C.F.R. § 3001.21(d)

The proposed rule provides only limited assistance toward eliminating a concern that the Postal Service's may not attempt to determine or may not accurately determine

when a mail preparation change will result in a deletion or redefinition of a rate cell. The rule only details the opportunity for a party to question via motion the Postal Service's silence about the impact of a mail preparation change. The rule is limited in scope, providing for "any interested party" to notify the Commission by motion of a potential rate effect of a mail preparation change. The proposed rule does not ensure that the Postal Service will undertake to meet its burden of determining, in the first instance, whether a rate filing is necessary. That burden is only implicit in part 3010 of the existing rules.

The Notice in this proceeding explains that Order No. 3047 places an affirmative burden on the Postal Service to determine whether the mail preparation change has a rate effect. Notice at 2, 5.<sup>9</sup> In the event the Postal Service determines that a mail preparation change has a rate effect, the current rules require a rate adjustment filing. 39 C.F.R. § 3010(d)(2). Such a filing must be at least 45 days prior to implementation of the mail preparation change. 39 C.F.R. § 3010.10(a). The rules encourage the Postal Service to submit its notice "as far in advance of the 45-day minimum as practicable, especially in instance where the ...operations changes are likely to have a material impact on mailers." 39 C.F.R. § 3010.10(b).

The Commission indicated that it will analyze the changes: "The Commission will analyze the significance of the change by assessing the operational adjustments and/or costs required by the mailer for compliance with the new mail preparation requirement." Order No. 3047 at 17. But the Commission will not undertake the analysis unless the Postal Service reaches a determination of a rate effect from a mail preparation change and files for a rate change, or if a potential rate impact is brought to the Commission's attention by an interested person filing a motion.

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<sup>9</sup> The Notice quotes Order No. 3047 at 16: "The Postal Service is required to comply with § 3010.23(d)(2) where the mail preparation change results in either the deletion of a previously available rate cell or significantly changes the basic characteristic of the mailing so that the rate cell is effectively "redefined." *Id.* at 2.

1. There is no assurance of Postal Service review of rate impact upon mail preparation changes

Commission Order No. 3047 stated that when an operational change is planned, the burden is on the Postal Service to undertake an initial review for rate impact:

The Postal Service will have the affirmative burden to determine whether changes to mail preparation have a rate effect with price cap implications in accordance with the Commission's standard and 39 C.F.R. § 3010.23(d)(2). The Postal Service must apply a good faith analysis to make the preliminary determination of whether a mail preparation requirement change will result in either the deletion or redefinition of a rate cell. Order No. 3047 at 20.

This burden is somewhat broader than the burden the Postal Service faced prior to the court's decision. Before the court ruled, rate adjustments were to be filed by, "The Postal Service, in every instance, in which it determines to exercise its statutory authority to make a ...rate adjustment for a class..." 39 C.F.R. § 3010.10(a). But the court ruled the Postal Service must also consider mail preparation changes as implicating rate adjustments. The Postal Service has not previously viewed its mail preparation changes as potential rate adjustments and, in response to PostCom's proposal, stated that it views an analysis and computation of the price cap impact of all mail preparation changes as "burdensome" and "overwhelm its resources." Order No. 3047 at 41-42.

Under Order No. 3047, there is no certainty other than good faith that the burden will be met because the proposed rule does not require Postal Service reporting of a determination of "no impact" for every operational change. There is no penalty to the Postal Service if it fails to undertake the review of the impact of a mail preparation change carefully, or otherwise overlooks a case where the billing determinants should be adjusted. Rather, that burden of analysis is left to interested parties. Nor is there to be an independent Commission review of

the potential price cap impact for each operational change except when the Postal Service determines that there is a rate effect and files for a rate adjustment, or an interested party files pursuant to the proposed motion rule. Alternatively, the Commission is not in a position to review the effects of each mail preparation change because notices for many mail preparation changes are not filed with the Commission and may not even be entered into the DMM.

It appears that the proposed rule in this matter leaves a potential gap in regulatory coverage. It does not ensure full and appropriate timely analysis of whether a mailing preparation change causes the deletion or redefinition of a rate cell. Order No. 3047 places the burden on the Postal Service for an initial review and defers to the Postal Service the initial task of analyzing mail preparation changes that may have price cap implications. Yet, the Commission rule does not provide express guidance for when a mail preparation requirements change rises to the level of a rate change. The standard of “a significant change to a basic characteristic of the mailing” is vague, subjective and dependent upon the viewpoint of the party gauging significance. The standard does not encompass analysis of the potential revenue and rate impact.

Having determined a mail preparation change can and does sometimes effect a rate change, the Commission should not abdicate its responsibility to administer the price cap rules by not ensuring consideration of whether rate cells are effectively deleted or redefined by such changes, whether noticed in the DMM or elsewhere. There is no check to ensure the Postal Service has actually and fully considered in good faith, or otherwise, the impact of an operational change on rate cells.

Order No. 3047 expressly rejected a proposal to require notification of negative rate impacts as part of the Annual Compliance Report (ACR) process at the end of the fiscal year by Postal Service reporting of all operational changes as suggested in Public Representative reply comments in Docket No. R2013-10R:

Therefore, the Public Representative proposes amendment to the rules to require the Postal Service to certify in the ACR that each of its

mail preparation changes and other rate changes, where no notice of rate change or a full-blown rate case was filed, did not result in a rate change exceeding the *de minimis* rule amount. The Postal Service should be required to report the revenue impact of the changes in its ACR. This will provide the Commission and other interested persons the opportunity to review the impact of all mail preparation changes to ensure the Commission and interested persons have the opportunity to review all effective rate changes, including those involving mail preparation changes and to make appropriate price cap adjustments. (Footnote omitted.)  
Public Representative Reply Comments at 11-12.

The Commission rejected the proposal, noting the administrative burden on the Postal Service because, “Requiring the Postal Service to engage in a price change analysis for every mail preparation change both pre- and post-implementation of the change would unreasonably increase the Postal Service’s administrative burden.” Order No. 3047 at 52. The order also rejected the Public Representative’s proposal because, “Additionally, the Public Representative’s proposal to review price cap compliance after-the-fact in the ACD would conflict with the Commission’s statutory duty to review rates and enforce the price cap pre-implementation.” (Emphasis supplied.) *Id.*

These comments are not offered to reargue the Public Representative’s position in Docket No. R2013-10R favoring ACR reporting of negative determinations, rather they are to point out that under the proposed rule here, a gap would remain in the review for potential deletions or redefinitions of rate cells through mail preparation changes of a basic characteristic of a mailing. A rate impact resulting from such changes would not necessarily be discovered if the Postal Service is required only to notify the Commission when it finds deletion or redefinition will occur and files for a rate change, or where an interested person recognizes a potential rate change and is willing to undertake the effort to file a motion with the Commission.

2. Proposed rule lacks provision for Postal Service notice of determination of no rate effect.

In the absence of an overt statement by the Postal Service in one of its releases that it has determined there is no rate impact from an operational change, an interested mailer or other party necessarily will not be aware that a negative decision has been reached by the Postal Service. Nor will interested parties be informed that a single procedural rule in the Code of Federal Regulations of another agency--this Commission—offers a procedure for potential relief for an affected party.

It would be useful if the Postal Service were to indicate in any announced mail preparation requirement change that it has analyzed the impact of the change and its conclusion whether or not there is a rate impact. Otherwise, a mail preparation requirement change could be implemented without consideration or recognition by the Postal Service of any rate impact. The Commission does not indicate any intention to review each mail preparation requirement change internally, either at the time of announcement or later if a motion pursuant to the proposed rule is not filed by an interested person.

### C. Other Issues

1. The purpose of a 30 day waiting period for filing a motion under §3001.21(d) is unexplained and unclear

The last sentence of the proposed rule states: “Motions concerning mail preparation changes must be filed at least 30 days *after* a party has actual or constructive notice of the implementation date of the change.” (Emphasis supplied.) Notice at 7. The purpose of the wait time is unclear. The proposal appears to require a movant to wait until at least 30 days has passed after receiving notice to file such a motion. The Commission’s Notice does not explain the need for such a delay in filing or the purpose of the delay. In fact, a requirement that such motions are to be filed within 30 days of notice so that they might possibly be ruled upon prior to the planned

implementation date would be more consistent with the PAEA's objective of predictability and stability in rates. 39 U.S.C. § 3622(b)(1). If the Commission intends that the filing is due before 30 days has lapsed from receipt of notice, the Public Representative proposes changing "filed at least 30 days after a party has received actual or constructive notice ...." to "filed within 30 days after a party has received actual or constructive notice...."

There is also the additional question of the usefulness of any time limitation for filing a motion challenging a mail preparation change, *i.e.* whether a time limit is useful at all. First, in many cases it is unlikely that the rate change question can be resolved before an operational change becomes effective since many are effective immediately or shortly thereafter.

Second, and more importantly, even if a motion filed under the proposed rule in less than 30 days after notice, would the motion be rejected and the Postal Service allowed to maintain its billing determinants unadjusted, even if an impact to rates is subsequently identified? In such a case, must the rate impact be permitted to persist until the next rate adjustment filing? Rather than imposing a time limit on filing motions, greater flexibility would be available if the Commission rule simply encouraged interested parties to file such motions whenever it becomes apparent to an interested party that effective deletions or redefinitions of rate cells have occurred or will occur.<sup>10</sup> Similarly, absent a motion, the Commission may open an investigation into billing determinants at any time to determine the impact of operational changes and require adjustments to billing determinants.

Rather than limiting the filing of motions to 30 days after notice, the rule might state that interested persons, whenever they believe an operational change will have, or has had, the effect of deleting or redefining a rate cell, may file a motion challenging the

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<sup>10</sup> Interested parties might also pursue the Commission's complaint process and follow the required procedures first to seek relief through communication with the Postal Service to resolve the issue.

Postal Service’s decision not to accompany the mail preparation change with a rate filing. If a motion is filed within 30 days from the receipt of notice, such filing may enable the Commission to review the change in a time period that will minimize the impact of a mail preparation change affecting rate cells and adjust billing determinants, as necessary, prior to the next planned annual rate adjustment.

- 2. The location of the proposed rule under the Motions section of the regulations obscures its availability

The location of the proposed rule within the Motions section of the Commission’s regulations obscures its availability. If the rule were incorporated into a section of the rules such as § 2010.23(d)(5) where it’s availability would be more readily appreciated, the language could be similar to that as proposed, but some reordering of the phrasing would be necessary, *i.e.* as follows:

**§3010.23 Calculation of percentage change in rates.**

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(d)

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(5) *Motions for adjustments upon mail preparation changes.*

Where an announced mail preparation change does not contain a Postal Service indication that the change has a rate effect requiring compliance with § 3010.23(d)(2) of this chapter, any interested party may file a motion challenging the Postal Service’s failure to file a rate adjustment pursuant to a classification change which shall set forth with particularity the mail preparation change at issue and the grounds by which the mail preparation change must comply with (d)(2) of this section.

Interested parties would be more likely to recognize that they are encouraged to notify the Commission when they believe a mail preparation change will have a rate impact if the substance of the proposed language is not incorporated into the Motions

section of the Commission's procedural rules. The rule is more likely to be recognized if placed in § 3010.23(d) as a new subsection § 2010.23(d)(5).

#### IV. CONCLUSION

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully submitted,

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