

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Chairman;
Mark Acton, Vice Chairman;
Tony Hammond; and
Nanci E. Langley

Statutory Review of the System
for Regulating Rates and Classes
for Market Dominant Products

Docket No. RM2017-3

ORDER DENYING MOTIONS TO MODIFY PROCEDURAL SCHEDULE

(Issued January 31, 2017)

On January 17, 2017, the Alliance of Nonprofit Mailers and MPA-Association of Magazine Media (Alliance-MPA) filed a motion to modify the procedural schedule in this docket.¹ The American Catalog Mailers Association, Inc., the American Forest & Paper Association, the Association for Postal Commerce, the Data & Marketing Association, the Envelope Manufacturers Association, the Greeting Card Association, IDEAlliance, the Major Mailers Association, the National Association of Presort Mailers, the National Newspaper Association, the National Postal Policy Council, the News Media Alliance, the Parcel Shippers Association, and the Saturation Mailers Coalition (Joint Parties) also filed a motion to modify the procedural framework.² The Joint Parties state that the

¹ Motion of Alliance of Nonprofit Mailers and MPA—The Association of Magazine Media to Modify Procedural Schedule, January 17, 2017 (Alliance-MPA Motion).

² Joint Motion for Modification of Procedural Framework, January 18, 2017 (Joint Motion). The Newspaper Association of America changed its name to News Media Alliance in September 2016. See Notice of Name Change, January 23, 2017.

Commission may treat their motion as comments in support of the Alliance-MPA Motion. Joint Motion at 1-2. For the reasons discussed below, both motions are denied.

I. BACKGROUND

On December 20, 2016, the Commission issued an advance notice of proposed rulemaking instituting the statutory review of the system of regulating rates and classes for market dominant products.³ In Order No. 3673, the Commission invited comments from interested persons regarding the process and structure of the review, as well as whether the current system is achieving the objectives while taking into account the factors. Order No. 3673 at 10-11. The Commission also invited comments on modifications to the system or alternative systems if the current system is not achieving the objectives while taking into account the factors. *Id.* at 11. The Commission set March 20, 2017, as the comment deadline and stated that no reply comments would be accepted. *Id.*

II. MOTIONS⁴

A. Alliance-MPA

In their motion, Alliance-MPA requests that the Commission defer comments on specific proposed changes to the current system until after the Commission has determined whether the system is failing to satisfy the objectives and factors of

³ Advance Notice of Proposed Rulemaking on the Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products, December 20, 2016 (Order No. 3673).

⁴ The American Postal Workers Union, AFL-CIO (APWU) filed a separate request for clarification of the process the Commission intends to use to conduct this review. See Process Clarification Request of the American Postal Workers Union, AFL-CIO, January 30, 2017 (APWU Request). In the request, APWU proposes that the Commission consider “a dual-ANRP-type process” where the Commission solicits an additional round of comments based on suggestions received on how to ensure the objectives are being met or continue to be maintained. APWU Request at 2. APWU also suggests that reply comments be permitted in both stages. *Id.* The APWU Request was filed well after the Alliance-MPA and Joint Motions, and after the deadline for responses to those motions. Because APWU’s proposal is similar to the proposals in the motions filed by Alliance-MPA and the Joint Parties, the discussion below applies equally to the APWU Request.

39 U.S.C. § 3622. Alliance-MPA Motion at 1. In addition, they request that the Commission authorize reply comments. *Id.*

Alliance-MPA provides five reasons why they believe the current procedural framework is problematic. First, they state that resources devoted to filing comments proposing specific changes to the system before the Commission determines whether the system fails to meet the section 3622(b) objectives would be wasted if the Commission later finds that the system satisfies the objectives. *Id.* at 3-4. Second, Alliance-MPA explains that resources may be wasted if the Commission finds that it lacks authority to adopt a proposed change. *Id.* at 4. Third, Alliance-MPA states that commenters who wish to preserve the existing system would be forced to pay attorneys and consultants to develop anticipatory responses for changes that may or may not be proposed. *Id.* Fourth, Alliance-MPA explains that the Commission has time to conduct the proceeding in an orderly fashion because there is no urgent threat to the financial health of the Postal Service.⁵ *Id.* at 4-5. Finally, Alliance-MPA states that the current procedural schedule does not shorten the resolution of the case. *Id.* at 5. Thus, Alliance-MPA requests that the Commission modify Order No. 3673 to allow reply comments and rescind the portions of the Order that invite comments on proposed regulatory changes. *Id.* at 6.

B. Joint Parties

In their motion, the Joint Parties express concern that the process announced in Order No. 3673 may not lead to an efficient review. Joint Motion at 2. They explain that some commenters may file extensive comments containing all of their preferred modifications while other commenters may refrain from proposing commendable

⁵ Specifically, Alliance-MPA states that the Postal Service's operating revenue exceeded operating expenses by \$610 million in FY 2016, market dominant volume has stabilized, and package volume and contribution are surging. *Id.* at 4-5. Further, they explain that there has been no movement by Congress or the Department of the Treasury to enforce the prefunding payments contemplated by the PAEA and "no one can seriously claim that the Postal Service will be forced to pay these amounts during the next year." *Id.* at 5.

alternatives to avoid detracting from their belief that the objectives are being met by the current system. *Id.* at 3-4. They state that under either scenario, the Commission deprives itself of a focused set of comments from stakeholders. *Id.* Thus, the Joint Parties request that the Commission first determine whether the current system is failing to achieve one or more of the objectives before parties are asked to comment on what modification may be appropriate. *Id.*

In particular, the Joint Parties suggest that the Commission revise the process so that it proceeds in the following manner: (1) initial comments are limited to whether the current system is achieving the objectives, taking into account the factors; (2) the Commission issues an order determining which objectives are not being achieved and issuing an advance notice of proposed rulemaking explaining its reasons and inviting comments on what modifications might better achieve those objectives; (3) parties file comments proposing modifications; (4) the Commission issues a notice of proposed rulemaking (NPRM) specifying what modifications it believes are most appropriate; (5) parties comment on the NPRM; and (6) the Commission issues a final order. *Id.* at 5.

The Joint Parties explain that this revised process will allow the Commission to make its initial determination more quickly. *Id.* at 6. Additionally, the Joint Parties state that this revised process would conserve time and resources of both the Commission and interested parties because parties would devote effort to propose modifications only on those objectives that the Commission determines are not being achieved. *Id.*

In addition, the Joint Parties request that the Commission allow reply comments, particularly if the Commission is not inclined to grant the request to modify the procedural framework. *Id.* The Joint Parties explain that there is the possibility of conflict among the different comments and suggestions. *Id.* at 7. They also state that Order No. 3673 does not address how the Commission may apply various objectives in conjunction with each other or what will happen if the Commission ultimately concludes that some objectives are being achieved but not others. *Id.* The Joint Parties provide that reply comments would allow interested parties to address this issue. *Id.*

III. RESPONSES⁶

A. United Parcel Service, Inc.

United Parcel Service, Inc. (UPS) filed a statement in support of the motions on January 19, 2017.⁷ UPS agrees that the framework proposed by Alliance-MPA and the Joint Parties is warranted to protect the interests of all stakeholders and to assure full and meaningful participation in this docket.⁸ UPS Statement at 2. UPS states that the proposed procedural change is consistent with the statute because section 3622(d)(3) provides that modification to the system should be subject to a second round of public comment. *Id.* at 2-3. UPS asserts that if the procedural framework is not changed to a two-tier system, interested parties may be required to choose to either adequately address the current system or formulate an alternative system that more fully accords with section 3622. *Id.* at 2.

B. United States Postal Service

The Postal Service filed its opposition in response to the motions on January 24, 2017.⁹ In its Response, the Postal Service states that the Commission's approach in

⁶ Alliance-MPA and the Joint Parties filed a reply to the Postal Service's opposition. Reply of the Association for Postal Commerce, Alliance of Nonprofit Mailers, American Catalog Mailers Association, Inc., Data & Marketing Association, Envelope Manufacturers of America, Greeting Card Association, IDEAlliance, Major Mailers Association, MPA—Association of Magazine Media, National Association of Presort Mailers, National Postal Policy Council, Newspaper Association of America, Parcel Shippers Association, and Saturation Mailers Coalition to Opposition of the United States Postal Service to Motions to Modify the Procedural Schedule, January 26, 2017. The Commission generally does not allow replies, nor does it find a reply or other responsive document necessary to resolve the motions at issue. See 39 C.F.R. 3001.21(b) ("Unless the Commission or presiding officer otherwise provides, no reply to an answer or any further responsive document shall be filed."). Thus, the reply of Alliance-MPA and the Joint Parties is not accepted.

⁷ Statement in Support of the Joint Motion for Modification of Procedural Framework, January 19, 2017 (UPS Statement).

⁸ UPS states that any proposed changes to the system for regulating ratemaking for market dominant products will affect competitive products stakeholders because one of the objectives and two of the factors refer to competitive products or markets. UPS Statement at 3.

⁹ Opposition of the United States Postal Service to Motions to Modify the Procedural Schedule, January 24, 2017 (Response).

Order No. 3673 is well-grounded in administrative law and practice, and in the Commission's practice. Response at 3. The Postal Service explains that by initiating the proceeding with an advance notice of proposed rulemaking, the Commission intended that there would be another opportunity for comments should the Commission propose a rule on a modification or alternative system. *Id.* at 2.

Addressing the concern that commenters might waste resources commenting on a conditional question that may prove moot, the Postal Service states that commenters are not required to commit any resources to the conditional question at this time because of the opportunity to comment should the Commission issue a proposed rule. *Id.* at 4. The Postal Service proffers that instead of the process burdening the parties, this initial phase gives parties more time to study the positions of other parties before any proposed changes. *Id.* at 4-5. The Postal Service notes that it strongly supports the current approach because it is more conducive to a timely resolution of this proceeding. *Id.* at 5.

In addition, the Postal Service states that the arguments do not demonstrate that the Commission's decision not to allow reply comments is inappropriate. *Id.* Rather, the Postal Service explains that parties will have an opportunity to comment on any proposed modifications or alternatives to the system. *Id.* In addition, interested parties already have a reference point on the Commission's past assessment of the regulatory system's effectiveness. *Id.* at 5-6. Further, commenters should be able to anticipate and respond to opposing positions in a single round of comments because other interested parties' positions are predictable. *Id.* at 6.

IV. COMMISSION ANALYSIS

The Commission established the current advance notice of proposed rulemaking and procedural schedule with the goal that, should the Commission determine that changes to the ratemaking system are warranted, the Commission would anticipate beginning the rulemaking process to consider such changes by the autumn of 2017. The Commission continues to believe in the importance of this goal, and it finds that

adopting the alternative procedure advocated by the parties would jeopardize achieving it. The procedure advocated by Alliance-MPA, the Joint Parties, and UPS is a reasonable alternative to the procedure the Commission adopted at the outset of this docket, and it might offer some advantages for some commenters, such as making it possible for commenters to focus on one aspect of the proceeding at a time. However, the Commission must weigh such benefits against its own needs in conducting this important review, including key time considerations and resource constraints. The Commission agrees with the Postal Service that the advance notice of rulemaking process is focused on receiving the public's views on a regulatory matter before concluding its statutorily-mandated review of the system or proposing and establishing rules and procedures.¹⁰ The Commission will therefore adhere to the schedule set forth in Order No. 3673.

To be clear, at this stage in the proceeding, the Commission has not made any determinations as to whether or not the ratemaking system is achieving its objectives, taking into account the factors. While Order No. 3673 solicits comments both on whether the ratemaking system is achieving its objectives, taking into account the factors, and on what changes should be made in the event that one believes the system is not achieving its objectives, the Commission as statutorily required will make a determination on the first question before considering the second question.

If a party believes that the system is meeting its objectives, it is free to focus on explaining why that is the case in its comments in response to Order No. 3673, and refrain from submitting any comments on any proposed changes to the system at this time. Should the Commission later decide that changes are warranted, such a party will

¹⁰ See USPS Response at 2; see also *P & V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1025 (D.C. Cir. 2008) (finding that an advance notice of proposed rulemaking was an effort to gather information). Moreover, the statute directs the Commission to conduct the review, and therefore the format of the review. See *Massachusetts v. E.P.A.*, 549 U.S. 497, 527 (2007) (“[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.”).

have the opportunity once again in the proposed rulemaking phase to weigh in on what changes it believes would best achieve the statutory objectives.

Similarly, the Commission finds that the potential benefits of reply comments at this stage are outweighed by time considerations. In Order No. 3673, the Commission posed specific questions to gather focused information from the public regarding the current system for use in its review. The Commission anticipates that there will be conflicting comments in response to the four questions. Having commenters reply to each other at this information-gathering stage would complicate the proceeding and require parties to expend further resources on restating and/or defending their positions, while lengthening the review process. Moreover, allowing reply comments is not necessary for interested parties to have an opportunity to address how *the Commission* should apply the objectives in conjunction with each other or what to do should the Commission conclude that some objectives are being achieved but not others. Parties are welcome to comment on these issues in response to Question Nos. 2 and 4 of the Order. In balancing all of these interests and concerns, and weighing its heavy responsibility under the statute to conduct the review, the Commission finds that the procedure outlined in Order No. 3673 is the most appropriate for the review of the system. Accordingly, the Alliance-MPA Motion and the Joint Motion is denied.

V. ORDERING PARAGRAPHS

It is ordered:

1. The Motion of Alliance of Nonprofit Mailers and MPA—The Association of Magazine Media to Modify Procedural Schedule, filed January 17, 2017, is denied.

2. The Joint Motion for Modification of Procedural Framework, filed by the American Catalog Mailers Association, Inc., the American Forest & Paper Association, the Association for Postal Commerce, the Data & Marketing Association, the Envelope Manufacturers Association, the Greeting Card Association, IDEAlliance, the Major Mailers Association, the National Association of Presort Mailers, the National Newspaper Association, the National Postal Policy Council, the News Media Alliance, the Parcel Shippers Association, and the Saturation Mailers Coalition on January 18, 2017, is denied.

By the Commission.

Stacy L. Ruble
Secretary