



**BAC 7710-FW-P**

## **POSTAL REGULATORY COMMISSION**

### **39 CFR Part 3030**

**[Docket No. RM2020-5; Order No. 5510]**

#### **Market Dominant Postal Products**

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is revising its rules concerning rate incentives for market dominant products to clarify the definition of “rate of general applicability” within the context of a market dominant rate adjustment proceeding; to add an additional criterion for a rate incentive to be included in a percentage change in rates calculation at discounted prices; and to state clearly what information the Postal Service must file to support a claim that a rate incentive meets the necessary criteria to be included in a percentage change in rates calculation at discounted prices.

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

**ADDRESSES:** For additional information, Order No. 5510 can be accessed electronically through the Commission’s website at <https://www.prc.gov>.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202-789-6820.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

- I. Background
- II. Basis for Rule Changes
- III. Final Rules

**I. Background**

The Commission's rules permit the Postal Service, when adjusting market dominant rates as part of a market dominant rate adjustment proceeding, to include discounted prices for rate incentives that the Postal Service plans to offer in the percentage change in rates calculation, as long as the rate incentive meets certain criteria. 39 CFR 3030.523(e). These criteria are: (1) that the rate incentive is in the form of a discount or can be easily translated into a discount; (2) that sufficient billing determinants are available for the rate incentive to be included in the percentage change in rates calculation; and (3) that the rate incentive is a rate of general applicability. 39 CFR 3030.523(e)(2). The Commission's rules also require the Postal Service to provide "sufficient information to demonstrate that the rate incentive is a rate of general applicability." 39 CFR 3030.512(b)(9)(i).

When the Commission previously promulgated rules with regard to the treatment of market dominant rate incentives, it included a specific definition of "rate of general applicability" in the context of market dominant rate adjustments which provided, *inter alia*, that "[a] rate is not a rate of general applicability if

eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies.” 39 CFR 3030.501(g). The Commission explained that mail volume sent by a mailer in a previous year is not a characteristic of the mail to which rates under an incentive program apply.<sup>1</sup>

In the most recent market dominant rate adjustment proceeding that the Commission conducted, a question arose regarding the extent to which a particular rate incentive proposed by the Postal Service constituted a “rate of general applicability” appropriate for inclusion in the percentage change in rates calculation at discounted prices.<sup>2</sup> After determining that a potential ambiguity existed in the Commission’s rules concerning whether a rate incentive featuring a mailer-specific volume threshold based on historical volume data could constitute a “rate of general applicability,” the Commission permitted the rate incentive to be included in the percentage change in rates calculation in Docket No. R2020-1, but indicated that it would initiate a rulemaking proceeding to clarify the issue. *Id.* at 23-24. The Commission then opened Docket No. RM2020-5 and issued a Notice of Proposed Rulemaking proposing amendments to its rules regarding rate incentives for market dominant products and soliciting comments from the public.<sup>3</sup>

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<sup>1</sup> See Docket No. RM2014-3, Order Adopting Final Rules on the Treatment of Rate Incentives and De Minimis Rate Increases for Price Cap Purposes, June 3, 2014, at 15-16 (Order No. 2086).

<sup>2</sup> Docket No. R2020-1, Order on Price Adjustments for USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes, November 22, 2019, at 17, 19-24 (Order No. 5321).

<sup>3</sup> Docket No. RM2020-5, Notice of Proposed Rulemaking to Amend Rules Regarding Rate Incentives for Market Dominant Products, February 14, 2020 (Order No. 5433).

## II. Basis for Rule Changes

In Order No. 5433, the Commission proposed to clarify its rules by making three revisions. First, the Commission proposed to amend § 3030.501(g) to clarify that in order to qualify as a rate of general applicability, a rate cannot be based on mailer-specific data, such as historical mailer volume. Order No. 5433 at 8, 10, 13. Second, the Commission proposed to amend § 3030.523(e)(2) to add an additional criterion for a rate incentive to be eligible for inclusion in a percentage change in rates calculation at discounted prices—the rate incentive must be made available to all mailers equally on the same terms and conditions. Order No. 5433 at 8, 10, 14-15.

The Commission explained that its basis for proposing these revisions was twofold. The Commission was concerned that interpreting “rate of general applicability” to permit volume thresholds based on historical volume data would contravene the policy reasons underlying the general applicability requirement, because, as the Commission has found before, “volume sent by a mailer in a previous year is not a characteristic of the mail to which rates under [an] incentive program apply[,]” due to the fact that past behavior by mailers bears no relationship to mail being sent in the present.<sup>4</sup> The Commission stated that it was equally concerned about the fairness of permitting mailer-specific thresholds for determining eligibility for market dominant rate incentives. Where a rate incentive is not made available to all mailers on the same terms and conditions,

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<sup>4</sup> Order No. 5433 at 8-9 (citing Order No. 2086 at 15).

the potential exists for non-qualifying mailers to be forced to subsidize the rate incentives received by qualifying mailers.

The third and final revision the Commission proposed was to amend § 3030.512(b)(9) to add additional requirements intended to ensure that the Postal Service provides sufficient information at the outset of a market dominant rate adjustment proceeding to permit the Commission and stakeholders to verify that all rate incentives included in a percentage change in rates calculation comply with the definition of “rates of general applicability” and are made available to all mailers equally on the same terms and conditions.

The Commission received four sets of comments with regard to its proposed rule revisions. Order No. 5510 at 7. In general, commenters other than the Postal Service were supportive of the changes. *Id.* at 7-8. The Postal Service argued that mailer-specific volume thresholds promote fairness among mailers because more mailers would participate in such promotions than would participate under a static volume threshold. *Id.* at 8-9. However, the Commission found that this did not address its primary concern, which is fairness among all mailers in a class, including those not eligible to participate in promotions. *Id.* at 9-10. The Commission determined that from a policy standpoint it is necessary to have bright-line rules with regard to what promotions can and cannot be included in a percentage change in rates calculation. *Id.* at 10. Therefore, the Commission adopted the proposed rules without modification. *Id.* at 11.

### **III. Final Rules**

*Final § 3030.501(g).* Final § 3030.501(g) is revised to state clearly that the definition of “rate of general applicability” within the context of a market dominant rate adjustment proceeding means a rate incentive that is not based on mailer-specific data, such as historical volume data.

*Final § 3030.512(b)(9).* Final § 3030.512(b)(9) is revised to state clearly what information the Postal Service must file to support its claim that a rate incentive meets the necessary criteria to be included in a percentage change in rates calculation.

*Final § 3030.523(e)(2)(iv).* Final § 3030.523(e)(2)(iv) is added to make it a criterion for a market dominant rate incentive to be included in a percentage change in rates calculation that the incentive be available to all mailers equally on the same terms and conditions.

### **List of Subjects for 39 CFR Part 3030**

Administrative practice and procedure.

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

### **PART 3030—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS**

1. The authority citation for part 3030 continues to read as follows:

**Authority:** 39 U.S.C. 503; 3622.

2. Amend § 3030.501 by revising paragraph (g) to read as follows:

**§ 3030.501 Definitions.**

\* \* \* \* \*

(g) Rate of general applicability means a rate applicable to all mail meeting standards established by the Mail Classification Schedule, the Domestic Mail Manual, and the International Mail Manual. A rate is not a rate of general applicability if eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies, including the volume of mail sent by a mailer in a past year or years. A rate is not a rate of general applicability if it benefits a single mailer. A rate that is only available upon the written agreement of both the Postal Service and a mailer, a group of mailers, or a foreign postal operator is not a rate of general applicability.

3. Amend § 3030.512 by revising paragraph (b)(9) to read as follows:

**§ 3030.512 Contents of notice of rate adjustment.**

\* \* \* \* \*

(b) \* \* \*

(9) For a notice that includes a rate incentive:

(i) Whether the rate incentive is being treated under § 3030.523(e)(2) or under §§ 3030.523(e)(1) and 3030.524.

(ii) If the Postal Service seeks to include the rate incentive in the calculation of the percentage change in rates under § 3030.523(e)(2), whether

the rate incentive is available to all mailers equally on the same terms and conditions.

(iii) If the Postal Service seeks to include the rate incentive in the calculation of the percentage change in rates under § 3030.523(e)(2), sufficient information to demonstrate that the rate incentive is a rate of general applicability, which at a minimum includes: the terms and conditions of the rate incentive; the factors that determine eligibility for the rate incentive; a statement that affirms that the rate incentive will not benefit a single mailer; and a statement that affirms that the rate incentive is not only available upon the written agreement of both the Postal Service and a mailer, or group of mailers, or a foreign postal operator.

4. Amend § 3030.523 by revising paragraph (e)(2) to read as follows:

**§ 3030.523 Calculation of percentage change in rates.**

\* \* \* \* \*

(e) \* \* \*

(2) A rate incentive may be included in a percentage change in rates calculation if it meets the following criteria:

(i) The rate incentive is in the form of a discount or can easily be translated into a discount;

(ii) Sufficient billing determinants are available for the rate incentive to be included in the percentage change in rate calculation for the class, which may be

adjusted based on known mail characteristics or historical volume data (as opposed to forecasts of mailer behavior);

(iii) The rate incentive is a rate of general applicability; and

(iv) The rate incentive is made available to all mailers equally on the same terms and conditions.

By the Commission.

**Erica A. Barker,**

*Secretary.*

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