

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

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

Docket No. RM2017-3

**JOINT MOTION FOR
MODIFICATION OF PROCEDURAL FRAMEWORK**
(January 18, 2017)

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”) respectfully move that the Commission modify the procedures announced in Order No. 3673 in order to simplify the proceeding and to enable interested parties to focus their resources and time on the issues that the Commission deems most important.

Alternatively, the Commission may treat this Joint Motion as comments in support of the motion filed yesterday by the Alliance of Nonprofit Mailers and MPA¹ asking for similar modification of the procedural schedule. The Joint

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

Parties support that motion as well for the reasons stated in that motion and herein.

In Order No. 3673, the Commission initiated the “ten-year” review of the system for regulating the rates and classes of market-dominant postal products as directed by Section 3622(d)(3) of the Postal Accountability and Enhancement Act (“PAEA”). That Order both set a process and proposed a framework for conducting the review, including proposed definitions and possible evaluation metrics for each Objective in Section 3622(b). The Commission invited parties to address the “process and structure of the review.” Order No. 3673 at 10.

The Joint Parties – representing mailers in every class and product of market-dominant mail – will be affected by the outcome of this proceeding and plan to file comments. However, the Joint Parties are concerned that the process announced in Order No. 3673 may not lead to a focused and efficient review. Instead, it may cause mailers, unions, the Postal Service, and the Commission to expend resources in unproductive and unnecessary ways. Accordingly, we request the Commission modify the process outlined in Order No. 3673 as follows:

1. The Commission first should determine whether the current system is failing to achieve one or more of the Objectives *before* parties are asked to comment on what modifications may be appropriate; and
2. The Commission should allow reply comments in Phase I, particularly if the Commission declines to make the first change.

I. THE COMMISSION SHOULD DETERMINE WHETHER OR NOT OBJECTIVES ARE BEING ACHIEVED BEFORE RECEIVING COMMENT ON POSSIBLE MODIFICATIONS

As proposed in Order No. 3673 (at 3), after it “receives comments and conducts its analysis, the Commission will determine if the current system is achieving the objectives while taking into account the factors listed in 39 U.S.C. 3622(c).” If the Commission finds in Phase I that the current system is achieving the Objectives, the proceeding ends. If the Commission finds that the system is not achieving the Objectives, taking into account the factors, “it may propose rules that modify the system or adopt an alternative system to achieve the objectives” in an order opening a Phase II of this proceeding. *Id.*²

The Joint Parties believe that the Order No. 3673 process conflates Phase I and Phase II in a way that will generate needless extra comments and complexity. In particular, by contemplating proposing rules in the Order concluding Phase I “that modify the system or adopt an alternative system to achieve the objectives,” the Commission inevitably will cause parties in their Phase I comments due on March 20 to include a much wider range of possible modifications than would seem desirable for an orderly management of this proceeding. Indeed, Order No. 3673 (at 11, paragraph 4) invites them to do so just that.

Commenters cannot know in advance whether the Commission would determine if any modifications might be needed – or which Objectives it may

² See *also* “PRC Announces Plan for 10-year Review of System of Regulating Rates and Classes for Market Dominant Products,” Postal Regulatory Commission Press Release (September 1, 2016).

conclude are not being achieved. They therefore will have an incentive to file extensive comments containing *all* of their preferred modifications on the record so that the Commission could consider them when developing any proposals for Phase II – including suggestions for modifications on issues that the Commission may determine do not warrant any changes. Perhaps equally undesirably, some commenters may refrain from proposing commendable alternatives so as not to detract from their belief that the Objectives are being met. In either case, the Commission deprives itself of a focused set of comments from stakeholders.

The Joint Parties believe that it would make more sense, and simplify the comments, if the Commission separated the Phase I determination of what Objectives, if any, are not being achieved from any Phase II suggestions of what modifications might be considered. Accordingly, the Commission first should determine whether the current system is achieving the Objectives, taking into account the factors – just as the current framework contemplates.

However, unlike the approach in Order No. 3673, if the Commission were to conclude that the current system is not achieving the Objectives, it should issue an Order stating its determination regarding which (if any) Objectives are not being achieved. *Only then* should it solicit comment on what *changes* would be appropriate. For example, page 11 of Order No. 3673 could be recast by striking item 4 and expanding item 3 along these lines (new language underscored):

3. Based on the Commission’s proposed framework or an alternative framework provided in response to question 2, is the current system achieving each objective, while taking into account the factors? Please note that review of the system shall be limited to section 3622 as

discussed in section II above. Participants should explain, as to each objective, their grounds for asserting that the current system is, or is not, achieving that objective, taking into account the factors, but should reserve any proposals for modification or an alternative until after the Commission has made its determination as to whether the current system is achieving the objectives.

Put differently, the Commission first should identify any Objectives that it determines are not being achieved and only thereafter request (through a Further Advance Notice of Proposed Rulemaking) suggestions from the mailing community on what changes might be appropriate. After considering those comments, the Commission would then be in a more informed position to issue a specific Notice of Proposed Rulemaking.

Therefore, the Joint Parties respectfully ask the Commission to revise the process so that:

1. The 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, if any, of the Objectives are not being achieved and, if the Commission concludes one or more are not being achieved, issuing an Advance Notice of Proposed Rulemaking explaining its reasons for such conclusion and inviting comment on what modifications might better achieve those Objectives.
3. Parties file comments addressing what modifications might enable the Objectives to be achieved;
4. The Commission subsequently issues a Notice of Proposed Rulemaking specifying the particular modifications it believes most appropriate.
5. Parties comment on the NPRM; and
6. The Commission issues a final order.

The primary difference between this approach and that in Order No. 3673 is that the latter appears to combine items 1 through 4 into one Phase I round.

This alternative process would benefit all interested parties by limiting the Phase I comments to only whether the Objectives are being achieved under the current system. This is fully consistent with Order No. 3673, which contemplates that parties will comment on the definitions and metrics proposed therein, will lead to simpler, more focused comments, and will allow the Commission to make its initial determination more quickly.

Second, our proposed alternative would, as the similar motion by ANM-MPA also notes, conserve the Commission and parties' time and resources. Under this approach, parties would devote effort to proposing modifications, if any, to better achieve *only* those Objectives that the Commission determines are not being achieved. This would avoid wasting time and resources on suggested modifications addressed to Objectives that the Commission determines are being achieved.

Instead, the Joint Parties believe that sufficient time could be saved by narrowly focusing the initial comments on the threshold question of whether the Objectives are being achieved that it could issue an Order determining that one or more Objectives are not being met, and remain on schedule to issue its final Notice of Proposed Rulemaking to adopt final rules changes within the time period contemplated by Order No. 3673.

II. REPLY COMMENTS SHOULD BE AUTHORIZED IN PHASE I

Order No. 3673 states (at 11) that no reply comments will be accepted in Phase I. The Commission should reconsider this aspect of the process, particularly if it is not inclined to grant the request in Section I above.

Under the current procedural framework, Phase I comments are likely to address both (1) whether the current system is achieving the Objectives, taking into account the factors, in light of the definitions and metrics proposed by Order No. 3673; and (2) any suggestions that parties may have regarding possible modifications to allow particular Objectives to be achieved more completely. It is reasonable to expect that different interested parties will address different Objectives. And it is not unreasonable to expect that commenters, either singly or collectively, may suggest possible modifications to the current system that could affect every Objective.

Such suggestions, coming from different points of view, may well conflict. And parties would have a legitimate interest in informing the Commission of their understanding of the possible consequences of particular suggestions.

In addition, because the PAEA provides that each of the Objectives “shall be applied in conjunction with the others” (39 U.S.C.3622(b)), a reply round would allow interested parties, if appropriate, to address how this could be accomplished in light of the comments made by other parties. We note that Order No. 3673 does not address how the Commission may apply the various Objectives in conjunction with each other, or how that might play out in practice if it were ultimately to conclude that some Objectives are being achieved but not others. Reply comments could help the Commission to take this statutory provision into proper account.

Under the current process, parties would have no opportunity to address such matters unless the Commission were to include them in any Phase II

proposed rulemaking, which would be late in the process and, if the proposal were an integral component of a modified system, possibly too late.

CONCLUSION

For the foregoing reasons, the Joint Parties respectfully request the Commission to: (1) modify the framework established by Order No. 3673 as described herein and as in the motion filed by ANM-MPA; and (2) provide for a round of reply comments in Phase I of this proceeding.

Respectfully submitted,

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