

change requiring compliance with the statutory price cap imposed by the Postal Accountability and Enhancement Act (“PAEA”) is necessarily fact-specific, and the Commission is empowered to refine, waive, and reconsider its rules as necessary when presented with new factual scenarios. Accordingly, there is no reason to revisit Order No. 3047 at this time.

I. THE COMMISSION’S TEST PRESERVES THE COMMISSION’S STATUTORY ROLE IN ENSURING USPS PRICE CHANGES COMPLY WITH THE LAW

The Commission recognized in Order No. 1890 that “[e]nsuring the Postal Service does not exceed the annual limitation [on increases in rates] is . . . fundamental to” the Commission’s statutory responsibility. Order No. 1890 at 16. The D.C. Circuit noted in reviewing that order that it is “self-evident . . . that changes in classifications can *cause* changes in the rates paid by mailers.” *Id.* at 752 (emphasis in original). In doing so, the court upheld the basic premise of the Commission’s decision in Order No. 1890 that the Commission has the authority “to consider mail preparation requirement changes in the [Domestic Mail] Manual as ‘changes in rates’ that count against the price cap.” *USPS*, 785 F.3d at 751.

Any consideration of the Commission’s action in Order No. 3047 must start from this premise. And in evaluating the Postal Service’s request for reconsideration of Order No. 3047, the Commission must assess whether the Postal Service has accepted this premise. One need look no further than the opening paragraphs of the Postal Service’s request to see that it has not.

From the outset, the Postal Service rejects this premise, stating that “the Commission cannot repeatedly point to a purported ‘statutory duty’ to enforce the price cap as a basis to avoid” the policy considerations the Postal Service claims argue for reconsideration because the court determined that the statute was ambiguous. USPS Request at 1. But the Postal Service misses the point. While the court held that the statute did not speak directly to the issue of whether the Commission could regulate changes in preparation requirements as changes in rates,

and was therefore ambiguous, it unequivocally affirmed the Commission's authority to conclude that changes in mail preparation requirements can amount to changes in rates and then regulate these changes. *See USPS*, 785 F.3d at 753. Once the Commission has made this determination, the statute is no longer ambiguous: the Commission must ensure that those changes in rates comply with the price cap. The Postal Service's argument is essentially that the Commission should disavow this determination and, relying on the ambiguity of the statute, ignore the rate effects of changes in mail preparation requirements.

The Postal Service's true motive, and its basic misunderstanding of the task before the Commission, is demonstrated when it states that the Commission's test would "penalize the Postal Service for implementing operational requirements that enhance efficiency . . . by requiring the Postal Service to forego a disproportionate amount of its scant price cap authority." USPS request at 2. Operational requirements that force mailers into higher rate categories, or that shift significant costs to mailers to allow them to remain in the same rate category, do not "enhance efficiency." The efficiency of the mail system is determined by the total costs of entering, processing, and transporting mail incurred by both the USPS and mailers. By shifting costs to mailers through operational requirements, the Postal Service simply increases the cost to mailers to achieve the same level of service. These shifts are not efficiency enhancements; they are rate increases, and the Commission's order properly recognizes the distinction.

Further, whether the Postal Service has "scant" or "ample" price cap authority is irrelevant to the question of when a change in mail preparation requirements has a rate effect that must comply with the price cap. In fact, when the Postal Service has "scant" price cap authority, the Commission should be extra vigilant in ensuring that the Postal Service has not attempted to increase revenue by concealing rate increases in rule or classification changes.

The Postal Service gives away the game when it claims that “reconsideration is necessary in light of the adverse financial consequences that Order No. 3047 would impose on the Postal Service.” USPS Request at 3. The Postal Service claims that the Commission’s test would force the Postal Service to choose between enacting regulations that would enhance efficiency or losing substantial revenue by accounting for these changes in its price cap calculations. Again, the Postal Service is actually arguing that the Commission should decline to regulate preparation changes as rate changes entirely, as any system of regulation would require the Postal Service to demonstrate that its changes with rate effects comply with the price cap. For the reasons stated in Order No. 1890 and in the comments of PostCom, *et al.* on remand, this approach would be inconsistent with the purpose of the PAEA and the Commission’s duty to enforce the price cap.

Further, if the operational changes contemplated by the Postal Service would truly improve efficiency on a system-wide basis, the Postal Service should incent mailers to comply with the preparation requirements, rather than impose them unilaterally. Discounts commensurate with the cost savings to the Postal Service would encourage efficient entry. If the Postal Service is not willing to pursue this approach, it is likely that its true motive is to increase revenue (either by shifting costs to mailers or forcing mailers into higher rate categories), not improve system-wide efficiency. Any revenue the Commission’s requirements cause the Postal Service to “forgo” would be revenue it is not entitled to in any event.

From the time of its initial response to mailers objecting to the mandatory Full Service IMb requirement in this docket, the Postal Service has made it clear that it does not believe changes to mail preparation requirements should be regulated as price changes under the PAEA. The Commission has repeatedly disagreed, and the D.C. Circuit has upheld the Commission’s authority. This request for reconsideration is yet another attempt by the Postal Service to

circumvent the Commission's oversight. The Commission, having reached a reasonable accommodation of the parties' interests in Order No. 3047, should decline to revisit its decision.

II. THE COMMISSION'S TEST IS REASONABLE AND CAN BE REFINED OVER TIME

Admittedly, the task the D.C. Circuit set for the Commission was not an easy one: to develop a principled approach that would allow the Commission, the Postal Service, and affected parties to distinguish between changes in mail preparation requirements that effectively function as changes to the rates mailers must pay, and thus require compliance with the price cap, from routine changes in mail preparation requirements which do not have rate effects. Given the inherently fact-specific nature of this inquiry, developing a bright-line rule that definitively and prospectively identifies such rate changes is particularly perilous. Recognizing this difficulty, PostCom, *et al.* and the Public Representative proposed tests based on the Commission's existing *de minimis* standard. The Postal Service, by contrast, proposed a test based entirely on whether the Postal Service itself classified the change as a rate change, effectively removing any Commission oversight over *de facto* rate changes resulting from mail preparation changes.

While the Commission declined to adopt any of these proposals, it nevertheless properly recognized that it has a statutory duty to enforce the price cap and limit price increases to those permitted by the price cap. It further properly concluded that this duty extends to *de facto* price changes arising from changes in mail preparation requirements. Ultimately, to execute this duty, it developed a test centered on whether the change in mail preparation requirements results in a deletion or redefinition of a rate cell, such that a mailer is required to either enter mail at a higher price or incurring significant additional costs to enter mail at the same price. While this test is not perfect, it is fundamentally correct: it recognizes that price increases can be found in

changes to eligibility requirements as well as changes to the prices themselves, and both types of changes must stay within the limitations of the price cap.

In addition to its attacks on the Commission's statutory authority discussed above, the Postal Service argues that the standard the Commission has developed fails to provide sufficient guidance as to what changes to mail preparation requirements would amount to changes in rates. Among the concerns raised by the Postal Service is its contention that the Commission's test is unworkable because the Postal Service lacks insight into mailers' costs, a key determinant of whether a change in preparation requirements is significant enough to constitute a modification of a rate cell. The Postal Service further contends that this "significance" requirement itself is too amorphous to provide meaningful guidance. Neither of these contentions warrants reconsideration of the Order No. 3047 at this time.

Rather, the Postal Service's concerns can be addressed by the Commission's proposed procedures in Docket No. RM2016-6, through informal consultation with mailers prior to the implementation of significant operational changes, and by the Commission's inherent authority to modify its policies in response to new factual circumstances. First, in Docket No. RM2016-6, the Commission has proposed a process that would provide interested parties with 30 days to comment as to whether proposed mail preparation changes would have rate effects. This process would allow for the introduction of mailer-specific cost information, as necessary, as well as provide time for the Commission to resolve disputes as to the application of the test on a case-by-case basis. Through this process, information about the significance of a change in terms of cost to mailers will be introduced. In turn, the Commission will have the opportunity to evaluate this information in the context of a specific change, thus allowing it to reach a more informed

conclusion than could be achieved by enacting a brighter-line rule in the current proceeding in advance of any specific knowledge of a proposed change.

Additionally, by placing the onus on mailers to contest preparation changes that the Postal Service has not designated as rate changes, the Commission's proposed rules would limit spurious claims that minor preparation changes have significant rate effects. Mailers will not incur the cost of contesting a change unless it would truly impose a hardship on the mailer to comply. Further, the Commission's test in Order No. 3047 should give the Postal Service sufficient guidance to determine what preparation changes are likely to draw a challenge, even if the Postal Service determines in good faith that they do not delete or redefine a rate cell. This is especially the case if the Postal Service consults informally with the mailing industry prior to introducing any changes. Thus, through this process of consultation and comment, the Postal Service will receive as much certainty as possible regarding whether a contemplated change in mail preparation requirements would qualify as a rate change under the Commission's test.

The Postal Service's drive for absolute certainty also ignores the accepted principle of administrative law that an agency may waive, revisit, and modify its rules when warranted by specific factual situations. This principle applies especially where, as with evaluations of postal rates, determinations are made on a case-by-case basis. As more factual situations are presented to the Commission, and the opportunity arises to develop more precedent, the Order No. 3047 test will be refined, benefitting from the input of mailers, the Postal Service, the Public Representative, and other interested parties. To the extent the test proves unworkable in practice, the Commission will have the opportunity to revise or replace it with a more practical test. Thus, even if the Order No. 3047 test raises some concerns, there is no need to revisit it at this time since there is likewise no reason to think that a revised test, relying on the same factual

information available to the Commission when it issued Order No. 3047, would anticipate future events any better than the current test.

PostCom, ANM, MMA, MPA, and NPPC intend to closely monitor the application of the Order No. 3047 test, and undoubtedly will voice any concerns that arise. Other associations will do the same. And the Postal Service and the Public Representative will certainly assist the Commission in refining the test as necessary as more experience with its application is gained. If the test needs revision in the future, the Commission will certainly be alerted to that fact. But for now, Order No. 3047 provides as much certainty as can be expected when addressing this fact-intensive inquiry. Accordingly, the Commission should decline to reconsider its test on the grounds that it fails to provide sufficient certainty going forward.

III. CONCLUSION

The Respondents are not convinced that the test articulated by the Commission in Order No. 3047 will fully address mailers' concerns. At the same time, however, the Respondents understand the difficulty of the Commission's task in this docket and believe that Order No. 3047 at least responds to the court's direction on remand while preserving the Commission's authority to enforce the price cap. The Postal Service has not proposed an alternative that would do the same. Accordingly, the Commission should decline to reconsider Order No. 3047 at this time.

Respectfully submitted,

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