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

Rule on Motions Concerning Mail Preparation Changes	Docket No. RM2016-6

COMMENTS OF THE NATIONAL POSTAL POLICY COUNCIL, THE NATIONAL ASSOCIATION OF PRESORT MAILERS, AND THE ASSOCIATION FOR MAIL ELECTRONIC ENHANCEMENT

(September 2, 2016)

The National Postal Policy Council ("NPPC") ,[1] the National Association of Presort Mailers ("NAPM"),[2] and the Association for Mail Electronic Enhancement ("AMEE")[3] ("Joint Commenters") respectfully submit these comments in response to Order No. 3048.[4] In that Order, the Commission has proposed procedures intended to ensure that the Postal Service properly accounts for the rate effects

[1] The National Postal Policy Council is an association of large business users of letter mail, primarily Bulk First-Class Mail using the Automation rate category, with member companies from the telecommunications, banking and financial services, insurance, and mail services industries. Comprised of 39 of the largest customers of the Postal Service with aggregated mailings of nearly 30 billion pieces and pivotal suppliers, NPPC supports a robust postal system as a key to its members' business success and to the health of the economy generally.

[2] NAPM is a nonprofit organization that represents mailers, both mail owners and mailing service providers who commingle, sort and prepare quality mailings inducted and compliant with work share requirements. Representing over 100 member companies mailing in 36 states, it collectively provides approximately 35% of the total First Class mail volume and over 50% of the Full Service volume. NAPM member mail service provider companies interact with and perform mailing services for tens of thousands of clients and businesses that use postal mailing products.

[3] AMEE has 33 member companies representing mailers, associations, and supporting vendors who have a primary interest in increasing the value and utility of First-Class Mail, and are engaged in developing or promoting technology in the area of mail electronic enhancement.

[4] Order No. 3048 (January 22, 2016) (Notice of Proposed Rulemaking On Motions Concerning Mail Preparation Changes). *See also* Notice Reinstating Rulemaking (July 27, 2016), 81 *Fed. Reg.* 51145 (August 3, 2016).

of mail preparation changes under rule of practice 3010.23(d)(2). The proposed rule would implement the standard adopted by the Commission in Order No. 3047, as affirmed by Order No. 3441 on remand in Docket No. R2013-10R.[5]

Order No 3048 proposes to establish a "reasonable but definite timeframe" (at 4) within which interested parties may challenge a mail preparation change on the ground that it constitutes a redefinition or elimination of a rate cell for purposes of price cap compliance. As proposed, interested mailers would have 30 days to file such a motion with the Commission upon "actual or constructive notice of a mail preparation change that has a rate effect requiring compliance with the price cap rules." Order No. 3048 at 2.[6] "Actual or constructive notice" would occur when the Postal Service "publishes written notice of the implementation of the mail preparation change," and the Order observes that the Postal Service "commonly publishes notice of mail preparation changes in the *Federal Register*, Postal Bulletin, and on the RIBBS website." *Id*. at 3.

Joint Commenters recognize the usefulness of the Postal Service's knowing, when filing notice of an index rate change, whether any mailing preparation changes that it has imposed since its most previous index rate adjustment is a classification change affecting price cap compliance.[7] The

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[5] Order No. 3441, Docket No. R2013-10R (July 20, 2016), *affirming* Order No. 3047, Docket No. R2013-10R (January 22, 2016), *petition for review pending United States Postal Service v. Postal Regulatory Commission*, Case No. 16-1284 (D.C. Cir. filed August 11, 2016).

[6] In Order No. 3047, the Commission ruled that under §3010.23(d)(2) a mail preparation change has a rate effect when the change results in the deletion and/or redefinition of a rate cell.

[7] Classification and compliance changes also can have very costly effects upon mailers and mail service providers outside of postage increases. Although beyond the scope of this proceeding, Joint Commenters respectfully suggest that the Commission conduct a broad factual inquiry into this matter at some appropriate time in the near future to consider whether the costs

proposal presented in Order No. 3048 is well-intentioned and, with certain improvements to enhance transparency and avoid confusion, could allow this issue (which has rarely arisen in 10 years under the current law) to be addressed outside of the abbreviated period in which the Commission reviews rate changes subject to the price cap. However, the proposed mechanism will not work in all instances, and in any event cannot substitute for the Commission's and Postal Service's legal responsibilities to ensure that rates for market-dominant products comply with the price cap restrictions established by the Congress.

In the interests of clarity and efficiency, the proposal should be improved in the following ways:

- In order to avoid useless disputes over timeliness, there should be only one start (not three or more possible start days) to the window for filing motions. The window for filing motions should be based on the date of publication of the final version of the mailing preparation change in the *Federal Register*. Although the Postal Service is free to provide notice by other means, such as the Postal Service's RIBBS website or the *Postal Bulletin*, only *Federal Register* publication should start the clock;

- The 30-day window for filing motions is in practice extremely short, because mailing preparation requirements are complex and understanding the implications of changes can require substantial time even before a motion can be prepared and filed. The Commission should (1) allow more time in which to file a motion and (2) require the Postal Service to provide the following additional information when it publishes notice of the changed mailing regulation:

    - The particular rate categories or cells that will be affected by the change;

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of compliance should be incorporated into consideration of rate changes, or constitute rate changes themselves. Alternatively, the Postal Service could be required to submit a cost/benefit analysis focused on the impact on customers large and small of any classification or compliance change.

- The number of mail pieces (or percentage of pieces) that will be affected by the change;
- Whether the Postal Service believes a mailing regulation change constitutes a classification change having index implications in all instances (Order No. 3048 appears to contemplate the Postal Service's mentioning the issue only when the change does have such implications, but not when it does not); and
- The basis upon which the Postal Service believes that the mailing preparation change will or will not constitute a classification change under Order No. 3047, including its best estimate of the cost to mailers to comply with the change.

- The proposed procedure cannot be the exclusive means to raise the issue because it could not apply when the Postal Service provides notice of a mailing preparation change within 30 days of the filing a notice of market-dominant rate changes, and is not workable when the effects of a mailing preparation change on rates are not apparent within 30 days; and
- Because the legal duty to comply with the price cap exists regardless of whether a mailer files a motion, the Commission should reaffirm that the Postal Service would retain the burden of proving that its mailing preparation changes do not constitute classification changes having price cap effects.

These modifications would make the process more transparent while providing the time and information necessary to enable mailers to understand not merely the operational consequences of a mailing change, but also to assess whether the change is likely to constitute a change of such magnitude as to give rise to price cap implications.

I. THE WINDOW FOR FILING MOTIONS SHOULD COMMENCE ON THE DAY AFTER THE POSTAL SERVICE PUBLISHES A MAILING REGULATION CHANGE IN THE *FEDERAL REGISTER*

Order No. 3048 contemplates starting the window for filing motions within 30 days of "actual or constructive notice." It further observes that the Postal

Service may publish mailing preparation changes in the *Federal Register*, the *Postal Bulletin*, and on the RIBBS website. Regardless of the various avenues that the Postal Service may use to announce mailing preparation changes, to avoid confusion and unnecessary digressions the Commission should use only one for starting the motion period. That should be the date on which the mailing preparation change is published as a final rule in the *Federal Register*.

Keying the notice provision to a single date of publication is essential because the Postal Service has moved away from using a single source to communicate mail preparation changes and other compliance requirement adjustments. Over the past several years, the Postal Service has adopted a practice of communicating mailing preparation changes, and compliance standard changes in separate, but overlapping publications, guides, and *Federal Register* notices. That practice has made it harder for mailers to know the current (or future) rules and, by extension, even more difficult to know whether the real effects of mail preparation changes affect the price cap. For purposes of applying the Commission's proposed rule, there would have to be a way to determine when a mailing preparation change is complete.

To achieve this, the Postal Service should be required to provide all of the relevant information related to the mail preparation change in a single notice so that mailers can understand all the impacts and properly comment. To the extent a proposed mailing preparation change is dependent on information contained in publications or guidance separate from that single notice, those other sources of information should be specifically referenced in that notice.

Using only one start day would avoid fruitless debates over whether constructive or actual notice occurred via some other means prior to the date upon which the mailer's motion was based. Such arguments would distract from the central issue, which is the legal effect of the mailing preparation change on the price cap.

Fixing the start of the motion period window based on *Federal Register* publication would be optimal. As is customary, day 1 of the count should be the following day. *Federal Register* publication is universally accorded full legal status for both regulatory and judicial purposes; publication in neither RIBBS nor the *Postal Bulletin* comes close to that status. And the *Federal Register* is more widely distributed and read than the latter two. Therefore, although the Postal Service would remain free to provide notice by other means, such as the RIBBS website[8] or the *Postal Bulletin*, and Joint Commenters urge it to continue to do so, only *Federal Register* publication should start the clock.

Finally, it is essential that the *Federal Register* notice that starts the comment period is the date on which the final rule is published, not a proposed version of a change. The Postal Service often makes changes – sometimes material – to its mailing preparation proposals between when they are first announced and when they become final. Obviously, a proposal that appears inconsequential when first announced could have clear price cap effects if

[8] Not all announcements published on RIBBS bear dates, which would make enforcing any deadline problematic.

changed in a major way before becoming final.[9] The comment period must begin upon proper notice of the final version of the rule.

II. MAILERS MUST HAVE SUFFICIENT TIME AND INFORMATION TO UNDERSTAND THE PRICE CAP IMPLICATIONS OF A CHANGE IN MAILING PREPARATION REQUREMENTS

The 30-day window for filing motions in practice is extremely short in light of the complexity of mailing preparation requirements and the time necessary to understand implications of changes. Mailing professionals at large operations are very busy and do not always focus immediately on mailing preparation changes that are not scheduled to take effect until months later. Nor are they likely to focus on the relatively arcane question of whether a particular changed mailing preparation requirement will effectively eliminate or redefine a rate category or cell.

If the proposed motion practice is to work as intended, mailers not only must receive notice of a changed mailing preparation requirement, but also must have adequate time to understand the operational effects of a changed preparation requirement *and* sufficient information to begin to think about the price cap implications. And that does not take into account the time needed to make a good faith determination that the change has rate effects, and to prepare an appropriate motion. Thirty days is dramatically insufficient to accomplish all of these necessary elements of a response. Thus, contrary to Order No. 3048, the proposed 30-day window is not a "reasonable" period of time for mailers to

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[9] In addition, sometimes the Postal Service announces for the first time in the final version of the rule how it intends to verify compliance. Onerous verification requirements and penalties can add significantly to the costs of using a particular rate.

understand the implications of a changed mailing regulation. Joint Commenters respectfully submit that the Commission should modify the current proposal by: (1) allowing 90 days for the motion; and (2) requiring the Postal Service to provide additional information when it publishes notice of the changed mailing regulation.

Joint Commenters believe that 90 days (instead of 30) is the minimally reasonable amount of time necessary for mailers to understand the changed mailing preparation requirement, analyze its effects on and costs to their operations, and understand the consequences of non-compliance. Only then can they address the business decisions they must make to adjust to the new requirements, and to begin to implement those decisions.

All of these actions must occur *before* mailers can discuss the matter with their mailing organizations or counsel, which is the point at which whether the change may have price cap implications is most likely to be identified.

In any case – and especially if the proposed 30-day period is adopted -- the Commission should require the Postal Service to provide additional information when it publishes notice of the final changed mailing regulation, including:

- The particular rate categories or cells that will be affected by the change;
- The number of mail pieces (or percentage of pieces) that will be affected by the change;
- Whether the Postal Service believes a mailing regulation change constitutes a classification change having index implications in all instances; and

- The basis upon which the Postal Service believes that the mailing preparation change will or will not constitute a classification change under Order No. 3047, including its best estimate of the cost to mailers to comply with the change.

Taking these in order, it would be reasonable to ask the Postal Service to indicate, in its *Federal Register* notice, the particular rate categories or cells that it expects to be affected by the change. This would impose no additional burden, because the Postal Service surely should know what rate categories and cells will be affected by a change in a mailing preparation requirement.

Second, the Postal Service notice also should indicate the number of mail pieces that it expects to be affected by the change, and what percentage those prices comprise of the total volume in the affected cells. That number should be readily discernable to it from billing determinants, and might assist in determining whether a particular change effectively deletes or redefines a rate cell.

Third, the Commission should require the Postal Service to state affirmatively whether or not it believes a mailing regulation change constitutes a classification change having index implications in all instances. Order No. 3048 contemplates the Postal Service's mentioning the issue only when the change has such implications, but not when it does not: In the case of a change that does not implicate the price cap, "the *Federal Register* notice would be silent and the absence of such a designation will inform mailers that the Postal Service does not recognize this change as requiring price cap compliance." *Id*. at 4. This silence serves no purpose. Requiring the Postal Service to state its understanding in each notice of a mailing preparation change should not impose any additional burden, because it unavoidably makes that determination in each

instance, and the need to make such a statement would ensure that the Postal Service considers the matter each time it changes a mailing preparation requirement.

Finally, the Postal Service should be required to state in the *Federal Register* notice why it believes that the mailing preparation change will or will not constitute a classification change under the standard adopted in Order No. 3047 as affirmed in Order No. 3441. Doing so would inform mailers and the Commission why the Postal Service is taking the position that it is, rather than forcing mailers to guess at why the Service is doing so. To the extent that the Postal Service may be relying upon incorrect assumptions about mailer behavior, this could enable mailers, by motion, to direct their attention to that assumption. In addition, as part of this explanation, the Postal Service should be required to include its best estimate of the cost to mailers to comply with the change.

III. MOTION PRACTICE CANNOT BE THE EXCLUSIVE MECHANISM FOR ENSURING COMPLIANCE WITH THE PRICE CAP

The *Notice* appears to contemplate that the motion practice would be the exclusive means by which mailers or others could challenge the price cap effects of a mailing preparation change (*i.e*., it would standardize the timeframe by which mailers "must" file a motion). *Id*. at 2. While Joint Commenters understand the desirability of the Postal Service's knowing whether any of its mailing preparation changes affect the price cap before it notices rate changes subject to the cap, there are situations in which this may not be practical. Therefore, the procedure simply cannot be as "definite" in all cases as Order No. 3048 presumes. *Id*. at 4.

One such situation would occur if the Postal Service provides notice of a mailing regulation change within 30 days before it files a notice of market-dominant rate changes subject to the price cap. In this circumstance, although mailers presumably could file a motion of the type contemplated by the *Notice* within the 30-day period, there would not be sufficient time for resolution of the issue before the Postal Service notices the rate changes.

Another would occur if mailers, in good faith, simply do not recognize the price cap implications of a mailing preparation change within the timeframe for filing a motion. Such occasions should be quite rare: for example, the Postal Service's attempt to make Full-Service IMb mandatory – by far the most prominent instance of this issue arising -- was known well in advance of the proposal to implement it in rates (although there was no procedure by which the issue could be raised and there always was a possibility that the Postal Service would refrain from doing so). The Commission should recognize that the proposed procedure cannot be "definite" in all circumstances and should explain how such situations should be addressed.

IV. THE PROCEDURE PROPOSED BY ORDER NO. 3048 DOES NOT RELIEVE THE POSTAL SERVICE OF ITS BURDEN OF PROVING THAT ITS RATES COMPLY WITH THE PRICE CAP

As Order No. 3048 states, the proposed motion procedure "does not change the Postal Service's burden to first determine whether the mail preparation change has a rate effect under the Commission's standard articulated in Order No. 3047" or "change the Postal Service's obligation to comply with the rules regarding the price cap." Order No. 3048 at 5. Demonstrating that mailing preparation changes – over which the Postal Service has exclusive control – do not constitute mail classification changes having price cap consequences is necessarily part of proving that rates comply with the statute.

Joint Commenters do not understand why whether a mailer happens to file a motion within a 30-day period should affect whether a mail preparation change constitutes a rate cell deletion or redefinition. Either such a change does, or it does not. Nor may the Commission delegate its duty to enforce the price cap to mailers, and the absence of a motion of the type proposed by Order No. 3048 simply cannot be dispositive of whether the Postal Service is in compliance with the price cap.

The motion practice proposed by Order No. 3048 is not analogous to a complaint case brought under 39 U.S.C. §3662. The procedure would merely accelerate the time for reviewing the legal consequence of a controversial mailing regulation change from the rate review process (as was the case in Docket No. R2013-10). It cannot shift to mailers the burden of proving that a

mailing preparation change constitutes a classification change with cap implications merely by creating a procedural means of raising the issue.

V. CONCLUSION

For these reasons, the National Postal Policy Council, the National Association of Presort Mailers, and the Association for Mail Electronic Enhancement urge the Commission to take these comments into consideration, and to modify the proposed rule 3001.21(d) consistent with these comments.

Respectfully submitted,

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