

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

STATUTORY REVIEW OF THE SYSTEM)
FOR REGULATING RATES AND CLASSES) Docket No. RM2017-3
FOR MARKET DOMINANT PRODUCTS)

**MOTION OF ALLIANCE OF NONPROFIT MAILERS
AND MPA—THE ASSOCIATION OF MAGAZINE MEDIA
TO MODIFY PROCEDURAL SCHEDULE**

January 17, 2017

The undersigned parties respectfully petition the Commission to modify in two respects the procedural schedule adopted in Order No. 3673, the December 20 advance notice of proposed rulemaking (“ANPR”) in this docket. First, the Commission should authorize a round of reply comments for responses to the comments due on March 20, with the period for reply comments sufficient to provide a reasonable opportunity to respond to the March 20 comments in light of their scope, detail, and complexity. Second, the Commission should modify Order No. 3673 by deferring comments on specific proposed changes to the current regulatory system until the second phase of this rulemaking, after the Commission has determined whether (and in what respects) the existing system of regulation is failing to satisfy the objectives and factors of 39 U.S.C. §§ 3622(b) and (c).

BACKGROUND

39 U.S.C. § 3622(d)(3), the provision of PAEA that requires the Commission to review its system for regulating rates and classes for market-dominant products,

contemplates a two-stage logical inquiry. First, the Commission must determine whether the existing “system for regulating rates and classes for market-dominant products . . . is achieving the objectives in subsection (b), taking into account the factors in subsection (c).” *Id.* Second, if “the Commission determines, after notice and opportunity for public comment,” that the answer is negative, “the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.” *Id.*

The Commission recognized the two-stage logic of the required inquiry in Order No. 3237. In that order, the Commission indicated that it would divide the ten-year review into two phases. In the first, the Commission would consider whether “the system is not achieving the statutory objectives. *Id.* at 2. Consideration of specific changes to the regulatory system—and the Commission’s authority to make those changes—would be deferred to the second phase, which would not occur until *after* the Commission decided whether the current regulatory system was satisfying the objectives of 39 U.S.C. § 3622(b). Order No. 3237 at 3. Considering specific changes to the regulatory system in the first phase would prejudice the threshold issue of whether “the system is not meeting its objectives and, therefore, that changes to the current system are required.” *Id.* “*The Commission makes no such assumptions.*” *Id.* (emphasis added).

The Commission reiterated this two-stage approach in a notice to the public on September 1, 2016. The Commission stated that the first phase of the case would begin with a notice on December 20, 2016; phase 1 comments would be due in “early Spring 2017”; and the Commission would issue its phase one findings in “early Autumn

2017.” PRC Press Release issued September 1, 2016. The autumn 2017 decision would also announce “preparatory rulemaking information for any changes in the in the system”—but only “if necessary.” *Id.*

In Order No. 3673, the Commission has departed from this procedure. The order invites comments on March 20 not only on whether the current regulatory system is working properly, but also on specific changes to the system:

If the system is not achieving the objectives, while taking account the factors, what modifications to the system should be made, or what alternative system should be adopted, to achieve the objectives?

Order No. 3673 at 11. The second ordering paragraph on the final page of the order repeats this invitation:

Comments 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, and if not, *whether and what modifications to the system or an alternative system should be adopted as necessary to achieve the objectives*, are due no later than March 20, 2017.

Id. at 12 (emphasis added).

ARGUMENT

Allowing the parties to submit comments on March 20 on specific “modifications to the system or an alternative system” is problematic in several respects:

(1) Comments proposing specific changes to the system of regulation on March 20 would necessarily be filed before the Commission determined whether (and, if so, how) the current regulatory system fails to satisfy the objectives of Section 3622(b). The result would be just what the Commission sought to avoid in Order No. 3237: commenters would be forced to assume that “the system is not meeting its objectives

and, therefore, that changes to the current system are required.” Moreover, the large number of objectives and factors, and the myriad potential ways in which they might be alleged to be satisfied or unsatisfied by the current system, imply that the range of potential changes proposed on March 20 could be large. If the Commission finds that current system satisfies the objectives of Section 3622(b), the proposed changes may not be adopted, and the resources devoted by the parties to developing the proposals will be wasted.

(2) Resources devoted to developing a proposed regulatory change will also be wasted if the Commission finds in phase 2 that it lacks authority to adopt the change. Order No. 3237, recognizing this problem in the context of the CPI cap, deferred consideration of the Commission’s authority to modify the cap until *after* the Commission “determines it is appropriate or necessary” to resolve this issue. Order No. 3237 at 3. Order No. 3673 inverts this sensible approach.

(3) Order No. 3673 would impose corresponding burdens on commenters who wish to preserve the existing system of regulation. These commenters would be forced to pay lawyers and consultants to develop anticipatory responses to a vast array of potential proposals for regulatory change that may or may not be proposed, and in any event cannot be adopted if the Commission finds that the current system of regulation satisfies the Section 3622(b) objectives that the proposals seek to advance.

(4) The drawbacks of soliciting comments on phase 2 issues before resolving phase 1 are unnecessary. Postal Service operating revenue exceeded operating expenses by \$610 million in Fiscal Year 2016, for a total operating profit of \$3.2 billion in the past three years. Market-dominant volume has stabilized and package volume and

contribution are surging. Although the Postal Service has not made the prefunding payments contemplated by the Postal Accountability and Enhancement Act for several years, neither the Department of the Treasury nor the Congress have acted to enforce these payments. While the disposition of these obligations is an appropriate subject of debate, no one can seriously claim that the Postal Service will be forced to pay these amounts during the next year. The Commission has time to conduct the ten-year review proceeding in an orderly fashion.

(5) In any event, allowing parties to submit specific proposals for regulatory changes on March 20 cannot speed up the final resolution of this case. Order No. 3673 states that “[n]o reply comments will be accepted.” *Id.* at 11. Because the proposed rulemaking procedures do not require proponents of regulatory change to identify their proposals before the March 20 filing date, interested parties are unlikely to have notice or an opportunity to comment on most of the proposals advanced. 5 U.S.C. § 553(b)(3) requires that agencies provide notice of proposed rulemaking that includes “either the terms of substance of the proposed rule or a description of the subjects and issues involved.” Although a final rule can be based on parties’ comments rather than the agency’s notice, the result cannot be “surprisingly distant” from the terms of the rules proposed in the agency’s notices. *Ass’n of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427, 461 (D.C. Cir. 2012) (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009)); *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 169-70 (2d Cir. 2013) (quoting *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (holding notice inadequate where it asked “two general questions” that failed to solicit comment on “overall framework under

consideration"), and *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (concluding notice inadequate where it failed to indicate form that "ultimate standard" might take)). Hence, the Commission may not adopt any of the proposals submitted on March 20 without first soliciting comments on the proposals in a later stage of the case.

CONCLUSION

For the above reasons, the undersigned parties respectfully request that the Commission modify Order No. 3673 in two respects. First, the Commission should allow a round of reply comments in response to the comments due on March 20. The period allowed for reply comments should be long enough to provide a reasonable opportunity to respond to the initial comments in light of their scope, detail, and complexity. Second, the Commission should rescind the portions of Order No. 3673, quoted above, that invite proposals for specific regulatory changes in phase 1. Comments on specific regulatory changes should be deferred until the Commission has determined whether, and in what specific respects, the Commission believes that the current regulatory system is failing to satisfy the objectives and factors of 39 U.S.C. §§ 3622(b) and (c).

Respectfully submitted,

/s/

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