

3622(b)(5) in FY 2009.

On the same date, the Commission issued a Notice of Public Forum and Opportunity to Comment, providing, *inter alia*, an opportunity to submit written comments on the Postal Service's response to CIR No. 1.

On January 29, 2010, the Postal Service filed its response to CIR No. 1. After making reference to several previous reports in which it had made statements relevant to these issues,¹ and reviewing the Postmaster General's statement of October 15, 2009 explaining the Postal Service's reasons for deciding not to seek *supra*-CPI market-dominant price increases in FY 2010, the Postal Service concluded:

The Postal Service's pricing strategies in FY 2009 were as consistent with the objectives of 39 U.S.C. § 3622(b)(5) as circumstances allowed them to be.

With respect to the Commission's request that it "elaborate on how it was in compliance with 39 U.S.C. § 3622(b)(5) in FY 2009," the Postal Service stated:

The Postal Service understands . . . that the statutory objective presented in section 3622(b)(5) is directed to the design of the ratemaking system established by the Commission, for the regulation of rates and classification for market dominant products, with respect to adequate revenues and financial stability. As such, it is difficult to evaluate compliance by the Postal Service in any particular year.

On February 2, 2010, the Public Representative filed Comments on Annual Compliance Report 2009, a substantial part of which (pp. 1-33) were devoted to: (1) commentary on the alleged inadequacy of the Postal Service's plans to achieve

¹ Specifically: the Fiscal Year 2010 Integrated Financial Plan; the Postal Service's Form 10-K for Fiscal Year 2009; the USPS 2009 Annual Report; and the December 2009 Comprehensive Statement on Postal Operations.

financial stability; (2) the Public Representative's view that the Commission should make a determination that the rates in effect in FY 2009 were not in compliance with § 3622(b)(5); and (3) the Public Representative's belief that, upon making such a determination, the Commission would have the authority to raise FY 2010 and FY 2011 rates to levels above those permitted by the "annual limitation" of § 3622(d) (hereinafter "price cap").

Summary

In these comments, we explain why Time Warner believes that § 3622(b)(5) does not, and cannot, raise an issue of "compliance" within the meaning of § 3653(b). We review Time Warner's previous comments on the scope of § 3653(b) and the Commission's discussion of those comments, and we conclude that the Commission has as yet made no statement responsive to the two major points of our analysis: (1) that it is impossible to make a determination of Postal Service noncompliance with the "objectives" and "factors" of § 3622(b) and (c) because those factors and objectives are not addressed to the Postal Service but to the Commission, relating to the Commission's design of a new ratemaking system; and (2) that it is impossible to make a determination of Postal Service noncompliance with the "objectives" and "factors" of § 3622(b) and (c) because a set of nine mutually competing "objectives," "each of which [is required] to be applied in conjunction with the others" (§ 3622(b)) and fourteen mutually competing "factors," which are required only to be "take[n] into account" in designing the new system (§ 3622(c)) are not conceptually susceptible to a "determination of noncompliance" (unless all that is meant by "noncompliance" is that they are disregarded completely).

We also point out that the arguments made by the Public Representative are based on misreadings of the statutory text of the PAEA and the Commission's rules, on a misconception of the overall statutory scheme of the PAEA, and on a lack of familiarity with relevant postal legislative history.

Discussion

1. The PAEA Carefully Limits the Scope of the Commission's Jurisdiction to Make Determinations of Noncompliance Under § 3653(b)

Section 3622 of the PAEA provides that "*the Postal Regulatory Commission shall . . . by regulation establish . . . a modern system for regulating rates*" (emphasis added) and that "*[s]uch system shall be designed to achieve the following objectives, each of which shall be applied in conjunction with the others*" (emphasis added),² immediately following which, nine objectives are specified. Subsection (b)(5) states the fifth of the nine objectives: "(5) To assure adequate revenues, including retained earnings, to maintain financial stability." Thus the nine objectives are objectives that the "modern system for regulating rates" that the Commission is directed to establish "shall be designed to achieve." The objectives are addressed to the Commission.

Subsection 3653(b) of the Act provides, in relevant part:

(b) Determination of Compliance or Noncompliance.—
Not later than 90 days after receiving the submissions required under section 3652 with respect to a year, the Postal Regulatory

² § The last clause was added in response to the concerns of various parties that one or another of the stated objectives might be viewed by the Commission as predominating over others, a concern caused in part by precedents established by the Postal Rate Commission regarding the weight to be given various statutory ratesetting factors under the PRA, and in part by the fact that some of the PAEA objectives are phrased in terms that could invite the misinterpretation that they were intended to be predominant (e.g.: "(1) To *maximize* incentives to reduce costs and increase efficiency"; "(5) To *assure* adequate revenues, including retained earnings, to maintain financial stability" [emphasis added]).

Commission shall make a written determination as to—

(1) whether any rates or fees in effect during such year (for products individually or collectively) were not in compliance with applicable provisions of this chapter (or regulations promulgated thereunder); . . .

As Time Warner noted in its Initial Comments on ACR2009 Pursuant to Order No. 380 (filed February 1, 2010), the proper interpretation and application of § 3653(b)'s provision for a determination of noncompliance is a matter of first impression. We also noted with approval James I. Campbell Jr.'s careful explication of the statutory text of § 3653(b), which concludes that "with respect to regulation of rates, the key statutory commands of chapter 36, those in § 3622 and § 3633, are directed to the Commission, not to the lawfulness of rates and fees per [se] nor to the duties of the Postal Service," and that "[t]he Postal Service cannot logically be found out of compliance with *statutory* commands addressed to the Commission."³ We argued that, "[g]iven the potentially far-reaching consequences of a determination of noncompliance, which automatically triggers authority for the Commission to impose a remedy under the remedial subsections of the complaint provision (§ 3662), Campbell's reading is persuasive not only as construction of the specific statutory text but also in terms of the overall statutory scheme."⁴

Time Warner has consistently advocated this view of both the *determination of noncompliance* provision of § 3653(b) and the *objectives* and *factors* provisions of § 3622(b) and (c). We have argued that that the concept of *compliance* has not

³ Docket No. RM 2007-1, An Analysis of provisions of the Postal Accountability and Enhancement Act Relating to the Regulation of Postal Rates and Services, by James I. Campbell Jr. (filed August 3, 2007), at 90-91.

⁴ Initial Comments . . . on ACR2009, at 3-4.

rational or nonarbitrary application to *objectives* or *factors*,⁵ and that the illogic of any such application is compounded when the objectives and factors at issue are not addressed to the entity whose "compliance" is being judged.⁶ We have stated that we believe a finding of "noncompliance" based on the "objectives" or "factors" provisions of § 3622 would exceed the Commission's legal authority,⁷ and have therefore urged the Commission to make clear that

in performing its annual compliance review under § 3653, the Commission will, absent extraordinary justification, make a determination of "noncompliance" only with respect to matters that involve a clear and determinate obligation imposed on the Postal Service by either the statute or the Commission's regulations at the time the rates were in effect.⁸

2. The Commission's Discussion in Order No. 203 Does Not Engage Time Warner's Key Argument Regarding the Limited Scope of § 3653(b)

In Order No. 203, its final order adopting regulations for periodic reporting, the Commission revised its earlier formulation of a regulation in order to remove any

⁵ See Docket No. RM2008-4, Docket No. RM2008-4, Initial Comments of Time Warner Inc. in Response to Order No. 104 (filed October 16, 2007), at 7 ("To speak of 'compliance' with 'goals' and 'objectives' makes little sense"); Reply Comments of Time Warner Inc. in Response to Order No. 104 (November 14, 2008), at 9 (§ 3653 "does not, and could not without leaving coherence behind, authorize the Commission to make determinations of 'compliance' with statutory 'goals' or 'objectives' or 'factors'").

⁶ See Docket No. RM2008-4, Initial Comments of Time Warner Inc. in Response to Order No. 104 (filed October 16, 2007), at 9 ("Subjecting the Postal Service to a determination of its compliance with the 'factors' and 'objectives' set out in § 3622 would also contravene the language of those provisions themselves, because they are addressed not to the Postal Service but to the Commission).

⁷ See Docket No. RM2008-4, Initial Comments of Time Warner Inc. in Response to Order No. 104 (October 16, 2008), at 11.

⁸ Initial Comments of Time Warner Inc. in Response to Commission Order No. 2 (April 6, 2007), at 18.

implication that every policy objective stated in title 39 creates a compliance issue. It stated:

The Commission agrees with Time Warner that using the term "compliance" in the title of proposed rule 3050.20 does not appropriately describe the task it assigns to the Postal Service—to analyze how its products have promoted the public policy objectives of title 39.

Order No. 203, at 31.

It added that the revised regulation "indicates that an analysis can be required annually by rule 3050.20 without constituting a 'compliance' issue." *Id.*⁹

The Commission's discussion in Order No. 203, however, also stated:

The Commission finds misguided Time Warner's suggestion that the Postal Service is not required to develop and implement rates that comply with the rate policies of section 3622.

Order No. 203 at 28.

This response misconceived precisely the distinction that Time Warner's argument was directed to maintaining, leading the Commission to mischaracterize what Time Warner had said, which was not that the Postal Service is not governed by the policies stated in the Act, including the objectives and factors stated in § 3622, but rather that those objectives and factors, which are addressed to the Commission, do not constitute "applicable provisions of this chapter (or regulations promulgated thereunder)" for which the Postal Service is subject to review for

⁹ In comments filed in this docket on February 5, 2010 (Public Representative Comments on United States Postal Service Plans to Achieve Financial Stability For FY 2010 and Beyond), at 3, the Public Representative joins back together what the Commission has put asunder, treating § 3653(b) (requiring the Commission to determine "whether *any rates or fees* in effect during such year (for products individually or collectively) were *not in compliance with applicable provisions* of this chapter (or regulations promulgated thereunder)" [emphasis added]), and § 3653(d) (authorizing the Commission to "provide *recommendations* to the Postal Service related to the *protection and promotion of public policy objectives set out in this title*" [emphasis added]) as interchangeable.

"compliance" under § 3653. Our discussion began by carefully distinguishing between the scope of the Commission's authority to compel Postal Service compliance with the requirements of chapter 36 and the scope of its authority to supervise the Postal Service's "promotion of public policy objectives of this title." We said:

Section 3653 of the Act ("Annual determination of compliance") does include a provision, subsection (d), that refers to "the goals established under sections 2803 and 2804" and the "promotion of public policy objectives set out in this title." However, that subsection, which comes after subsection (b), captioned "Determination of Compliance or Noncompliance," and subsection (c), captioned "Noncompliance With Regard to Rates or Services," is entitled "Review of Performance Goals" and authorizes the Commission to perform an "evaluat[ion]" and to "provide recommendations":

§ 3653(d) Review of Performance Goals.—The Postal Regulatory Commission shall also evaluate annually whether the Postal Service has met the goals established under sections 2803 and 2804, and may provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in this title.

Unlike subsections (b) and (c), this subsection makes no mention of a "determination of compliance" or "action" by the Commission in the event that it makes an adverse determination. It provides for an "evaluat[ion]" with respect to meeting "goals" and for "recommendations" with respect to the "promotion of public policy objectives."¹⁰

Time Warner's comments on the Commission's proposed periodic reporting rules were also careful to observe another critical distinction between two quite different propositions: (1) that the "objectives" and "factors" of § 3622 *in themselves* constitute requirements applicable to the Postal Service, subjecting it to review for

¹⁰ Initial Comments of Time Warner Inc. in Response to Order No. 104 (October 16, 2008), at 7.

compliance under § 3653(b); and (2) that *regulations adopted by the Commission to implement those factors and objectives* might constitute requirements applicable to the Postal Service, subjecting it to review for compliance under § 3653(b). We rejected the first proposition, stating:

For the Commission to treat the "Objectives" and "Factors" as constituting, *of their own force*, legal requirements binding on the Postal Service, and as an appropriate basis for the exercise of the Commission's sweeping remedial powers under § 3653(c), would in Time Warner's view represent a misinterpretation of § 3622.¹¹

But we made clear that we were not taking issue with the second proposition:

The extent to which the Commission may employ the objectives and factors set out in § 3622(b) and (c) as a basis for imposing requirements on the Postal Service, in the exercise of its rulemaking authority under § 3622(a), presents a different question.¹²

Perhaps in response to this point in Time Warner's comments, the Commission's discussion in Order No. 203 went on to state:

[E]ven if no regulations had been implemented by the Commission, the Governors would *have to* establish rates that *comply with the policies* of section 3622. 39 U.S.C. 404(b) only authorizes the Governors to establish rates that are in accordance with the policies of chapter 36.

Order No. 203 at 29 (emphasis added).

That statement only further obfuscates the distinctions that were under discussion. To say that the Governors "have to establish rates *that comply with the policies of section 3622*" is to reject Time Warner's argument that "[t]o speak of 'compliance' with 'goals' and 'objectives' makes little sense," which would either

¹¹ Initial Comments of Time Warner Inc. in Response to Order No. 104 (October 16, 2008), at 10.

¹² *Id.*, n.4.

contradict or make unintelligible the Commission's apparent concession in the same discussion that it "agrees with Time Warner that using the term 'compliance' in the title of proposed rule 3050.20 does not appropriately describe the task it assigns to the Postal Service—to analyze how its products have promoted the public policy objectives of title 39." If "compliance" is not an appropriate term with respect to "the public policy objectives of title 39"--by which we assume the Commission means to refer to subsection 3653(d)'s provision that the Commission "may provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in this title"--then how can it be an appropriate term with respect to "the policies of section 3622"? That question is left unanswered.

Moreover, to say that the Governors "*have to* establish rates that comply with the policies of section 3622," because § 404(b) does not authorize them to establish rates of any other kind, merely introduces an equivocation that eclipses the relevant distinction. In the context of this discussion, the only relevant sense of "have to" is as a synonym for "can be compelled to by the Commission." Section 3653(b) authorizes the Commission to compel compliance with "applicable provisions of *this chapter*" (emphasis added). Section 3653(d) authorizes the Commission to "make recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in *this title*" (emphasis added). Section 404(b) is a part of "this title" (title 39) but *not* of "this chapter" (chapter 36). Thus, the fact that § 404(b) "only authorizes the Governors to establish rates that are in accordance with the policies of chapter 36" does not alter the fact that nothing in the Act authorizes the Commission to make a finding of noncompliance with respect to § 404(b).

The Commission's statement that the Governors "*have to* establish rates that comply with the policies of section 3622" is consequently rather like a (hypothetical) statement by the Postal Service to the effect that the Commission "*has to* adopt regulations consistent with section § 404(b)," which authorizes the Governors of the Postal Service (not the Commission)

to establish reasonable and equitable classes of mail and reasonable and equitable rate of postage and fees for postal services in accordance with the provisions of chapter 36. Postal rates and fees shall be reasonable and equitable and sufficient to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

The hypothetical statement would be true in the sense that it identifies a provision of law that implicitly limits the powers of the Commission. But if it were intended to mean that the Postal Service has the power to compel the Commission to act "in accordance" with § 404(b) (short of bringing an action in federal court), it would be neither true nor logical.

Indeed, the discussion in Order No. 203 never actually answers Time Warner's argument respecting the inappropriateness of applying the concept of "compliance" to the "objectives" and "factors" of § 3622.. The following paragraph (at 29) appears to be Order No. 203's final word on the subject:

Time Warner contends that the concept of "compliance" is not easily applicable to such things as objectives and factors, which by their nature must be weighed and balanced. To ease concerns over the potential misuse of the Commission's broad remedial powers, Time Warner requests a Commission statement on how or when it might find the Postal Service to be not in compliance with such subjective terms. The Commission believes that Time Warner's request is well intentioned, but this rulemaking is not an appropriate vehicle for such a discussion.

Surely, now that the Commission in an ACR docket has asked the Postal Service to explain "how it was in compliance with 39 U.S.C. § 3622(b)(5) in FY 2009" and has invited the public to comment on "plans for financial stability in FY 2010 and beyond and [to] offer alternate means for achieving financial stability under the PAEA," which it describes as "bearing directly on compliance issues in this proceeding," the appropriate vehicle for such a discussion has arrived.¹³

3. The Public Representative's Comments on the Alleged Failure of the Postal Service to Comply with § 3622(b)(5) Are Inconsistent with the Language and Structure of the PAEA, and the Public Representative's Proposed "Remedy" is Reckless and Based on a Misinformed View of Postal Legislative History Subsequent to Reorganization

a. The Public Representative's focus on rate increases as the only possible way of dealing with the Postal Service's financial difficulties makes neither theoretical nor practical sense

The Public Representative's focus on rate increases as the only possible way of dealing with the Postal Service's financial difficulties--so much so that it must, reasons the Public Representative, be legally obligatory--bypasses the crucial antecedent question of whether rate increases *can* relieve the Postal Service's financial difficulties.

The Public Representative appears to hold as an article of faith that there must be *some* level of rates other than that implemented by the Postal Service in FY 2009 that would have "assure[] . . . financial stability." In both its motion of December 17, 2009, "requesting the Commission to direct the Postal Service to provide estimates of rate increases to break even by the end of FY 2011 in order to

¹³ See CIR No. 1 and Notice of Public Forum and Opportunity to Comment in the instant docket.

eliminate the threat of insolvency," and its February 2, 2010 comments, presenting three alternative sets of rate increases to produce breakeven in 2011, the Public Representative apparently *begins* his analysis with the conviction that *any* set of rate increases that would produce "break even by the end of FY 2011" would "eliminate the threat of insolvency." But that, of course, is a judgment about an issue that is not susceptible to proof. Whether it is so is the very issue in dispute. And nothing in the PEAE suggests that the Commission has the authority to override the judgment of the Governors on that issue.

The Public Representative often speaks as if the issue *were* susceptible to proof, for example in stating (at 2):

The Postal Service's total rates and fees (collectively) for FY 2009 again failed to recover total costs, thereby subjecting the Postal Service to virtually certain insolvency in the year ahead, and are unlawful.

But the Governors and management of the Postal Service, whose experience, access to information, and interest in avoiding "virtually certain insolvency in the year ahead" are certainly no less than that of the Public Representative, disagree. Other than insinuations of bad faith on the part of the Postal Service,¹⁴ and

¹⁴ See, for example, Public Representative Comments at 30-31: "price increases of this order of magnitude [i.e., 21% over the course of a single year] to maintain the benefits offered by the Postal Service may be compared to the likely impact on rates if the alternative path of privatization being discussed in some quarters, including the Postal Service, is followed."

See also *id.* at 10: "The argument that rates should not be increased during a recession, when business is slow, lacks credibility when, at the same time, UPS and FedEx have raised rates." One might inquire whether UPS and FedEx have suffered massive volume losses over the same period, or whether they are required by law to maintain a universal network for the daily delivery of letter mail, or pay their labor force wages well in excess of market rates. The Postal Service's discussion in its FY 2009 Annual Report (at 30) of the difference between the market it is required by law to serve and the markets served by UPS and FedEx demonstrates how ill founded is the Public Representative's imputation:

Expanding use of electronic communications methods and other commercial services competes with some of our principal services. Our

mischaracterizations of the facts,¹⁵ the Public Representative is unable to offer any reason for preferring his judgment.

As a practical matter, the Public Representative's insistence that the Commission rather than Congress ought to decide what to do about the Postal Service's financial plight and that *supra*-CPI-U rate increases represent the only option that should be considered must confront the objection that the Commission has only one lever to pull, whereas Congress has every lever that lies within the reach of government power, and that the lever that the Commission does have will leave most causes of the problem unaffected. The Commission has the power, in certain circumstances, to overrule the Postal Service's decisions regarding rates and

business and results of operations will be adversely affected by electronic diversion. If we do not compete effectively with these services, or grow marketing mail, package services or revenues from other sources, this adverse impact will be substantial over time.

The Postal Service product mix is shifting away from transactions, correspondence and periodicals mail toward advertising and shipping services which are highly correlated with economic expansions and contractions. This year's revenue and volume clearly show the effect of that changing product mix.

¹⁵ Based on the following characterization of the Postal Service's financial situation, the Public Representative (at 28-29) finds reason for optimism: "Postal Service volumes . . . recently dipped precipitously due to increases in internet traffic and, coincidentally, during a major business recession." A "recent dip" in volume does not begin to capture the Postal Service's own assessment of the problems it faces:

Over the past fifteen years transaction mail, such as bill payment, has been eroded by competition from electronic media, primarily the Internet. It is expected that over time bills and statements will continue to follow payments online, and there is evidence that the recent recession has accelerated that movement. [emphasis added] Factors underlying this trend include growing Internet access in homes, increased availability of broadband service, falling personal computer prices, expansion of mobile Internet access, increasing familiarity and comfort with the Internet, and the growing trend by businesses to incent or require their customers to use alternatives to mail for payments and statement receipt. Correspondence mail has long been a declining part of mail volume. With the availability of inexpensive telephone service, e-mail and other Internet-based forms of communication such as e-cards and social networking, there is little chance that the trend in correspondence mail will change.

USPS 2009 Annual Report at 30.

classifications. But it has no power to do anything that would affect most of the causes of the Postal Service's financial plight, or to implement any of the variety of measures other than rate increases that might be necessary or appropriate to put the Postal Service on a path to financial stability.

The GCA has succinctly described the impracticality at the heart of the Public Representative's arguments:

When an unsatisfactory state of affairs is caused by multiple factors, it is irrational to decide at the outset that (i) only one of those factors can be addressed as an avenue to correcting the situation, and (ii) that one factor must be exploited intensively enough to overcome the effects of all the other causes as well. Yet that is the fundamental assumption of the Motion; and it is only on that assumption that the Public Representative is able to argue that current rates are unlawful.¹⁶

b. The Public Representative's interpretation of § 3622(b)(5) rests on the misconception that the PAEA retains the fundamental statutory scheme of the PRA

According to the Public Representative:

A fundamental policy of the Postal Reorganization Act (PRA) required the Postal Service to breakeven in its operations without taxpayer funding. [footnote omitted] . . . The PAEA preserves the policy that the Postal Service would not be funded by taxpayers *even though the specific language requiring the Postal Service to break even was eliminated*.¹⁷

After an assertion on that sort, one would expect to be presented with at least some evidence that Congress intended to preserve the policy even as it repealed the provisions stating the policy. Instead, the Public Representative provides only one *ipse dixit* after another to the effect that the cost-of-service regime established by the

¹⁶ Reply of the Greeting Card Association to Motion of the Public Representative for production of Estimates of Rate Adjustments (filed December 23, 2009), at 6.

¹⁷ Comments on Annual Compliance Report 2009 (filed February 2, 2010), at 11 (emphasis added).

PRA was somehow retained rather than replaced when Congress enacted the price-cap regime of the PAEA, e.g.:

In the instant case, the most important objective of modern rate regulation is, "To assure adequate revenues, including retained earnings, to maintain *financial stability*." 39 U.S.C. § 3622(b)(5). Of overarching importance must be the continued financial viability and stability of the Postal Service.

Id. at 12.

Unlike the PAEA, which relegates "assur[ing] adequate revenues . . . to maintain financial stability" to the status of one among nine objectives of the ratemaking system, the PRA contained three provisions that made assuring adequate revenues to maintain financial stability the "overriding objective" of that Act's ratemaking system: (1) the "break-even requirement" of former § 3621; (2) the Governors' modification authority under former § 3625; and the Governors' authority to establish temporary rate and classification changes under former § 3641. Section § 3621 of the PRA, which was repealed by the PAEA, provided:

Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service. For purposes of this section, "total estimated costs" shall include (without limitation) operating expenses, depreciation on capital facilities and equipment, debt service (including interest, amortization of debt discount and expense, and provision for sinking funds or other retirements of obligations to the extent that such provision exceeds applicable depreciation charges), and a reasonable provision for contingencies.

Section 3625(d) of the PRA, which was repealed by the PAEA, provided that:

with the unanimous written concurrence of all of the Governors then holding office, the Governors may modify [a] . . . recommended decision of the Commission . . . if the Governors expressly find [*inter alia*] that . . . (2) the rates recommended by the Commission are not adequate to provide sufficient total revenues so that total estimated income and appropriations will

equal as nearly as practicable estimated total costs.

Section 3641 of the PRA, which was repealed by the PAEA, authorized the Postal Service to "establish temporary changes in rates of postage and in fees for postal services in accordance with the proposed changes under consideration by the Commission . . . [i]n any case in which the Postal Rate Commission fails to transmit a recommended decision" to the Governors within 10 months of their request for a recommended decision.

Taken together, those three provisions gave the Governors not only the responsibility but also the *power* to raise rates as high as necessary to insure break-even. That approach to rate regulation is commonly denominated "cost-of-service regulation." Under it, the regulated enterprise is entitled to recoup its full costs of providing the public with the services it is authorized to provide.

The PAEA replaced the PRA's cost-of-service regulation with an entirely different type of regulatory regime, commonly called "price-cap regulation." Under that approach, which is generally intended to check excessive growth in the prices charged by regulated monopolies, the regulated enterprise is entitled to increase its rates only up to a certain level (determined by a specified index, such as growth in CPI-U), irrespective of whether rates at that level recoup all of its costs. The limitation on price increases is intended to exert some derivative discipline over growth in the enterprise's costs. A *guarantee* against financial failure is the hallmark of cost-of-service regulation, but is entirely inconsistent with the rationale of price-cap regulation.

Congress could have retained a form of cost-of-service regulation when it adopted the PAEA. It is even arguable that it would have been sensible for

Congress to provide for a price-cap regime but to include some fail-safe mechanism that would ultimately insure that the Postal Service would remain financially stable. But it did not do so. Rather, in the PAEA Congress made the assurance of financial stability one among nine competing statutory "objectives," while placing the price cap mechanism at the center of the new system. And it created an "escape clause"--the so-called "exigency" provision--that is not "fail-safe," because it requires agreement between the Postal Service and the Commission in order to raise rates by more than the caps would allow.

c. Congress, not the Commission, is the necessary and proper forum for dealing with the inability of the Postal Service to achieve financial stability within the strictures of the PAEA

The Public Representative offers a variety of arguments why Congress should not be confronted with the evident failure of current postal laws to allow the Postal Service to achieve financial stability while maintaining the kind of postal system that Congress would prefer. The Public Representative protests vehemently against the Postal Service's "apparent lack of plans to reasonably ensure the maintenance of the financial stability of the Postal Service at the end of FY 2010 and FY 2011," and not just "plans," but "specific" plans with "time frames for relief" and alternative plans "if no relief is obtained."¹⁸ The Public Representative appears to have an unworldly faith in the efficacy of detailed planning in confronting an array of imminent perils that are beyond one's ability to control.

For example, in its FY 2009 Annual Report, the Postal Service states:

¹⁸ Public Representative Comments on United States Postal Service Plans to Achieve Financial Stability for FY 2010 and Beyond (filed February 5, 2010), at 2 and *passim*.

We believe that recovery in volume and associated revenue growth, along with continuing productivity improvements, will be required to address the challenge presented by our current financial situation and the regulatory price cap.

One might infer from the fact that the Postal Service does not state how it plans to achieve these goals or express confidence that it will be able to achieve them that it in fact does not know how or whether they can be achieved. The Public

Representative spurns such

vague management musings without specific goals or plans and without a timeline, and without reference to the actual financial cash requirements of the Postal Service.

Comments on USPS Plans, at 2.

The public representative appears to think that all that is lacking to "insure financial stability" is a set of detailed blueprints laying out the steps by which it shall be achieved. But the best the Public Representative is able to do in the way of specific goals and time frames (Comments on ACR at 27) is to express confidence, with respect to each of his three alternative rate increase scenarios, that "volumes and cash balances . . . can be expected to grow beyond FY2011 as economic recovery continues." Perhaps.

In a similarly otherworldly fashion, the Public Representative complains that "[t]he Postal Service says it is essential to obtain relief from the retiree health benefit payments but does not indicate its plan to obtain relief and in what manner and over what period." *Id.* One might hazard a guess that the Postal Service's plan consists principally in telling Congress at every opportunity that without such relief it will be nearly insolvent by the end of the coming fiscal year.

It is true, as the Public Representative says (at 6), that "it is by no means a certainty that Congress will be willing to provide subsidies to the Postal Service in a

timely manner." But it does not follow from the fact that Congress may be reluctant to address a problem that Congress is not the proper forum for addressing the problem.

Whether Congress should be prodded to take action to save a system that under current law seems headed for disaster is a political and policy issue that the Postal Service has the right to decide for itself.

d. The Public Representative's assertion that confronting Congress with the problem of the Postal Service's financial instability is "not . . . the tradition" is misinformed

According to the Public Representative (at 31):

Ultimately, Congress may be willing to subsidize the Postal Service or authorize the U.S. Treasury to increase loans to the Postal Service, *but that is not currently the law or the tradition.*

[Emphasis added.]

It is true by definition that the things that will not come to pass without Congressional action are "not currently the law." But it is not true that subsidizing the Postal Service when it encounters deep financial difficulties is "not . . . the tradition." In fact, it is so much the tradition that anyone who is old enough to remember the last major postal reform before the PAEA might be expected, upon surveying current circumstances and proposals, to feel a twinge of *déjà vu*.

As GCA has pointed out:

[H]istory shows that – given a substantial enough financial problem – legislative assistance is by no means an implausible goal. In the mid-1970s, the Postal Service was in dire financial condition. The legislative response was Pub. L. 94-421, the Postal Reorganization Act Amendments of 1976. Pub. L. 94-421, *inter alia* –

provided, for FY 1976 and FY 1977, annual appropriations of \$500 million to retire Postal Service

indebtedness. . . .¹⁹

The circumstances that led to that special \$1 billion appropriation (at a time when the entire revenue requirement was just over \$20 billion) bear an uncanny similarity to current circumstances, with respect to both the national economy and the financial condition of the Postal Service. Those circumstances were reviewed by Sen.

William Hathaway of Maine in a speech on the Senate floor on January 18, 1977:

When Congress enacted the Postal Reorganization Act of 1970, it hoped to set up an independent business entity which would ultimately need no Federal funding. . . .

At the time this legislation was enacted, it was hailed as the beginning of a long-needed modernization effort which would bring new efficiency to an enterprise which some had claimed was outdated and riddled with political appointees.

With such a promising beginning, the Postal Service seemed to be off to a good start in its first 2 years of operation. The old post office system had suffered a \$204 million loss in its last year of operation, but by 1973 the postal system had cut this figure down to \$13 million, still a large sum, but indicative of substantial progress. Then in 1974, the loss figures jumped to \$438 million, and to \$989 million in 1975.

In fiscal year 1976, the loss was \$1.176 billion. . . .

The Postal Service has been faced with the same rising costs for gasoline, other fuels, and essential items which all Americans have had to endure. It has responded with a series of rate increases and recently with tentative announcements of closings of rural post offices, and is considering other service cutbacks such as eliminating Saturday deliveries.

These events and tentative announcements have understandably disturbed both my constituents and citizens in other parts of the country. They now feel that they need to have more of a voice and that many decisions which could be made by the Postal Service in pursuit of ostensible cost-saving would, in the long run, be very detrimental and contradictory to the

¹⁹ Reply of the Greeting Card Association to Motion of the Public Representative for production of Estimates of Rate Adjustments (filed December 23, 2009), at 8 (footnote omitted).

original concept behind the Postal Service and its predecessor: namely, to function as a service to deliver mail promptly and efficiently to all parts of the country.²⁰

Conclusion

Time Warner thanks the Commission for the opportunity to comment on these important issues of first impression concerning the meaning and proper application of § 3653(b).

²⁰ Congressional Record - Senate, January 18, 1977, 1528-29.

Compare the following assertions of the Public Representative:

[A] Public Representative study for this proceeding has determined the potential across-the-board rate and fee increases for market dominant products that could help to avoid the growing outcry from the public about proposed reductions in services. [footnote omitted] A case in point is the public reaction to the Postal Service's plans to close certain stations and branches nationwide.[footnote omitted] In the alternative, the public faces significant loss of access to their postal services. [Comments on ACR 2009, at 17]

Ratcheted rate increases of several pennies for single-piece First-Class rates amounting to a few percentage points could "save the service" currently enjoyed, in some cases demanded, by many mailers and the public, including the demand to keep post offices open. [*Id.* at 30]

It is remarkable that in a period of negative economic growth nationally, the Public Representative dismisses across-the-board postage increases of as much as 21.2% in a single year as "amounting to The Public Representative's focus on rate increases as the only possible way of dealing with the Postal Service's financial difficulties-a few percentage points."

Respectfully submitted,

s/ _____
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