

## **DISSENTING OPINION OF COMMISSIONER GOLDWAY**

The First-Class Mail prices proposed by the Postal Service fail to comply with the statutorily imposed workshare requirements of 39 U.S.C. § 3622(e), when analyzed under the established analytical methodology. To circumvent this problem, the Postal Service employs a different analytical methodology, which effectively delinks single-piece First-Class Mail prices from presort First-Class Mail prices. This unilateral decision on the part of the Postal Service is far reaching in that it directly influences the design of economically efficient rates, the distribution of hundreds of millions of dollars in workshare discounts, and potentially could lead to Postal Service decisions that place an unequal, and potentially unfair, price burden on single-piece mailers. I believe that major methodological changes should not be made in a vacuum without thorough review, including the consideration of the view of those that use the mail.

My colleagues believe that the short-term disruption that rejecting these prices would cause outweighs this transgression. They find support in the general provisions of the PAEA, which promote pricing flexibility for the Postal Service. The only reference to pricing flexibility in the PAEA is in the objectives list of section 3622 (objective 4). Because the PAEA must be interpreted solely on the basis of its text, there is no way to elevate pricing flexibility above any of the other nine objectives, such as objective 1, which is to “maximize incentives to reduce costs and increase efficiency.” It should be borne in mind that the 39 U.S.C. § 3622(e) requirement that workshare discounts equal costs avoided is not an “objective” or a “factor.” It is a separately stated requirement. Section 3622(e) provides that the Commission “shall ensure that such discounts do not exceed the cost that the Postal Service avoids . . . .”

I believe that the most prudent approach is to require compliance with the specific requirements of the PAEA in this instance because it leads to the establishment of economically efficient prices which will help further the long-term viability of the Postal Service. This approach outweighs the temporary inconvenience of immediately

requiring the submission of new rates, when compared with the much more significant disruption caused if the Commission as a whole, or another reviewing authority, later finds the prices unlawful.

The Postal Service appears to be flouting the cost avoidance methodology affirmed by the Commission for several years. In Docket No. R2006-1 (the last omnibus rate case under the PRA), First-Class Mail workshare methodologies were litigated by the participants.<sup>1</sup> The Postal Service proposed but the Commission did not adopt a delinked workshare methodology similar to what the Postal Service introduces in this docket. In Docket No. R2008-1 (the first annual rate adjustment under the PAEA), the Postal Service attempted to introduce a similar methodology. However, the Commission used the established analytical methodology and noted that the Postal Service's methodology "has not been reviewed by the Commission, and is significantly different in approach than each of the other cost avoidances in the class." Docket No. R2008-1, Order No. 66 at 18 (footnote omitted). In the FY 2007 ACR, the Postal Service also initially presented First-Class workshare cost avoidances that do not use the established methodology. In the FY 2007 ACD Report, the Commission stated, "[a] decision to change the framework used for measuring worksharing cost avoidance should await a more complete airing of the pros and cons of the alternatives." FY 2007 ACD at 63.

I am not averse to considering proposals to modify established methodologies should such analyses be brought forward in a timely manner. However, the Commission has continuously stressed that important methodological issues should be considered outside of the time constraints of annual price adjustments or compliance report proceedings. The Postal Service also appears to concur with this sentiment when it suits them. After the filing of the Postal Service's 2007 Annual Compliance

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<sup>1</sup> The history of considering these methodological issues can easily be traced back to Docket No. MC95-1.

Report, the Postal Service requested consideration of 13 different methodological changes. Each issue was expeditiously considered, with public comment, and resolved in time for the filing of the 2008 Annual Compliance Report.

In this price adjustment docket, instead of allowing thorough consideration of an important methodological proposal using a tested, inclusive procedure, the Postal Service introduces its proposal during a proceeding under strict time constraints. This approach precludes meaningful public comment and effectively asks the Commission to accept the Postal Service's new methodology without analysis befitting the significance of this change, albeit subject to some future review.

The Postal Service justifies its change based on its legal interpretation of the relationship of the term "product" to the workshare requirements of 39 U.S.C. § 3622(e), not on any changed circumstance since the last price adjustment or on any new economic theory. I have not been convinced on this record that the Postal Service's legal interpretation is correct.<sup>2</sup> I am particularly concerned that the Postal Service's interpretation allows it to unilaterally determine what is or is not a workshare discount, thus effectively allowing it to write the protections intended by 39 U.S.C. § 3622(e) out of the statute when it is convenient.

In their opinion, my colleagues state that "the Postal Service has provided relatively little support for this contention" that First-Class automation discounts are justified by section 3622(e)(2)(D). The Postal Service has not met the requisite burden of proof to overcome the clear statutory prohibition against passthroughs exceeding 100 percent. Their opinion further maintains that "[T]his decision...is the most responsible

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<sup>2</sup> As noted, 39 U.S.C. § 3622(e) setting forth the 100 percent passthrough standard does not use the term "product." It does, however, use the term "workshare discount" which it defines as a discount provided for "presorting, prebarcoding, handling, or transportation of mail, as further defined by the Postal Regulatory Commission under subsection (a)."

way to respond to the Postal Service's failure to obtain advance review of its new workshare discount design methodologies.”

I disagree. The most responsible way to address this failure is to reject the Postal Service's filing because it fails to satisfy the Commission's rules.

I believe that developing a new set of rates in compliance with the workshare requirements of 39 U.S.C. § 3622(e) and using established methodology can be accomplished more quickly and with less disruption than do my colleagues. This can be done while providing the Postal Service substantial flexibility in pricing its products and raising revenue equivalent to that proposed in the Notice. A number of workable options can be considered that satisfy the legal criteria, which could be implemented before May 11, 2009.

It strikes me that there are close parallels between what is happening to the Postal Service financially, and what has been happening to the banking industry. The banking industry was given wide discretion to lend how and on what terms it chose. The assumption was that this was safe because the managers' discretion would be bounded by certain basic principles (*e.g.*, that investors would have knowledge of the kind of securities marketed, and the risks would be publicly known either through an SEC filing or prospectus) and accountability would be provided by a diligent board of directors.

It is now clear that these basic principles and institutional safeguards were allowed to become mere window dressing. I fear this to be the direction in which postal regulation is headed. Congress intended that there be a certain economic “rhyme and reason” to both class prices and product discounts; hence, provisions such as section 3622(c)(2) (attributable cost floor) and section 3622(e) (discounts match avoided costs). Are these on the way to becoming window dressing? The uneconomic approach to rate setting can be a factor contributing to the Postal Service slide into financial distress. If

the Postal Service is to be excused again for violating 39 U.S.C. § 3622(e), the reasons given must be carefully chosen so that the Postal Service, and the postal community, do not get the impression that there is not now, and never will be, any enforceable standard for workshare pricing.

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Commissioner Ruth Y. Goldway