



BAC 7710-FW-P

POSTAL REGULATORY COMMISSION

39 CFR Part 3010

[Docket No. RM2016-6; Order No. 4393]

Mail Preparation Changes

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts a final rule concerning mail preparation changes. This Order amends an existing Commission rule.

DATES: *Effective* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

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I. Introduction

In this Order, the Commission adopts a final rule concerning mail preparation changes. The final rule adopted by this Order amends an existing Commission rule located at 39 CFR part 3010.¹ The rule as adopted incorporates suggestions presented by commenters that include slight modifications to the rule as proposed, but do not materially affect its substance.

II. Background

The Commission is charged with enforcing its price cap rules, which require that the Postal Service make reasonable adjustments to its billing determinants to account for the effects of classification changes such as the introduction, deletion, or redefinition of rate cells. See 39 CFR 3010.23(d)(2). Under § 3010.23(d)(2), these classification changes can include changes to mail preparation requirements made by the Postal Service. In Docket No. R2013-10R, the Commission articulated a standard governing when mail preparation changes result in the deletion or redefinition of rate cells under § 3010.23(d)(2) of the price cap rules.²

¹ On December 1, 2017, the Commission issued a Notice of Proposed Rulemaking in Docket No. RM2017-3 that proposed replacing provisions of 39 CFR part 3010 with new rules in new subparts. The Commission issues this rule in part 3010 and any changes to the rule's location in the CFR will be made in the Docket No. RM2017-3 rulemaking. See Docket No. RM2017-3, Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products, December 1, 2017 (Order No. 4258). The notice of proposed rulemaking was published in the Federal Register on December 11, 2017. See 82 FR 58280.

² Docket No. R2013-10R, Order Resolving Issues on Remand, January 22, 2016 (Order No. 3047). For a complete history of the underlying proceedings and the facts regarding the change to Full Service Intelligent Mail barcoding (IMb) which precipitated the need for a standard, see Docket No. R2013-10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013, at 5-35 (Order No. 1890); Order No. 3047; Docket No. R2013-10R, Order Resolving Motion for Reconsideration of Commission Order No. 3047, July 20, 2016 (Order No. 3441).

After setting forth the standard applied to mail preparation requirements, the Commission instituted the present rulemaking “to create rules for the process and timeframes for the regulation of mail preparation requirement changes.”³ As discussed below, the Commission issued an initial proposed rule that was later withdrawn and replaced with a revised proposed rule.

A. Initial Notice of Proposed Rulemaking

On January 22, 2016, the Commission published a notice of proposed rulemaking (Initial NPR) that proposed a procedural rule for issues concerning compliance with the price cap rules for mail preparation changes.⁴ The Commission identified a need to amend its rules to “ensure that the Postal Service properly accounts for the rate effects of mail preparation changes” under § 3010.23(d)(2). Order No. 3048 at 1.

The Initial NPR proposed adding a new section under the Commission’s existing general motion rule that would create a separate motion procedure dedicated to compliance issues for mail preparation changes. *Id.* at 3-4. The initial proposed rule defined motions concerning mail preparation changes as “challenges to instances where an announced mail preparation change does not contain a Postal Service indication that the change has a rate effect requiring

³ Order No. 3047 at 21. See also *id.* at 59 (“The Commission intends to also issue a rulemaking to establish procedural rules setting forth the process governing mail preparation changes that require price cap compliance.”).

⁴ The Initial NPR was published in the Federal Register on February 1, 2016. See 81 FR 5085. Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, January 22, 2016, at 1-2 (Order No. 3048).

compliance with § 3010.23(d)(2)....” *Id.* at 7. The Initial NPR proposed parameters for motions specific to mail preparation changes, including a filing deadline and grounds required for the motion. Specifically, the Initial NPR proposed that any motions concerning mail preparation changes were to be filed within 30 days of “actual or constructive notice of the implementation date of the change” and were to contain a description of the change at issue and the “grounds by which the mail preparation change must comply with § 3010.23(d)(2)....” *Id.* The filing deadline would be triggered by written notice of the implementation date of the mail preparation change by the Postal Service. *Id.* at 3-4. The Postal Service would be required to “affirmatively designate only those changes that require compliance with § 3010.23(d)(2)” when it provided written notice of publication of the mail preparation change. *Id.* at 4.

Although the Initial NPR reiterated the Commission’s previous explanation that the “Postal Service has the affirmative burden to determine whether a mail preparation change requires compliance with § 3010.23(d)(2) under the Commission’s standard in Order No. 3047,” the initial rule did not propose including a statement of this affirmative burden in the rule.⁵

In proposing the initial rule, the Commission explained that the “primary purpose of the rulemaking is to ensure that the Postal Service properly accounts for the rate effects of mail preparation changes under § 3010.23(d)(2) of this

⁵ The revised notice of proposed rulemaking (Revised NPR) was published in the Federal Register on March 31, 2017. See 82 FR 16015. Revised NPR, March 27, 2017, at 1-2, 7 (Order No. 3827).

chapter in accordance with the Commission's standard articulated in Order No. 3047." Order No. 3048 at 1-2. The Commission stated that it also intended to "standardize the procedure and timeframe by which interested parties must file a motion with the Commission when they contend that a mail preparation change has a rate effect requiring compliance with the price cap rules." *Id.* at 2. The Initial NPR was intended to provide "an avenue for interested parties to raise the possibility that the Postal Service may have erred by failing to account for the price cap impact of a mail preparation change." *Id.* at 5.

In response to the Initial NPR, the Commission received numerous comments that raised questions about the utility of creating a separate procedural rule for motions concerning mail preparation changes. Commenters submitted concerns over how a separate motion procedure would affect the Commission's authority and responsibility to independently review mail preparations for compliance with the price cap rules.⁶ Commenters also raised questions concerning the potential redundancy of the proposed rule in light of the right to challenge the Postal Service's compliance with the price cap rules in existing proceedings before the Commission. *See id.* at 3. Commenters also suggested modifications to the various procedural components set forth in the initial proposed rule, raising concerns with the notice provisions and the filing deadline. *See id.* at 3-5.

⁶ Order No. 3827 at 2-3. The Commission refers to its response to the comments in Order No. 3827.

The Postal Service did not share the concerns of the majority of the commenters. Instead, it suggested adding additional sections to the proposed motion procedure, including discovery, meet and confer requirements, and deadlines for resolving motions. *Id.* at 5-6.

B. Revised Notice of Proposed Rulemaking

On March 27, 2017, the Commission issued a revised notice of proposed rulemaking (Revised NPR) which, in response to comments on the Initial NPR, withdrew the initial proposed rule and proposed a revised rule.

The Revised NPR proposed adding a new section to the price cap rules, § 3010.23(d)(5). The revised proposed rule creates a standardized reporting process for mail preparation changes and memorializes the Postal Service's burden to demonstrate compliance with the price cap. Specifically, the revised proposed rule requires that the Postal Service publish notice of all mail preparation changes in a single, publicly available source. Order No. 3827 at 13-14. Under the revised rule, the Postal Service must file notice with the Commission designating the source it will use to provide public notice. *Id.* The revised proposed rule also requires the Postal Service to affirmatively state whether or not the mail preparation change requires compliance with § 3010.23(d)(2). *Id.* If the Postal Service's determination of price cap compliance is raised, the Postal Service is required to demonstrate, by a preponderance of the evidence, that the mail preparation change at issue does not require compliance with § 3010.23(d)(2).

The revisions to the rule were made “to better target the specific goal of ensuring that the Postal Service properly accounts for mail preparation requirement changes under § 3010.23(d)(2).” *Id.* at 11. The Revised NPR withdrew the initial proposal to create a separate motion procedure for issues concerning mail preparation changes. The Commission explained that it chose not to continue creating a separate motion procedure specific to compliance issues for mail preparation changes based on its review of existing procedures and practices and in response to commenter concerns. *See id.* at 8-11. The Commission requested comments in response to the Revised NPR.

The Postal Service, the Public Representative, the Association for Postal Commerce (PostCom), and the National Postal Policy Council, the National Association of Presort Mailers, and the Association for Mail Electronic Enhancement (collectively NPPC *et al.*) submitted comments in response to the Revised NPR.⁷

III. Review of Proposed Rule and Analysis of Comments

In this section, parts of the revised proposed rule that will be finalized are identified, briefly outlined, and comments or issues relating to the rule are discussed and analyzed.

⁷ Comments of the National Postal Policy Council, the National Association of Presort Mailers, and the Association for Mail Electronic Enhancement, May 1, 2017 (NPPC *et al.* Comments); Public Representative Comments on Revised Notice, May 1, 2017 (PR Comments); United States Postal Service Comments on Proposed Rules for Motions Concerning Mail Preparation Changes, May 1, 2017 (Postal Service Comments); Comments of the Association for Postal Commerce, May 1, 2017 (PostCom Comments).

A. Publication Requirement

The rule sets forth a requirement that the Postal Service publish notice of all mail preparation changes in a single, publicly available source. See Order No. 3827 at 13. The Postal Service shall file notice with the Commission of the single source it will use to publish notice of all mail preparation changes. *Id.* The publication requirement also requires an affirmative designation of whether or not the change will be subject to § 3010.23(d)(2). *Id.* The Commission analyzes and responds to comments relevant to the publication requirement.

In response to both the Initial and Revised NPR, commenters generally expressed concern that it is difficult to monitor the multiple sources used by the Postal Service to provide notice of mail preparation changes. See *id.* at 6-7. The multiple sources of publication make it “more difficult to know whether the real effects of mail preparation changes affect the price cap.”⁸ Numerous commenters requested that the Commission direct the Postal Service to identify a single publication where all mail preparation changes will be published. *Id.* Requiring single source publication would allow both mailers and the Commission “to more easily monitor mail preparation changes for price cap compliance” and alleviate the need for a separate motion procedure. *Id.*

In their comments to the Initial NPR, NPPC *et al.* supported single source publication of all mail preparation changes. Initial NPPC *et al.* Comments at 5.

⁸ Order No. 3827 at 6 (citing Comments of the National Postal Policy Council, the National Association of Presort Mailers, and the Association for Mail Electronic Enhancement, September 2, 2016, at 5 (Initial NPPC *et al.* Comments)).

In their comments on the Revised NPR, NPPC *et al.* find that the revised proposed rule represents a substantial improvement over the initial proposed motion procedure and is an appropriate response to its concerns. NPPC *et al.* Comments at 2. NPPC *et al.* state that the publication requirement “will promote clarity and efficiency by having the Postal Service post all of its mailing regulation changes in one place.” *Id.* They state that the publication requirement should “greatly help the Commission and mailers keep track of mailing regulation changes between market-dominant pricing adjustments.” *Id.*

In its comments to the Initial NPR, PostCom proposed directing “the Postal Service to identify a publication in which all mail preparation changes will be published.”⁹ In its comments on the Revised NPR, PostCom notes that the proposed rule does not define the term “mail preparation change” and contends that “[w]hile there is nothing inherently problematic with failing to define this term, it does create some uncertainty.” PostCom Comments at 1. PostCom specifically notes its concern that the Postal Service would decline to publish notice of a mail preparation change because it could determine the change does not relate to “mail preparation.” *Id.* at 1-2. In light of this concern, PostCom suggests that the Commission clarify in the final rule that the Commission “will still hear challenges to changes that were not published in the specified source.” *Id.* at 2.

⁹ Comments of the Association for Postal Commerce, September 2, 2016, at 5 (Initial PostCom Comments).

With respect to PostCom's concern that the Postal Service may attempt to avoid price cap compliance by failing to classify a change as a mail preparation change and, as a result, fail to provide the requisite notice, the Commission submits that its existing procedures provide adequate recourse to deal with any issues concerning challenges to changes that are not properly designated or published in the specified source. Therefore, the Commission declines to adopt PostCom's suggested change in the final rule.

In comments to the Initial NPR, the Public Representative supported requiring the Postal Service file notice of mail preparation changes in a single source.¹⁰ He submitted that, because the mail preparation changes are not currently published in a single source, "the Commission is not in a position to review the effects of each mail preparation change" and this creates a gap in regulatory coverage. Initial PR Comments at 6-7. In comments to the Revised NPR, he states that the "Commission's order should make clear whether one particular publication (as selected by the Postal Service) must provide notification of all mail preparation changes." PR Comments at 7. The Public Representative is correct that the Commission's proposed rule requires single source publication of all mail preparation changes, regardless of whether the changes are also noticed in additional sources. Therefore, the Commission modifies the final rule to clarify that the rule requires publication of all mail preparation changes in a

¹⁰ Public Representatives Comments, September 2, 2016, at 6-7 (Initial PR Comments).

single source as follows: “The Postal Service shall file notice with the Commission of the single source it will use to provide published notice of all mail preparation changes.”

With respect to the publication requirement, the Postal Service contends that the “Commission should decline to adopt the proposed ‘single source’ publication requirement.” Postal Service Comments at 27. It states that it is “unclear what procedural purpose would be served by these new requirements” and that it “already has strong business incentives to provide advance notice of upcoming changes, to help ensure that mailers can and will comply with any new requirements in a timely manner.” *Id.* at 25, 26. The Postal Service outlines the many ways in which it communicates proposed changes to mail preparation requirements, including at conferences attended by various mailers, and sources such as the *Postal Bulletin* and the **Federal Register**. *Id.* at 26. The Postal Service does not claim that it would be burdensome or difficult to provide notice of all mail preparation changes in one source; rather, it contends, “[n]otice was not the source of the disagreement between the Postal Service, the Commission, and the mailers challenging the IMb requirements.” *Id.* at 27. Further, it submits that no party has complained “that its ability to dispute the price-cap effects of mail preparation requirement changes has been hampered by where and how the Postal Service gave notice of the relevant changes.” *Id.* The Postal Service also contends that the rule requiring that the “Postal Service publish all such

changes in a 'single source' serves no relevant purpose" in the absence of a filing deadline for motions concerning mail preparation changes. *Id.* at 3.

In response to the Postal Service's question regarding the purpose of the single source publication requirement, the rule will provide standardized, transparent reporting of mail preparation changes to ensure compliance with the price cap rules. This information will enable the Commission and the mailing community to properly monitor the changes to mail preparation requirements for price cap compliance. This rulemaking was initiated to add a procedural component to the existing Commission rules in order to ensure that the Postal Service "properly accounts for the rate effects of mail preparation changes under § 3010.23(d)(2)." Order No. 3048 at 1. Although the Postal Service states that it has a business incentive to provide notice of mail preparation changes, price cap compliance is an obligation that exists independent of any business incentive the Postal Service may have for its actions. Without a standardized process for reporting changes to mail preparation requirements, it is difficult to monitor the multitude of mail preparation changes made by the Postal Service for purposes of ensuring price cap compliance.

As previously stated, the Postal Service provides notice of changes to mail preparation requirements in many different sources including the "**Federal Register**, Postal Bulletin, and on the RIBBS website."¹¹ As the Postal Service

¹¹ Order No. 3048 at 3. Since the publication of the Initial NPR, the RIBBS Web site has transitioned to PostalPro. See <https://ribbs.usps.gov>; <https://postalpro.usps.com>.

admits that it already provides notice of changes to mail preparation requirements in a variety of formats and sources, it should not be burdensome for it to comply with the single source publication requirements. Further, this rule does not interfere with parties' current rights to challenge the Postal Service's compliance with the price cap rules in existing Commission proceedings and does not conflict with the Commission's responsibility to enforce the price cap rules.

Accordingly, the Commission finds it appropriate to maintain the publication requirement in the final rule, with the slight modification described above, because it will provide important notice to both the mailers and the Commission of mail preparation changes that could potentially implicate the price cap.

In addition to publication in a single source, the rule requires the Postal Service to affirmatively designate whether or not the individual mail preparation change requires compliance with § 3010.23(d)(2). Although the Commission did not receive comments specific to this revised affirmative designation requirement in response to the Revised NPR, a similar requirement was proposed in the Initial NPR. The initial rule proposed requiring an affirmative designation for only those instances where the mail preparation change required compliance with the price cap rules. Comments received on that provision requested that the Commission modify the requirement to include an affirmative statement of whether or not the change required compliance with the price cap rules. Specifically, PostCom

submitted that “the Postal Service should provide an affirmative statement of no price impact, providing clarity for mailers and no additional burden on the Postal Service in light of their affirmative duty to make the initial determination.”¹² The Postal Service did not oppose the affirmative designation requirement in the Initial NPR and does not comment specifically on the modified designation requirement in the Revised NPR, except to state that it opposes all changes in the Revised NPR. Postal Service Comments at 5.

As it remains the Postal Service’s obligation to review all of its mail preparation changes for compliance with § 3010.23(d)(2), the rule maintains the requirement that the Postal Service provide an affirmative statement of its determination for each mail preparation change that it does or does not require compliance with § 3010.23(d)(2).

B. Evidentiary Burden

In addition to the publication requirement, the rule provides that, “[i]f raised by the Commission or challenged by a mailer, the Postal Service must demonstrate, by a preponderance of the evidence, that a mail preparation change does not require compliance with paragraph (d)(2) of this section in any proceeding where compliance is at issue.” Order No. 3827 at 13-14.

In response to the Revised NPR, NPPC *et al.* submit that “the revised proposal correctly makes clear that, if a question arises (which has seldom

¹² Order No. 3827 at 7(citing Initial PostCom Comments at 7); *see also e.g.*, Initial PR Comments at 6-8; Initial NPPC *et al.* Comments at 8-11.

occurred over the past decade) the Postal Service bears the burden of proof that a mail preparation requirement change does not require compliance with section 3010.23(d)(2) of the Commission's rules." NPPC *et al.* Comments at 2. NPPC *et al.* contend that the "revised proposal properly emphasizes that the Postal Service bears the obligation to comply with the price cap regulations and the Commission has primary enforcement authority." *Id.*

The Postal Service objects to the evidentiary burden provision and submits that the burden of proof should be placed on the "proponent that asserts that a particular mail preparation change constitutes a change in rates because it redefines a price cell." Postal Service Comments at 2, 15-16. It states that "[i]f the Commission nonetheless decides to place the burden of proof on the Postal Service, the Postal Service will need to develop a process for obtaining cost information from potentially impacted mailers in order to determine the amount of compliance costs that a given change might impose on the mailing community." *Id.* at 2-3. The Postal Service further claims that the rule is unfairly "assigning the burden of proof." *Id.* at 14.

The Postal Service also claims that the evidentiary burden provision is unfair based on its pending appeal of the underlying substantive standard applying § 3010.23(d)(2) to mail preparation changes. *Id.* at 19. The Postal Service maintains that the substantive standard set forth in Order No. 3047 and reiterated in Order No. 3441 fails to provide clarity and that the Commission

“should suspend further work on the rulemaking until the D.C. Circuit has completed its review of the substantive standard.” *Id.*

The Postal Service claims that its complaints regarding confusion over application of the standard are relevant to the evidentiary standard set forth in the current rulemaking because it is confused over “what, exactly, it is asking the Postal Service to prove.” *Id.* at 22. The Postal Service repeats its substantive argument regarding its objections to the redefinition prong of the Commission’s standard and states that it “does not have comprehensive, verifiable information concerning the costs that any given mail preparation change will collectively impose on the impacted mailer.” *Id.* at 22-23. It contends that as a result, the Commission is “[p]assing the fact-gathering burden onto the Postal Service” and undermining the purpose of the rulemaking which it characterizes as establishing a “‘streamlined’ process that would allow the Postal Service to implement mail preparation changes ‘with minimal disruption,’ and that would not stay implementation of a mail preparation change that is the subject of a motion.” *Id.* at 23.

In response to the Postal Service’s concerns over the evidentiary standard, the Commission submits that the evidentiary burden in the final rule is the same burden that has existed throughout the PAEA era. It is the Postal Service’s responsibility to “apply a good faith analysis to make the preliminary determination of whether a mail preparation requirement change will result in either the deletion or redefinition of a rate cell.” Order No. 3047 at 20. If it

determines that a mail preparation “change has deleted or redefined a rate cell then it must comply with the price cap rule under [§ 3010.23(d)(2)] and account for the rate effects of the change.” *Id.* Accordingly, as explained in Order No. 3047, the Postal Service has the “affirmative burden to determine whether changes to mail preparation have a rate effect with price cap implications in accordance with the Commission’s standard and [§ 3010.23(d)(2)].” *Id.*

In response to the Postal Service’s contention that the Commission’s failure to explain its standard and how it is to be applied to future cases should prevent the rulemaking from moving forward, the Commission points to its responses to the Postal Service’s arguments concerning the substantive standard in Order Nos. 3047 and 3441. In Order No. 3441, the Commission explained:

Although the Postal Service claims that the Commission “fail[ed] to respond” to the Court’s holding that the Commission must explain its standard, the Commission provided a detailed explanation of the standard, parameters of the standard, and application of the standard. Order No. 3047 at 13-31. The Commission cannot provide explanation of abstract hypothetical changes the Postal Service may make in the future, as those issues and facts are not currently before the Commission. However, despite the fact that this standard is to be applied on a case-by-case basis, the Commission provided an explanation of how the standard would be applied, and set forth the parameters of such application so that the Postal Service and interested parties would have sufficient guidance in the future. *See id.* at 15-31.

Order No. 3441 at 11.

The Commission has previously declined the Postal Service’s motion to suspend this rulemaking proceeding pending resolution of the Postal Service’s

Petition for Review before the D.C. Circuit Court of Appeals.¹³ The Commission again declines to suspend this proceeding. As previously stated, the Postal Service's comments simply repeat "the Postal Service's arguments in disagreement with the Commission's substantive standard articulated in Order Nos. 3047 and 3441 and [do] not provide any justification to warrant a stay."¹⁴ Moreover, the final rule will not be affected should the Court disagree with the Commission's standard articulated in Order No. 3047 because, should the standard be modified, the Court affirmed the Commission's authority to regulate mail preparation changes under the price cap rules and this rule sets a procedure for reporting and monitoring mail preparation changes. Order No. 3047 at 2, 9-10. The final rule sets up a procedure for reporting mail preparation changes, requires a designation of whether or not the change implicates the price cap, and formalizes the Postal Service's burden to comply with the price cap; the rule does not incorporate the substantive standard. In the event the standard is later modified, the rule would remain as a procedural mechanism to identify mail preparation changes that may have rate implications, and provide an avenue for parties to raise the issue of whether a change has such implications, and would apply regardless of the appellate outcome.

The Postal Service also points to Order No. 3827, the Revised NPR, and contends that statements made in that order contradict the Commission's

¹³ Order Denying Motion, April 28, 2017 (Order No. 3879).

¹⁴ Order No. 3879 at 2; see Postal Service Comments at 19-25.

standard set forth in Order No. 3047. The Postal Service submits that the Commission, in Order No. 3827, “maintains that a mail preparation change is subject to the price cap when it functionally ‘eliminates’ a rate.” Postal Service Comments at 20. It claims that this statement contradicts the Commission’s position on appeal and contends that “the Commission’s brief in the D.C. Circuit acknowledged that the elimination of a rate does not address whether mailers will be forced to pay higher prices.” *Id.* Although this comment addresses the substance of the standard as opposed to the rule, the Commission responds in order to correct the Postal Service’s mischaracterization. The functional elimination of a rate is a deletion under § 3010.23(d)(2) and once it is clear that a rate has been deleted; the effect of that deletion is calculated pursuant to the price cap rules. Section 3010.23(d)(2) represents the first step in a two-part process for price cap compliance; it determines whether the price cap applies. Once that determination has been made under § 3010.23(d)(2), the remaining subparts of § 3010.23(d) are utilized to determine the rate effect of the change. In this second step, depending on the calculation, the rate effect could represent a rate increase, decrease, or have zero effect.¹⁵ These facts are acknowledged by both Order No. 3827 and the Commission’s brief in the D.C. Circuit Court of Appeals and do not represent the contradiction claimed by the Postal Service.

¹⁵ Order No. 3047 only concerned the first step in this two-part process; whether a mail preparation change was subject to the price cap applying § 3010.23(d)(2).

Moreover, if the Postal Service is unsure how to apply § 3010.23(d)(2) to a mail preparation change in order to determine whether the price cap applies, it may file a motion with the Commission. As discussed in more detail below, see *infra* section III.C., the Commission's general motion practice rules provide an avenue for the Postal Service to request a determination from the Commission on whether a specific mail preparation change will trigger compliance with the price cap under § 3010.23(d)(2).

With respect to the Postal Service's concern that the lack of discovery will prevent it from satisfying its burden of proof, the Commission responds that discovery is always available in Commission proceedings where it is "reasonably calculated to lead to admissible evidence during a proceeding." See, e.g., 39 CFR 3001.86. The Commission has traditionally declined to make discovery a right in proceedings, as it "could take away the Commission's ability to adapt review procedures to fit the underlying issues presented."¹⁶ As the Commission explained in the Revised NPR, in the situation where compliance with the price cap is at issue "the specific evidence presented will be largely fact dependent subject to the individual circumstances of the matter and the Postal Service's showing will be evaluated based on the evidence available at the time." Order No. 3827 at 9. If issues arise that cannot be resolved within the existing procedures or require discovery, in line with past practice, the Commission

¹⁶ Docket No. RM2008-4, Notice of Final Rule Prescribing Form and Content of Periodic Reports, April 16, 2009, at 12 (Order No. 203).

retains the flexibility to tailor the proceedings accordingly to fit the issue and any party may file a request for discovery. Therefore, the Commission declines to modify the rule to institute discovery as a matter-of-right.

However, the Commission agrees with the Postal Service's suggestion that the rule also codify the requirement that a "challenging party should provide relevant evidence to rebut the Postal Service's initial determination that the price cap does not apply." Postal Service Comments at 18. Parties requesting relief before the Commission based on the Postal Service's action or inaction must always provide the requisite support for their position. In addition to the rules prescribed for specific proceedings, § 3001.11 of this chapter provides that the necessary contents of documents that do not pertain to a specific rule, regulation, or Commission Order. See 39 CFR 3001.11(c). Accordingly, the Commission modifies the final rule to include the contents necessary to challenge a Postal Service determination concerning a mail preparation change.

The Public Representative also suggests a slight modification to the last sentence of the proposed rule to clarify that "raised by the Commission" is intended to cover situations where the Commission independently questions the Postal Service's compliance with § 3010.23(d)(2). PR Comments at 7. The Commission avers that the word "raised" appropriately covers all situations where compliance issues for mail preparation changes may be questioned by the Commission. However, the Commission makes a slight modification to apply the term "raised" to challenges by the Commission or any other party in order to

simplify the language in the rule. Accordingly, final rule § 3010.23(d)(5) incorporates the slight modifications described.

C. Motion Procedure

As explained above, the final rule creates a process where the Postal Service will be required to provide published notice of all mail preparation changes in a single source with a designation of whether or not each change requires compliance with § 3010.23(d)(2). The rule also memorializes the Postal Service's burden to demonstrate compliance with the price cap rules for any issues arising from its designation of a mail preparation change. The rule does not create a separate motion procedure for issues concerning mail preparation changes as originally contemplated. The Commission analyzes and responds to comments relevant to the withdrawal of the motion procedure.

NPPC *et al.* agree with the Commission that “existing procedures should be sufficient to allow interested parties to raise issues of price cap compliance for mail preparation changes.” NPPC *et al.* Comments at 3. However, NPPC *et al.* contend that the “new procedures in the revised proposal will make recourse to the existing procedures rarely necessary.” *Id.* PostCom submits that the “revised procedures are superior to those previously proposed” and “commends the Commission for its thoughtful consideration of the comments submitted on its previous proposal.” PostCom Comments at 1.

As noted by the Public Representative, by withdrawing the motion procedure and associated filing deadline, the revised rule “permits interested

persons to challenge at any time a Postal Service's decision that a mail preparation change is not a rate change." PR Comments at 6. He concludes that the rule will "close a potentially significant regulatory gap in the original proposal" by "providing for a method to sufficiently alert the Commission and other interested parties about mail preparation changes." *Id.* at 4, 5. He notes that the revised location of the rule in part 3010 "will be more readily appreciated and that interested parties will be more likely to recognize that they may challenge the Postal Service's conclusions regarding compliance with paragraph (d)(2) of that section." *Id.* at 6.

The Postal Service seeks to have the Commission reinstate the initial proposed motion rule with modifications. Postal Service Comments at 2.

Specifically, the Postal Service requests that the Commission reinstate:

[T]he 30-day filing deadline for motions challenging the Postal Service's initial determination that a mail preparation change does not implicate the price cap, adopt the additional procedural provisions requested by the Postal Service in its initial Comments, and place the burden of proving 'significant' mailer costs on the proponent that asserts that a particular mail preparation change constitutes a change in rates because it redefines a price cell.

Id. (internal citations omitted).

The Postal Service contends that, without a separate procedure specific to mail preparation changes, it "must rely on impacted mailers to come forward with evidence concerning the extent of compliance costs that a mail preparation change will impose, and without any defined process to insure that they do so

accurately and completely.” *Id.* at 23. It claims that “[t]he Commission’s proposal does not meaningfully address that problem.” *Id.*

The Postal Service claims that the Commission revised the proposed rule “without meaningful explanation,” yet it also acknowledges that the Commission explained that “its existing procedures ‘should be sufficient to raise issues of price cap compliance for mail preparation changes,’ that creating additional procedures would be ‘redundant,’ and that the revised proposed rule is meant ‘to better target the specific goal of ensuring that the Postal Service properly accounts for mail preparation requirement changes under § 3010.23(d)(2).’”¹⁷

The Postal Service’s specific complaints with respect to the Commission’s explanation of the rule are that it fails to explain how “the revised proposed rule comports with the statutory criteria and addresses the Postal Service’s concerns about predictability, or acknowledges the Commission’s prior statements explaining that the goal of this proceeding would be to allay those concerns.” Postal Service Comments at 10.

The Postal Service also claims that the revised rule “strips the rule of its critical procedural protection: the 30-day filing deadline.” *Id.* at 9. The Postal Service explains that it is concerned that “[i]f mailers are permitted to raise objections to mail preparation changes under the substantive standard at any time, regardless of how much time has passed since the Postal Service provided

¹⁷ *Id.* at 9, 10 (citing Order No. 3827 at 10-11).

notice of the change or the stage of implementation that the change is in, then the present rulemaking completely fails to protect against unpredictable impacts on the Postal Service's pricing authority." *Id.* at 9-10.

In response to the Postal Service's comments, the Commission declines to create a separate motion procedure for mail preparation changes because "existing procedures available to interested parties should be sufficient to raise issues of price cap compliance for mail preparation changes." Order No. 3827 at 10. As the Commission previously explained:

Mailers may notify the Commission using the general motion procedures set forth in § 3001.21 of this chapter if they disagree with the Postal Service's determination of compliance with § 3010.23(d)(2). The rules under § 3001.21 of this chapter require motions to "set forth with particularity the ruling or relief sought, the grounds and basis therefore, and the statutory or other authority relied upon..." Accordingly, any motions filed under § 3001.21 of this chapter concerning mail preparation changes shall provide all information the mailers have to rebut the Postal Service's determination, consistent with the Commission's standard set forth in Order No. 3047.

Id. Moreover, as the rule relates to ensuring that the Postal Service is complying with the price cap rules, it is in line with the objectives and factors of the PAEA.

In response to the Postal Service's concern that it would be subject to late objections to its determination that a change does not impact the price cap, the Postal Service may file a motion with the Commission and "seek a determination from the Commission [on the price cap impact of the change] using the procedures set forth under § 3001.21 of this chapter prior to implementation of the change." *Id.* at 9. Therefore, both mailers

and the Postal Service may use existing procedures to resolve issues concerning the price cap impact of a mail preparation change.

In response to the Postal Service's contention that the revised rule ignores the primary reason for instituting the rulemaking, the main purpose of the rule was to "ensure that the Postal Service properly accounts for the rate effects of mail preparation changes under § 3010.23(d)(2) of this chapter in accordance with the Commission's standard articulated in Order No. 3047." Order No. 3048 at 1-2. In accomplishing that goal, the Commission initially sought to create a more efficient process that improved upon existing procedures by proposing a new motion procedure specific to compliance issues for mail preparation changes. However, based on its review of comments and further analysis, the Commission determined that any additional motion rule would add potential inefficient redundancies. A separate motion practice would be an unnecessary addition to existing actions that could include a comment filed in a rate adjustment proceeding alerting the Commission to the potential rate impact of a mail preparation change, a Postal Service request for an advance determination on the rate impact of a mail preparation change, an interested party's motion to designate a mail preparation change as having a rate impact, or other relevant motions. In those actions, the Postal Service or any interested party is free to request discovery.¹⁸ Therefore, the Commission disagrees with the Postal

¹⁸ As previously discussed, under the PAEA, the Commission retains discretion to order or permit discovery, in part due to the "extremely compressed time schedules under which

Service's comments that it needs to create a separate procedure specific to compliance issues for mail preparation changes and submits that the final rule provides a more effective way of ensuring the Postal Service complies with the price cap rules for mail preparation changes.

In addition to potential redundancies, the Commission also found that a separate motion rule would conflict with existing procedures. See Order No. 3827 at 10. For example, in a rate adjustment proceeding, the Commission's rules request participants focus their comments on whether the Postal Service's planned rate adjustment complies with the price cap rules. 39 CFR 3010.11(b)(1)-(2). The Commission must then determine whether the planned rate adjustments are consistent with the annual limitation and applicable law. 39 CFR 3010.11(d). This process has accommodated nearly all changes to mail preparation requirements that require compliance with the price cap rules over the past decade without issue.¹⁹ The Commission's standard, articulated in Order No. 3047, does not disrupt this process and the Commission finds that a separate motion procedure with deadlines outside of the rate adjustment

compliance review must be conducted." Order No. 203 at 55. In most cases, the Commission functions as a gatekeeper for limited discovery — where parties request the Commission to propound specific questions or requests on participants. This gatekeeper role filters discovery requests that may be untimely, irrelevant, intended as a leveraging tactic, or simply abusive.

¹⁹ In Docket No. R2013-10R, although the Postal Service contended that the Full Service IMb requirement was not a rate change, the Postal Service did not argue that it was unaware of the significance of the change compared to its more routine mail preparation changes. See Order No. 3047 at 21, 26-27.

proceedings would conflict with the existing rules governing compliance with the price cap rules.

IV. Ordering Paragraphs

It is ordered:

1. Part 3010 of title 39, Code of Federal Regulations, is revised as set forth below the signature of this order, effective 30 days after publication in the

Federal Register.

2. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

List of Subjects in 39 CFR Part 3010

Administrative practice and procedure, Postal Service.

For the reasons discussed in the preamble, the Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

Part 3010—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS

1. The authority citation of part 3010 continues to read as follows:

Authority: 39 U.S.C. 503; 3662.

2. Amend § 3010.23 by adding paragraph (d)(5) to read as follows:

§ 3010.23 Calculation of percentage change in rates.

* * * * *

(d) * * *

(5) *Procedures for mail preparation changes.* The Postal Service shall provide published notice of all mail preparation changes in a single, publicly available source. The Postal Service shall file notice with the Commission of the single source it will use to provide published notice of all mail preparation changes. When providing notice of a mail preparation change, the Postal Service shall affirmatively state whether or not the change requires compliance with paragraph (d)(2) of this section. If the Postal Service's determination regarding compliance with paragraph (d)(2) of this section is raised by the Commission or any other party, the Postal Service must demonstrate, by a

preponderance of the evidence, that a mail preparation change does not require compliance with paragraph (d)(2) of this section in any proceeding where compliance is at issue. In any challenge to the Postal Service's determination concerning a mail preparation change, the challenging party shall provide all information to rebut the Postal Service's determination that the change is not subject to the price cap.

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