

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

EXIGENT REQUEST, 2010

Docket No. R2010-4

RESPONSE OF THE UNITED STATES POSTAL SERVICE  
TO MOTION OF THE AFFORDABLE MAIL  
ALLIANCE TO DISMISS REQUEST  
(August 2, 2010)

On July 26, 2010, the Affordable Mail Alliance ("AMA") filed a motion asking the Commission to summarily dismiss the Postal Service's request in this docket. Procedurally, there is no basis for summarily dismissing this proceeding. Substantively, the arguments made by the AMA have no merit. Rather, the AMA advances an interpretation of section 3622(d)(1)(E) of title 39 that, in its zeal to defeat the Postal Service's request for an exigent rate increase, advances a strained and fatally flawed interpretation of section 3622(d)(1)(E), unmoored not only from the plain language of the provision but also from its legislative history and prior Commission discussions of the provision. The AMA also makes manifestly misleading comparisons between the Postal Service and various enterprises in the private sector, while ignoring the many and varied burdens and obligations unique to the Postal Service. In so doing, the AMA also ignores the significant cost cutting efforts the Postal Service has vigorously pursued over the last decade, including since the passage of the PAEA.

Therefore, for the reasons stated below, the Commission should refuse the AMA's invitation to go "through the looking glass," deny the motion, and proceed to a

consideration of whether the Postal Service's requested rate increases are "reasonable and equitable and necessary."

### **SUMMARY OF ARGUMENT**

The AMA's motion provides no basis for summarily dismissing the Postal Service's request in this proceeding. Procedurally, there is no basis under the statute or the Commission's rules for the summary dismissal of this request. Under the Administrative Procedure Act, ratemaking is rulemaking, as opposed to adjudication. In the rulemaking context, principles by which an adjudicatory proceeding may be summarily dismissed do not apply, although final rules might be challenged for lack of statutory authority. In this case, there is no question that under the statute and the Commission's rules, the Postal Service is authorized to initiate this request, and the Commission is authorized to conduct the proceeding and make its required determinations. The notion that the process might be preempted by what are essentially initial comments, in the guise of a motion to dismiss, has no place.

Substantively, the Motion is wholly deficient, in both its interpretation of the "extraordinary or exceptional circumstances" prong of the exigency standard provision, and in its interpretation of the requirement that an exigent increase be "reasonable and equitable and necessary 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."

#### **Extraordinary and Exceptional**

With regard to the threshold "extraordinary or exceptional circumstances" standard, the Postal Service's request is clearly authorized by the fact that the Postal

Service has suffered severe volume declines in the past several years. One has to go back to the Great Depression to find year-to-year volume declines that are comparable to these declines. This reflects the exceptional severity of the recent recession. Clearly, volume declines of such a precipitous and historic nature constitute circumstances that are “extraordinary” or “exceptional” within the plain meaning of those terms.

Rather than demonstrating that these volume declines do not rise to the plain and ordinary meaning of those terms, AMA attempts to argue that exigent circumstances must be foreseeable and that economic downturns are inherently foreseeable events. However, its argument is clearly foreclosed by the plain language and legislative history of the statute, as the Commission has previously recognized. Moreover, even if AMA were correct on this point, the current circumstances would still justify the filing of an exigent request, because the severity of the current recession and the historic declines in volume were clearly unforeseeable.

AMA’s reasoning reflects a belief that “extraordinary or exceptional circumstances” cannot encompass severe and abnormal volume declines precipitated by an economic downturn, and that the standard can only be satisfied through an event such as a terrorist attack or a natural disaster. However, there is nothing in the plain language of the statute that supports this interpretation. Furthermore, Interpreting the standard as excluding exceptional volume declines due to economic events would be wholly illogical, because the declines recently experienced by the Postal Service are much more significant than the declines that occurred following 9/11 or the anthrax mailings. In determining whether “extraordinary or exceptional circumstances” have

arisen, it is bizarre to focus solely on what type of event occurred to the exclusion of the impact of that event on the Postal Service.

The AMA's argument that approval of this request would make the cap a "dead letter" is premised on a blatant mischaracterization of the true nature of the circumstances leading to this proceeding. Approval of this request would simply recognize that the year-to-year volume declines not experienced since the Great Depression, precipitated largely by an economic recession generally regarded as the worst since the Great Depression, constitute "extraordinary or exceptional circumstances," which is a straightforward interpretation of the statutory standard. If anything, it is AMA that is trying to interpret the exigency clause out of the statute, by arguing that it cannot be employed, regardless of how many "extraordinary or exceptional" events may occur, unless and until a whole host of legislative and political changes fundamentally alter the legal and political context in which Postal Service is required to operate.

#### The Necessity of this Increase

AMA's motion is gravely deficient in its attempt to argue that this increase is not "necessary" because the Postal Service has failed to practice "honest, efficient, and economical management" (HEEM). As an initial matter, AMA paints a misleading and incomplete picture of the performance of Postal Service management. A price cap predicated on CPI-U is very challenging, because the majority of the Postal Service's costs are outside of management control (including health care, worker's compensation, Federal pensions, wages, and network expansion), and because in many instances

these costs increase above (and oftentimes rapidly above) general inflation. In addition, the PAEA did not give the Postal Service any significant additional tools to cut its costs, and in fact imposed a significant new cost on the Postal Service, in the form of mandated pre-funding of retiree health benefits payments.

The Postal Service met these challenges in the form of significant cost-cutting using the tools within its control, constituting over \$6.0 billion in FY 2009 alone. For FYs 2007-2009, the career workforce decreased by 114,000 full-time equivalents (FTEs), representing \$7.7 billion in annual savings going forward; for the ten year period ending at the close of FY 2009, the career workforce declined by 215,000 FTEs, representing \$13 billion in annual savings. The Postal Service has accomplished all of this while maintaining high levels of service. In fact, Postal Service revenues would have exceeded costs over the past several years, despite historic volume losses, if it were not for the billions of dollars of retiree health benefits payments paid by the Postal Service since the enactment of the PAEA (an expense that any normal firm facing a financial crisis would likely forgo). These results reflect the practice of “honest, efficient, and economical management,” using the tools within the Postal Service’s control. However, because of the substantial portion of its costs that are non-volume variable, it is simply unrealistic to expect the Postal Service to be able to keep its bottom line intact in the face of major and continuing volume declines while attempting to stay within a price cap that does not take volume trends into account.

In addition to a misleading discussion of past management performance, AMA inappropriately seeks to bifurcate the “necessary” component of the exigency provision into two separate inquiries, by arguing that the clause requires a retrospective review of

prior management performance. However, the “necessary” clause is a single, *prospective* inquiry, which is directed solely to determining whether a certain level of above-cap revenues are “necessary” going forward to provide adequate service, assuming that the Postal Service acts in an honest, efficient, and economical manner.

AMA argues that inefficiencies purportedly reflecting a failure by the Postal Service to abide by the HEEM standard will be perpetuated in the future, thereby rendering this increase unnecessary. In doing so, AMA fails to present an accurate picture of the actions taken by Postal Service management, both before and during the current recession, as discussed above. AMA also fails to construct a useful, fair, or accurate basis to evaluate the HEEM standard. In determining the meaning of that standard, the Commission must consider the legal and political context in which postal management operates, because that context reflects the fact that Congress legitimately considers a wide range of societal policy concerns to be important when operating the Postal Service, extending beyond, and often elevated above, the AMA’s narrow views of efficiency. The HEEM standard cannot be interpreted so as to condemn Postal Service management as being dishonest, inefficient, or uneconomical for its failure to take actions where Congress has largely or entirely constrained the Postal Service’s discretion. Nor can it be interpreted so as to essentially require that an exigent increase cannot occur until Congress revamps the statutory and political environment in which the Postal Service operates, or until the Postal Service disregards its current obligations as a Federal entity.

AMA focuses on three areas in which it claims that Postal Service management has engaged in dishonest, inefficient, and uneconomical management: rationalization of

the mail processing network, size of the workforce, and employee compensation. However, AMA fails to address the extent to which legal and political factors inhibit managerial discretion in these areas.

With regard to labor costs, AMA fails to account for the differences between the Postal Service and private employers, both factually, in terms of the high rate of postal unionization, and legally, in terms of the statutory guarantees and leverage given to Postal Service employees. AMA goes on to criticize particular labor costs and decisions out of context, without discussing the relevant constraints or mitigating factors. (For example, the current labor agreements were negotiated before the recession, when mail volume was at its peak.) Nor does AMA balance these isolated criticisms against the substantial cost cuts the Postal Service has made notwithstanding its constraints.

With regard to network consolidation, political circumstances oftentimes turn Postal Service closure or consolidation initiatives into a Sisyphean task. AMA also ignores the fact that the biggest cost savings when it comes to the network is in staffing rather than the reduction of brick and mortar facilities, and Postal Service management has, using the tools within its control, achieved significant reductions in plant costs through workforce declines.

Comparisons to the private sector are also misleading, unless the legal and political context in which the Postal Service operates is taken into account. While AMA points to UPS and FedEx as firms with management that meet the HEEM standard, and suggests that the Postal Service has violated that standard because it did not undertake the steps that UPS and FedEx did to return to profitability during the recession, AMA fails to discuss the significant differences between UPS and FedEx on the one hand,

and the Postal Service on the other. The AMA also misleadingly suggests that the Postal Service's competitors responded to the recession exclusively through aggressive cost cutting, when in fact UPS and FedEx consistently increased their published rates during the recession. This completely belies the AMA's claim that responding to a financial crisis in part through price increases is diametrically inconsistent with the HEEM standard. Rather, it demonstrates that the balanced approach of cost cuts and revenue increases being pursued by Postal Service management is an eminently reasonable approach.

AMA's other arguments as to why this increase is not "necessary" are unavailing. First, while the Postal Service is seeing some results better than initially projected prior to the beginning of this fiscal year, that does not change the fact that this increase is necessary to help close the Postal Service's financial gap. Second, while it is true that this increase is not sufficient by itself to resolve the Postal Service's financial situation, that fact would be a reason to *increase* the size of the Postal Service's request, rather than decrease or reject it. Indeed, a much larger request could have been justified under the statute as "necessary." However, the Postal Service has responded to its financial challenges by pursuing a broad-based and balanced plan, which shares the burden of closing the financial gap. Nothing in the statute requires that the Commission increase the prices proposed by the Governors for this reason, because the statute simply requires that an increase be "necessary," rather than "sufficient" to cover the financial gap.

Finally, the prospect of legislative action on certain benefit costs does not affect this proceeding. The Commission cannot consider the prospect that such legislation

*might* be enacted as part of the “necessary” analysis, because it must determine what is “necessary” by reference to what is in management’s ability to control. Furthermore, even if such legislation is forthcoming, it would not eliminate the need for the full increase proposed by the Postal Service in this proceeding.

## **DISCUSSION**

### **I. THERE IS NO PROCEDURAL BASIS FOR THE SUMMARY DISMISSAL OF THIS RULEMAKING PROCEEDING**

AMA characterizes its pleading as a motion to dismiss for failure to “satisfy 39 U.S.C. § 3622(d)(1)(E).” Motion at 1. AMA appears to assume that an exigency rate proceeding initiated by the Postal Service under this provision and the Commission’s rules is amenable to dismissal, or, in effect, summary judgment, in the sense those results are commonly sought in adjudications. AMA cites no statutory or regulatory basis for this assumption.

While the PAEA does not specify statutory procedures for conduct of Commission hearings under the exigency provision, except in requiring that “an opportunity for public hearing and comment” be provided, the Commission’s general rulemaking authority is exercised under the Administrative Procedure Act (APA). See 39 U.S.C. § 503 (incorporating 5 U.S.C. chapters 5 and 7). Under the APA, ratemaking is rulemaking, as opposed to adjudication. *Compare* 5 U.S.C. §§ 551(4), (5) and (6), (7). In the rulemaking context, principles of jurisdiction or summary judgment simply do not apply, although final rules might be challenged for lack of statutory authority. In this case, there is no question that, under the statute and the Commission’s general and specialized procedures for conducting exigency proceedings, the Postal Service is authorized to initiate the rate change, and the Commission is authorized to conduct the

proceeding and make its required determinations. The notion that the process might be preempted by a motion to dismiss has no place. Even under the Postal Reorganization Act, where ratemaking proceedings were governed by formal rulemaking procedures under the APA, attempts to preempt proceedings were never successfully employed. In that context, the Commission's rules did provide for rejection of a Postal Service Request, but only for failure to comply with substantive and procedural filing requirements. 39 C.F.R. §§ 3001.54(s), 3001.64(i). Here, the Commission's specialized procedures for exigency rate changes do not contemplate or provide for preemptory challenges. 39 C.F.R. Part 3010, Subpart E. As such, the Commission should deny this motion as procedurally improper, and proceed according to the set procedural schedule.

## **II. THE PRECIPITOUS AND UNPRECEDENTED DROP IN VOLUME IN THE PAST FEW YEARS CONSTITUTES EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES**

The threshold issue in applying section 3622(d)(1)(E) is determining whether “extraordinary or exceptional circumstances” have occurred:

notwithstanding any limitation set under subparagraphs (A) and (C), and provided there is not sufficient unused rate authority under paragraph 2(C), establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances, provided that the Commission determines, after notice and opportunity for a public hearing and comment, and within 90 days after any request by the Postal Service, that such adjustment is reasonable and equitable and necessary 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.

From the structure of section 3622(d)(1)(E), the occurrence of “extraordinary or exceptional circumstances” is not identified as something that the Commission must

determine; in contrast, the statute expressly identifies the Commission as the body which determines whether the exigent increase is “reasonable and equitable and necessary.”<sup>1</sup> However, the issue of whether the Governors’ determination that “extraordinary or exceptional circumstances” have occurred is subject to second-guessing in a close case need not be resolved definitively now, because, as discussed below, such circumstances have clearly occurred in this case. While the AMA argues that this standard has not been met, its argument is fatally flawed in that it disregards the plain meaning of the terms, incorrectly argues that “extraordinary or exceptional circumstances” have to be “unforeseeable” despite clear Commission recognition that this is not an accurate interpretation of that standard, and unconvincingly minimizes the extreme and historic (and, incidentally, unforeseen) declines in mail volumes that have largely been precipitated by the recent recession.

**A. The Recent Volume Declines are “Extraordinary or Exceptional” Within the Plain Meaning of Those Terms.**

In interpreting the meaning of “extraordinary or exceptional,” the Commission must start by considering the plain, ordinary meaning of those terms. See Dean v. United States, 556 US \_\_\_, \_\_\_, 129 S.Ct. 1849, 1853 (2009) (noting that statutory interpretation must start with “the language of the statute”); Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) (noting that terms that are undefined by a statute are given their “ordinary meaning”). “Extraordinary” is defined as “beyond what is usual, ordinary, regular, or established,” while “exceptional” is defined as “forming an

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<sup>1</sup> AMA is thus incorrect when it asserts that section 3622(d)(1)(E) explicitly provides that the Commission makes the determination as to whether “extraordinary or exceptional circumstances” have occurred. Motion at 13-14. In contrast, on pages 2-3 of its June 9, 2010 pleading in Docket No. PI2010-3, Valpak correctly notes the statutory distinction between the three determinations that the Commission is required to make, and the separate provision regarding “extraordinary or exceptional circumstances.”

exception or rare instance” or “unusual.” See WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY 674, 686 (1996). Under either of these terms, the filing of this exigent request by the Postal Service is clearly authorized by the severe and sudden declines in volume that have recently occurred, most of which were precipitated by the recent recession.

As witness Corbett explains, the Postal Service has suffered severe volume declines in the past several years: from the first quarter of FY 2007 through the second quarter of FY 2010, mail volume fell a total of 20.1 percent. See Corbett Statement at 3. In FY 2009 alone, volumes declined by 12.7 percent. See Postal Service FY 2009 Annual Report (Form 10-K) at 2. By comparison, all previous recessions since the creation of the Postal Service have had a smaller cumulative impact than this recession. Id. at 11. The anthrax and 9/11 attacks also had a dramatically smaller cumulative effect on volumes. Corbett Statement at 3 (noting that the volume declines “dwarf[ ] the impact of the 2001 recession, 9/11, and anthrax attacks combined.”). In fact, one has to go back to the Great Depression to find year-to-year volume declines that are comparable to the declines that have been experienced by the Postal Service. Id. at 4; PRC FY 2009 Annual Report at 20-22 (recognizing that the “Postal Service has experienced the largest year-to-year declines in mail volume since the 1930’s Depression era.”). This reflects the fact that the current recession is generally regarded as the most severe economic downturn since that era. Corbett Statement at 13-15.

Clearly, volume and revenue declines of such a precipitous and historic nature constitute circumstances that are “beyond what is usual, ordinary, regular, or

established,” “forming an exception or rare instance,” or “unusual.”<sup>2</sup> In the face of the abrupt and severe volume declines described by witness Corbett, AMA’s one-paragraph dismissal of the current recession as simply a “fact of life” that was merely of “above-average severity” (Motion at 66) does not withstand even minimal scrutiny. Indeed, the AMA does not even attempt to address the volume and revenue declines discussed by witness Corbett, or seek to demonstrate that they do not rise to the plain and ordinary meaning of “extraordinary or exceptional.”<sup>3</sup> Rather, the AMA simply claims that recessions are a “fact of life,” and cannot constitute an “extraordinary or exceptional circumstance” because they are foreseeable. As discussed below, however, this constitutes an incorrect interpretation of the “extraordinary or exceptional” standard; furthermore, even if it were correct, the severity of the current recession, and the historic declines in volume that have occurred, were clearly unforeseeable.<sup>4</sup>

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<sup>2</sup> The Motion spends a great deal of time arguing that electronic diversion does not constitute an “extraordinary or exceptional circumstance.” Motion at 35-39, 65. All of this is irrelevant, because the Postal Service is not claiming for purposes of this proceeding that electronic diversion, standing alone, constitutes “extraordinary or exceptional circumstances.” This is clear from the statement of witness Corbett, which identifies the severe, abrupt, and historic volume losses precipitated by the recession. See Corbett Statement at 11-16. Electronic diversion is relevant to this proceeding in that the current economic circumstances clearly accelerated what was heretofore a gradual, long-term trend. Moreover, it is not necessary in this proceeding to determine what the volume loss might have been had the country experienced more ordinary economic times.

<sup>3</sup> Yet, one prominent member of the AMA, the Association for Postal Commerce, was more forthcoming as the circumstances experienced by the Postal Service, noting that recent volume declines had been “precipitous.” See Docket No. R2009-3, Comments of the Association for Postal Commerce in Response to Order No. 209 Concerning Standard Mail Volume Incentive Pricing Program at 1-2 (May 19, 2009) (noting that the “Summer Sale” “offers an opportunity for the Postal Service to mitigate some of the losses it is experiencing during this recession, and temporarily reverse the continuing and precipitous declines in mail volumes. Postal leadership has observed that the last fiscal year saw the greatest declines in mail volume since the Great Depression, and this year looks to be even worse.”). In addition, Time Warner, the parent company of Time Inc. (another member of the AMA), also recognized the consequences of the “severe economic downturn” on the Postal Service. See Docket No. ACR2009, Initial Comments of Time Warner Inc. on ACR2009 Pursuant to Order No. 380 at 20-21 (February 1, 2010).

<sup>4</sup> Moving beyond the plain language of the statute, the Motion also cites to other price cap regimes, and the standards that govern when those price caps may be pierced. Motion at 12-13. While such information may be interesting from an academic perspective, it is fundamentally irrelevant whether this increase would be allowed by the FCC if the Postal Service was a private sector entity providing telecommunications services. The Commission must interpret the PAEA, as applied to the Postal

The AMA's dismissal of recessions as being a "fact of life" reflects a belief that "extraordinary or exceptional circumstances" cannot encompass precipitous volume declines due to an economic downturn. Indeed, if the current circumstances do not qualify as "extraordinary or exceptional," considering the severity of the current recession and its impact on the Postal Service, it is hard to imagine any volume declines due to an economic event ever qualifying. However, nothing in the plain meaning of the terms "extraordinary" or "exceptional" suggest that they cannot describe an economic crisis of abnormal, unusual, or rare severity, such as one that precipitates dramatic volume declines of such magnitude as the current crisis. Rather, the ordinary meaning of the qualifiers "extraordinary or exceptional" can describe numerous types of circumstances that are abnormal, rare, or unusual. Interpreting the standard as excluding exceptional volume declines due largely to economic events would, furthermore, be wholly illogical. While all parties seem to accept that a terrorist attack along the lines of 9/11 or the anthrax mailings would qualify as "extraordinary or exceptional," the financial effects of those attacks on the Postal Service were, as noted above, relatively insignificant when compared to the effects of the current recession. In determining whether "extraordinary or exceptional circumstances" have arisen, it is bizarre to focus solely on what type of event occurred to the exclusion of the impact of that event on the Postal Service's finances.

Finally, AMA attempts to bolster its claims with selective citations to post-enactment legislative statements. This is unavailing, because such statements cannot be used to avoid the plain language or legislative history of the statute. See Pittston

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Service, rather than applying regulations established by other regulatory bodies in completely different contexts.

Coal Group v. Sebben, 488 U.S. 105, 118-119 (1988); Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (“Post-enactment legislative history is not only oxymoronic but inherently entitled to little weight”). Indeed, if post-enactment legislative statements were relevant (which they are not), the best source would seem to be the joint letter sent to the Commission in April 2007 by Senators Collins and Carper during Docket No. RM2007-1, which was more contemporaneous to the passage of the PAEA. See Letter from Senators Collins and Carper to Commission Chairman Blair (dated April 6, 2007, posted on Commission website April 11, 2007). In that letter, Senators Collins and Carper noted that “extraordinary or exceptional circumstances” include not only terrorist attacks and natural disasters, but also “other events that may cause significant and substantial declines in mail volume...that the Postal Service cannot reasonably be expected to adjust to in the normal course of business.” Id. at 2. The Postal Service has undoubtedly experienced “significant and substantial declines in mail volumes” in recent years, due to the current economic downturn. Furthermore, as discussed in more detail below, the abruptness and severity of the decreases, when combined with the restrictions on the Postal Service’s ability to reduce costs and increase revenue, especially in the short-term, has prevented the Postal Service from adhering to the CPI-U cap while maintaining its financial integrity.

**B. “Extraordinary or Exceptional Circumstances” Do Not Need to be Unforeseeable.**

Neither the ordinary meaning of “extraordinary” nor “exceptional” dictates that a circumstance must be “unforeseeable” in order to qualify. The AMA argues to the

contrary, asserting that the standard “*implies...unforeseeability.*” Motion at 14 (emphasis added).<sup>5</sup> However, the only support mustered for this assertion is a citation to Order No. 26, in which the Commission characterized the exigency clause as dealing with “unforeseeable emergencies.” *Id.* at 14 (citing Order No. 26 at ¶ 2105). This overlooks the fact that, after several parties pointed out that this characterization was inconsistent with the statutory language and the legislative history of the exigency provision, the Commission retracted the statement, noting that “[t]he text of Order No. 26 and the related rule were inexact in this respect.” See Order No. 43 at ¶¶ 2210-11. In fact, one of the parties making the point that the Commission had incorrectly characterized the nature of the exigency standard in Order No. 26 was Time Warner, Inc., the parent company of Time Inc., which is listed as a member of the AMA. See Docket No. RM2007-1, Reply Comments of Time Warner Inc. to Initial Comments on Commission Order No. 26 at 5 (October 9, 2007) (“Moreover, it is difficult to argue with the proposition that the terms “extraordinary or exceptional” and “necessary,” while they may connote circumstances that are quite unusual and entail some degree of urgency, cannot, without exceeding their definitional breaking point, be made synonymous with “unforeseen emergency.”).

The Commission has therefore recognized that the plain language of the statute does not require an “extraordinary or exceptional circumstance” to have been

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<sup>5</sup> In making this argument, counsel for AMA apparently take inspiration from the Humpty Dumpty character in Lewis Carroll’s “Through the Looking Glass,” who has the following exchange with Alice:

‘I don’t know what you mean by “glory”,’ Alice said.

Humpty Dumpty smiled contemptuously. ‘Of course you don’t – till I tell you. I meant “there’s a nice knock-down argument for you!”’

‘But “glory” doesn’t mean “a nice knock-down argument”,’ Alice objected.

‘When I use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means what I choose it to mean – neither more nor less.’

“unforeseeable.” This is also confirmed by the legislative history. The Senate version of the PAEA would have required that an above-cap increase be justified by “*unexpected and extraordinary circumstances.*” See H.R. 22, 109<sup>th</sup> Cong., § 201(a) (February 9, 2006) (as passed by Senate) (emphasis added). The final version of the legislation, however, dropped the requirement that the circumstances be “unexpected,” and thus dropped the requirement that exigent circumstances must be unforeseeable. This was discussed in the comments of the National Postal Mail Handlers Union and Time Warner in Docket No. RM2007-1, comments with which the Commission agreed in Order No. 43.

The inappropriateness of considering foreseeability as an essential aspect of interpreting the meaning of “extraordinary or exceptional” is further demonstrated by the fact that many rare or unusual events can be characterized as “foreseeable,” including events that would presumably qualify as being “extraordinary or exceptional” under the AMA’s view of the provision. For instance, terrorist attacks have unfortunately occurred with sufficient regularity in the United States and other developed nations that one might prudently factor their impact into business plans.<sup>6</sup> The annual occurrence of a “hurricane season” in the Gulf of Mexico is well-known, and modern meteorology provides the public with ample warning of advancing storms. No one has yet claimed that the regularity of such events or their presence in the public consciousness would disqualify them from constituting “extraordinary or exigent circumstances,” nor could one seriously do so without altogether stripping 39 U.S.C. § 3622(d)(1)(E) of meaning. Rather than engage in arcane disputes about whether a particular circumstance could

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<sup>6</sup> The Department of Homeland Security currently classifies the risk of terrorist attacks as being “significant.” See “Homeland Security Advisory System”, *available at* [http://www.dhs.gov/files/programs/Copy\\_of\\_press\\_release\\_0046.shtm](http://www.dhs.gov/files/programs/Copy_of_press_release_0046.shtm).

arguably have been foreseen, the focus of the exigent inquiry should be its impact on the Postal Service's finances. By the same token, the Postal Service does not claim that the current volume decline meets the statutory threshold because economic downturns are generally unpredictable, but rather because of the unprecedented impact of *this* recession on the Postal Service's financial integrity.

**C. Even If “Extraordinary or Exceptional Circumstances” Had to be Unforeseeable, the Current Circumstances Would Qualify**

The AMA's re-hashing the argument about whether the “extraordinary or exceptional” standard encompasses unforeseeability is also irrelevant, because even if the AMA were correct on this point (which it is not), the current circumstances would still qualify. While it is undoubtedly true that recessions occur as a normal part of the business cycle, it is also true that the current recession has been exceptionally severe, and that previous recessions have not come close to matching the current recession in terms of the sudden, devastating, and unprecedented effect it has had on postal volumes and revenues, and on the Postal Service's financial integrity. See Corbett Statement at 11-16. The severity of the current recession, and its effects on the Postal Service, were most certainly unforeseeable. Id.

Consider, for example, the precipitous decline in Standard Mail volumes. Total Standard Mail revenue declined by 15.4 percent in calendar year 2009 (2009Q2 - 2010Q1). But, according to MAGNA, total advertising expenditures declined 15.3 percent in calendar year 2009. In December, 2008, Bob Coen (the predecessor to MAGNA's forecaster) predicted total U.S. advertising expenditures would decline by 3 *percent* for calendar year 2009. Recalling that a forecast such as Mr. Coen's made in December of 2008 was finalized *after* the Lehman Brothers / AIG / TARP crisis from that

fall, it is quite clear that the 2009 advertising collapse was as swift as it was unexpected. So while the effects of the recession were by no means limited to Standard Mail, it was in that segment of the business that the scope of the damage was most stark.

Overall, to claim that the current circumstances were foreseeable, and to assert that the Postal Service should have “anticipated and mitigated” (Motion at 16 n.8) the onset of a financial crisis that is widely seen as the most severe in the post-war period, and which has caused a sudden decline in mail volumes unprecedented since the Great Depression, is wholly unreasonable.

**D. Exceeding the Cap Due to These Circumstances Would Not Diminish the Requirement to Adhere Strictly to the Cap in Normal Circumstances.**

The nature of the current recession and its severe impact on the Postal Service demonstrate that the AMA is engaging in blatant hyperbole when it claims that approval of this exigent increase would make the cap a “dead letter.” Motion at 71-72. The AMA pontificates that:

This case should be recognized for what it is: less than four years after PAEA became law, the proposed rate increases would nullify the primary line of defense established by Congress to protect mailers and the American public from abuse of the Postal Service’s market power. If the increases are approved, the central regulatory constraint of PAEA will be dead. With traditional cost-of-service regulation of class-wide rate increases having been repealed in 2006, allowing the Postal Service to breach the CPI cap whenever the Postal Service expects to lose money would eliminate any regulatory discipline on the Postal Service to control its costs.

Id. at 5. Approval of this request would do absolutely nothing of the sort. Rather, approval of this request would simply recognize that year-to-year volume declines not experienced since the Great Depression, precipitated largely by an economic recession generally regarded as the worst since the Great Depression, constitute “extraordinary or exceptional circumstances,” which is a straightforward interpretation of the statutory

standard. The Postal Service's request certainly does not represent an effort by the Postal Service to, in the AMA's words, "breach the CPI cap whenever [it] expects to lose money," a premise that is a blatant mischaracterization of the true nature of the circumstances leading to this proceeding. Recognizing that this case is predicated on "extraordinary or exceptional circumstances" would therefore in no way diminish the stringency of that standard, or undercut the efficiency incentives of the price cap. Nor is it relevant that this case comes four years after the passage of the PAEA, as there is nothing in the statute that states that an "extraordinary or exceptional circumstance" can only occur a certain period of time following passage of the legislation.

Rather, the primary concern should be exactly the opposite of that suggested by the AMA. If the Commission were to deny the requested price adjustments on the grounds advocated by the AMA, the Postal Service's ability to use the *only* safety valve incorporated into the PAEA's price cap regime would be effectively eliminated. The AMA is essentially arguing that unless changes are made to the political and legal structure in which management must operate to address and resolve conditions concerning labor costs and the network, then the prerequisites for an exigent adjustment cannot be met. Yet the AMA itself concedes these conditions have existed for decades, and have been extensively chronicled by Congress, the Postal Service, executive review panels and commissions, the General Accountability Office, the Postal Rate and Regulatory Commissions, and every other interested stakeholder. The AMA does not seem to consider that the persistence of these conditions reflects the policy environment in which the Postal Service is expected to operate, and which constrains management discretion. Rather, the AMA's position would not allow exigent increases

until universal consensus was reached that the Nirvana state of “best practices of honest, efficient, and economical management,” as determined by the AMA, had been achieved.

So, for example, if there were another major act of terrorism, or a monumental natural disaster, regardless of the effects of such a trigger event on the Postal Service’s finances, the AMA’s position would nonetheless preclude any exigent increase if long-standing unrelated matters such as network realignment or pay comparability had not been resolved to its satisfaction.<sup>7</sup> Consequently, the AMA is not merely arguing that the current exigent proposal should not be allowed, but rather is espousing positions that, as a practical matter, would likely preclude *any* exigent increase over the foreseeable time horizon, regardless of how many “extraordinary or exceptional circumstances” occur, unless and until there are a whole host of legislative and political changes that fundamentally alter the business model under which the Postal Service is required to operate. From the AMA’s perspective, it is apparently acceptable to have a safety valve appear as part of the statutory price cap regime, as long as the Postal Service in reality can never be authorized to use it under current law. It is the AMA, not the Postal Service, that is trying to rewrite the statute to deviate from the more balanced approach actually adopted by Congress in the PAEA.

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<sup>7</sup> AMA is very explicit and emphatic about this view in its Motion. After claiming to identify opportunities for the Postal Service to become more efficient by closing and consolidating plants (pg. 25), and similar opportunities from reducing the size and cost of its workforce (pg. 30), AMA makes the following blanket (and identical) statement with regard to both types of alleged opportunities:

Until the Postal Service has exhausted these opportunities, an exigent rate increase cannot be found “necessary” under Section 3622(d)(1)(E) to the continued provision of adequate postal services to the American people.

Motion at 25, 30. A similar statement with respect to compensation premiums is made on page 34 of the Motion.

Finally, in addition to arguing that the current recession was foreseeable, the AMA argues that it was not severe enough to constitute “extraordinary or exceptional circumstances” because the Postal Service could have weathered the current recession better if had been managed in an honest, efficient, and economical manner. Motion at 66. As demonstrated above, however, it is hard to imagine a financial crisis having a more severe impact on the Postal Service. Furthermore, as discussed below, the AMA cannot demonstrate that the Postal Service failed to engage in honest, efficient, and economical management during the recession, because an accurate assessment of the facts yields the opposite conclusion. Finally, the argument as to whether the Postal Service could have weathered the crisis better inappropriately conflates the two prongs of the exigency clause, because if it is relevant it goes to whether this exigent request is “necessary.” This determination is distinct from whether “extraordinary or exceptional circumstances” have occurred.

**III. THE MOTION PROVIDES NO BASIS FOR CONCLUDING THAT THE POSTAL SERVICE’S REQUESTED INCREASE IS NOT “NECESSARY” WITHIN THE MEANING OF THE EXIGENCY PROVISION**

The second prong of the exigency provision is the requirement that the Commission determine whether the rate adjustments proposed by the Postal Service are “reasonable and equitable and necessary 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 bulk of AMA’s motion is an indictment of the leadership of the Postal Service, alleging decades of mismanagement, and arguing that this request must be dismissed because prior performance in an “honest, efficient, and economical manner” is a “condition for any exigent rate increase,” and that the “Postal Service’s

projected losses could be avoided through more efficient and economical management.” Motion at 4, 17. Considered as an exercise in polemics, the AMA’s pleading is a competent, if pedestrian, example of the genre. Considered as the basis for the relief it seeks, however, the AMA’s arguments quickly collapse into a pastiche of selective memory, misunderstanding, and misrepresentation, leavened with a healthy dose of willful ignorance of the legal and political context in which the Postal Service operates.

**A. The Language of the Exigency Provision that Follows “Necessary” is an Integrated, Forward-Looking Determination.**

As an initial matter, the AMA inappropriately seeks to bifurcate the “necessary” component of the exigency provision into two separate inquiries, arguing that the first inquiry is whether the Postal Service has previously engaged in “honest, efficient, and economical management” (“HEEM”), with the second inquiry being whether above-cap increases are necessary to enable the Postal Service to continue providing service adapted to the needs of the United States. Motion at 13-14. However, this approach is inconsistent with the language of the exigency provision, which shows that the “necessary” inquiry is plainly an integrated, forward-looking inquiry.

In particular, the exigency provision directs the Commission to determine whether an exigent increase is “necessary to *enable* the Postal Service” to “*maintain and continue*” the provision of universal postal services adapted to the needs of the United States, if the Postal Service acts in an “honest, efficient, and economical” manner. The terms “enable,” “maintain,” and “continue” are forward-looking terms. Furthermore, the HEEM standard is an integral component of that forward-looking inquiry, rather than a separate element. Prior performance in an honest, efficient, and

economical manner is therefore not a “condition for any exigent rate increase,” as the AMA asserts (Motion at 4) (and, even if it was, the AMA’s arguments would still fail, for the simple fact that management has been engaging in “honest, efficient, and economical management,” as properly understood, a topic that is discussed below). Rather, the consideration of management performance is directed solely to determining whether a certain level of above-cap revenues are “necessary” going forward to provide adequate service, assuming that the Postal Service acts in an honest, efficient, and economical manner. See also Docket No. RM2007-1, Reply Comments of Time Warner Inc. to Initial Comments on Commission Order No. 26 at 6-7 (noting that “the natural reading of the “honest, efficient, and economical management” language is that it is *prospective* in outlook, i.e., that the requested revenues must be necessary in order to *go forward* with management of the Postal Service on an “honest, efficient, and economical” basis.”) (emphases in original).

The forward-looking nature of the exigency provision necessarily limits the scope in which considerations of past performance are relevant. In particular, a party’s claims that the Postal Service is being managed in a manner inconsistent with the HEEM standard are only relevant if they are perpetuated in the Postal Service’s projections. In this respect, the AMA does argue that Postal Service’s roll-forward contains excessive costs because it does not assume efficiency savings that the AMA believes should be achieved. Motion at 55-57. While this is an argument that is better tuned to the language of the statute, it does not get the AMA anywhere, because the AMA is unable to demonstrate that the Postal Service has acted in a manner inconsistent with the standard. First, and most importantly, in considering the extent to which additional

revenues are necessary to provide adequate services through HEEM, it is imperative to take into account the legal and political realities facing the Postal Service. Indeed, while the AMA notes that certain things it believes are inefficiencies have existed for a long time, it does not seem to recognize that this fact demonstrates that these things are structural, and reflect the legal and political expectations as to how the Postal Service is to operate. These expectations distinguish the Postal Service from private sector enterprises.

Second, it is important to note that simply identifying a purported inefficiency is not a basis for a summary dismissal of an exigent request. At the very least, a party must show that the inefficiency exists, that it is within management's control to eliminate within a relevant period of time, and that if management eliminated the inefficiency, it would completely eliminate the need for the above-cap increase. As a dispositive motion, therefore, the AMA's pleading is deficient. The AMA should not be allowed to short-circuit the procedural schedule established by the Commission, which implements the public hearing and comment process required by the statute, and set forth in its rules, by filing what are essentially initial comments in the guise of a dispositive motion to dismiss.

**B. The AMA Sets Forth a Flawed and Misleading Discussion of the “Honest, Efficient, and Economical” Standard, and the Postal Service’s Adherence Thereto.**

**1. Account must be taken of the legal and political context in which the Postal Service is expected to operate.**

The AMA focuses on three areas in which it claims that Postal Service management has engaged in dishonest, inefficient, and uneconomical management:

rationalization of the mail processing network, size of the workforce, and employee compensation. In particular, the AMA argues that the Postal Service could reduce its costs going forward if it negotiated reductions in employee headcount, elimination of the limitations against lay-offs, and reduced compensation, and if it rationalized its network. Motion at 55-56. The AMA does not even address, however, the extent to which such matters are within Postal Service management's control.

This is a grave deficiency in the motion, because in determining the meaning of HEEM standard as set forth in the exigency provision, it is necessary for the Commission to consider the legal and political context in which postal management operates, since that context reflects determinations by Congress as to how the Postal Service should be operated. It is this context, which differs significantly from the environment relevant to private sector entities, which makes comparisons to the private sector misleading in many instances. It would be perverse to condemn Postal Service management as being dishonest, inefficient, or uneconomical for its failure to take actions which Congress does not want the Postal Service to take, and for which Congress has therefore largely or entirely constrained its discretion. Considering the entire legal context is also consistent with the principle that a statute must be interpreted as a whole. *See, e.g., FDA v. Brown and Williamson Tobacco Corp.*, 529 US 120, 132-33 (2000). The Commission cannot interpret the HEEM standard as essentially requiring that Congress revamp the statutory environment in which the Postal Service operates, or as prompting the Postal Service to disregard its obligations as a Federal entity.

The HEEM standard therefore cannot be interpreted in the abstract, without consideration of the legal and political context in which Postal Service management operates.<sup>8</sup> The statutory context in which the Postal Service operates sets forth a variety of policies affecting the Postal Service's ability to cut costs, which reflect the fact that Congress legitimately considers a wide range of societal policy concerns to be important when operating the Postal Service, that extend beyond, and that are oftentimes elevated above, the AMA's narrow views of efficiency. For instance, as discussed in more detail below, the statute contains a number of provisions that reflect Congress' policies regarding employment with the Postal Service, and Congress specifically stated that the PAEA should not be read so as to diminish or affect the rights and privileges of Postal Service employees. Other statutory provisions also affect management's discretion to cut costs in a manner comparable to the private sector. For instance, private parties generally have the unilateral discretion to close money-losing retail outlets, or eliminate money-losing products, or, in the case of private delivery providers, change their delivery frequencies to low-volume areas.

In addition to the statute itself, Congressional policies are also advanced in more informal ways, which still directly affect the options available to Postal Service management. The Postal Service operates as part of the Federal government, and as a practical matter thereby is required to act not only in accordance with its statutory

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<sup>8</sup> Not only does AMA not address this in its Motion, it went out of its way to avoid any mention of the fact that Postal Service management's discretion can be constrained. For instance, while it quotes directly from Senator Carper's opening statement at a Senate hearing on June 23, 2010, it omits the portions of his statement that noted that:

Congress also has a role to play. All too often, we criticize the Postal Service for various management and service problems but then stand in the way when the Postmaster General puts painful but necessary changes on the table.

mandate, but also with other expressions of Congressional will. As a consequence, the Postal Service is required to balance potentially competing concerns in ways in which no private entity is so obliged. In purporting to evaluate the Postal Service performance against the HEEM standard, therefore, it is absolutely necessary to acknowledge that a naïve comparison of the private sector with the Postal Service fails to take these factors into account. The AMA certainly has fallen into that trap.

For example, there can be language in House or Senate reports on an Appropriations bill that is to be construed as a Congressional directive.<sup>9</sup> Congressional committees have used this device in each of the last three years, delaying (pending further study by GAO) consolidation efforts affecting specified postal facilities in Quincy IL, Aberdeen SD, Yakima WA, Sioux City IA, Bronx NY, Canton OH, Detroit/Flint MI, Alexandria LA, and Pasadena CA. Likewise, committee report language in the FY 2010 Appropriations bill affected the Postal Service's procurement of rural airmail delivery service in Idaho. The PAEA itself included provisions (in Section 1009) which contained directives regarding specific ZIP Codes and retail hours in a specific retail facility.

Other bills may be introduced which, even if never formally enacted into law, constitute a sufficient indication of Congressional intent to dissuade the Postal Service from pursuing management initiatives that might otherwise improve efficiency. In the last three years, for example, there have been bills introduced that would have impeded pay and/or benefit cuts for supervisors, discouraged management efforts to increase contracting out of delivery services and mail processing, and complicated efforts to close post offices. Postal Service management cannot simply ignore these

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<sup>9</sup> See, e.g., House Report 111-366, Conference Report to Accompany H.R. 3288 (Dec. 8, 2009) at page 379.

manifestations of Congressional intent, and thus, for example, entered into an agreement with the National Association of Letter Carriers limiting further expansion of delivery services by contract carriers.

Congress appropriately decides which policy objectives it wishes to emphasize in particular instances. Postal management appropriately responds to those wishes. Most relevantly for this discussion, however, the environment created in which those ranges of policy objectives are imposed on the Postal Service cannot fairly be compared with the contrasting environment in which private sector firms operate. When the AMA faults postal management for not being able to respond to deteriorating circumstances as nimbly as private sector firms, without taking these considerations into account, it is failing to construct a useful, fair, and accurate basis to evaluate the HEEM standard as it must be applied to the Postal Service.

**a. Labor Costs**

**i. The Postal Service Has Restrictions on Its Bargaining Power as Compared to Private Businesses**

In its litany of Monday-morning-quarterbacking, AMA criticizes the Postal Service's "oversized work force, inflexible work rules, and low productivity," along with "above-market rates of compensation," all of which AMA facetiously claims is a sole result of the Postal Service's failure to negotiate more austere collective bargaining agreements. Motion at 25-34. According to AMA, the Postal Service fiddled the tune of even higher wages, a larger workforce,<sup>10</sup> and lower productivity in collective bargaining

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<sup>10</sup> At least one of AMA's attempted "gotcha" sources bears specific correction. At page 29 of its motion, AMA claims that, at an August 6, 2009, Senate hearing, the Postmaster General "acknowledged that the size of the Postal Service workforce at the time, 630,000 career employees, was still approximately 80,000 positions above an 'optimum' level." Postal Service counsel has reviewed the webcast of this

agreements as the current recession began to blaze, instead of enacting layoffs, furloughs, and wage cuts as many private firms did. Id. at 47-52. Because AMA attributes these sins solely to Postal Service leadership's alleged failure to exercise "honest, efficient, and economical management," AMA argues the Postal Service deserves to be denied the revenue tools to rescue itself.

This line of argument suffers from its obfuscation of a fundamental point: the majority of the private sector, including most members of the AMA, consists of non-unionized employers.<sup>11</sup> Accordingly, such businesses are at greater liberty to cut wages and slash employment levels by managerial decree. As an employer subject to the National Labor Relations Act, the Postal Service cannot unilaterally modify wages, hours, working conditions, or other mandatory subjects for bargaining. E.g., NLRB v. Katz, 369 U.S. 736 (1962). Moreover, even compared with the minority of private-sector businesses whose employees engage in collective bargaining, the Postal Service is precluded from bargaining over statutorily-mandated benefits, including pensions and retiree health obligations, which account for billions of dollars in labor costs. When one considers that FedEx is all but non-unionized<sup>12</sup> and that UPS is not subject to similar

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hearing in vain for such a statement. The only apparent explanation is that AMA is misinterpreting or exaggerating Mr. Potter's response to Senator Collins (not Senator Coburn, as AMA claims), between 109:35 and 110:31 of the webcast. In that colloquy, the Postmaster General compares present employment levels with a 80,000-lower figure that the Postmaster General speculated would "ultimately" (not "optimally") prevail. The U.S. Postal Service in Crisis: Hearing Before the Subcomm. on Federal Financial Management, Government Information, Federal Services, and International Security of the Senate Comm. on Homeland Security and Government Affairs, 111th Cong. (2009), available at <http://www.senate.gov/fplayers/l2009/urlPlayer.cfm?fn=govtaff080609&st=1000&dur=13245>.

<sup>11</sup> The Bureau of Labor Statistics reports that only 7.2 percent of private-sector employees in the United States were union members in 2009. Bureau of Labor Statistics, "Economic News Release: Union Members Summary" (Jan. 22, 2010), at <http://www.bls.gov/news.release/union2.nr0.htm>.

<sup>12</sup> Notwithstanding AMA's glib comparisons between the Postal Service and private integrators' cost-control efforts, fully 98.4 percent of FedEx Express's employees are not affiliated with a union. "FedEx Increases Lobbying Spending to Fight FAA Union Provision," Businessweek, July 20, 2010, <http://www.businessweek.com/news/2010-07-20/fedex-increases-lobbying-spending-to-fight-faa-union->

statutory constraints on its labor negotiations, the glibness of AMA's attempted comparisons between the two integrators' and the Postal Service's cost control efforts should become apparent.

As to other labor-relations matters, the Postal Service is barred from exercising the same type of negotiating power that private firms might. When facing an impasse in negotiating with employee organizations, a private firm such as UPS might weigh the relative cost of surrendering the point as opposed to facing a strike, and the firm might well determine that it has sufficient power to withstand a strike and win a substantial number of its negotiating points. This prospect can form a backdrop for negotiations even before the breaking-point, with employee organizations being more willing to concede points based on their own assessment of the employer's relative power.

By contrast, 39 U.S.C. § 1207 requires the Postal Service and labor organizations to submit any dispute concerning collective bargaining agreements to binding interest arbitration, or by some other process to which all parties must agree. Rather than allowing disputes to be determined on the basis of the parties' relative power, this method effectively leaves dispute resolution to a third party that can tend to favor mutual concessions without regard to the parties' relative leverage in general. Moreover, arbitrators generally have tended to favor the precedent of the parties' prior agreements and to be reluctant to impose large wage or benefit reductions. Even when an issue has not crystallized into an arbitrable dispute, the potential for interest arbitration and its prospective outcomes cannot help but frame the Postal Service's approach to negotiations, with the result that the Postal Service's collective bargaining

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[provision.html](#) ("About 4,500 pilots are the only major group represented by a union among FedEx's 290,000 employees and contractors.").

agreements may be tempered in ways incomparable to labor agreements in private sector employment.

This description is borne out by the very results of collective bargaining agreements that AMA criticizes. For instance, AMA cites one arbitrator's conclusion, "join[ing] a long list of arbitrators in prior USPS interest arbitrations," as to the existence of a wage premium. Id. at 31 fn.11. What AMA elides is that such a wage premium persists because the self-same interest arbitrators who recognize it have failed to effectively address it, even as they fashion awards that they intend to gradually reduce it. The same applies to several other results of collective bargaining processes with which AMA takes issue.<sup>13</sup> In its 2003 report, the President's Commission on the Postal Service recognized that the persistent compensation premium is a structural problem rooted in the arbitration provision of Title 39, United States Code, and proposed a solution whereby the Postal Regulatory Commission would be responsible for determining wage and benefit comparability, a suggestion never taken up by the Congress. REPORT OF THE PRESIDENT'S COMMISSION ON THE UNITED STATES POSTAL SERVICE, EMBRACING THE FUTURE: MAKING THE TOUGH CHOICES TO PRESERVE UNIVERSAL MAIL SERVICE 69, 118-119 (2003).

Indeed, not only did Congress choose not to address the labor issues raised by the President's Commission, which were recognized as an essential element of controlling costs, Congress provided in the PAEA that

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<sup>13</sup> As another example, the present layoff protection language in certain collective bargaining agreements, under which employees are fully protected from layoffs after six years of service, originated in an arbitration award rendered in 1978. Despite the Postal Service's view of the problems in the current collective bargaining framework, the Postal Service naturally believes in abiding by its obligations with respect to collective bargaining and the resulting agreements.

nothing in this Act shall restrict, expand, or otherwise affect any of the rights, privileges, or benefits of either employees of or labor organizations representing employees of the United States Postal Service under chapter 12 of title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations within the United States Postal Service, or any collective bargaining agreement.

PAEA § 505(b), 120 Stat. 3198, 3236. The reference to “nothing in this Act,” by definition, includes Congress’s reference to honest, efficient, and economical management elsewhere in the Act and now codified at 39 U.S.C. § 3622(d)(1)(E). With the Postal Service’s collective bargaining agreements and statutory constraints thus insulated from statutory conflicts, it is irrelevant for AMA to argue that, all else being equal, a private firm would take a different labor approach in the course of efficient and economical management. It is clear from the PAEA’s text that the HEEM standard must be construed so as to allow for the collective bargaining agreements and statutory provisions on labor *as they are*, and not such that the latter should be disregarded in pursuit of the former, as AMA would have the Commission believe.

Nor, contrary to AMA’s depiction, has the Postal Service resigned itself to complacency. Since before the passage of the PAEA and especially since the current economic distress, the Postal Service has urged Congress to require arbitrators to take the Postal Service’s financial condition into account, thereby injecting into arbitrators’ considerations the very need for exigent cost-cutting that AMA claims is necessary.<sup>14</sup>

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<sup>14</sup> E.g., UNITED STATES POSTAL SERVICE, ENSURING A VIABLE POSTAL SERVICE FOR AMERICA: AN ACTION PLAN FOR THE FUTURE 13 (March 2, 2010); The Future of the U.S. Postal Service: Hearing Before the Subcomm. on Federal Financial Management, Government Information, Federal Services, and International Security of the Senate Comm. on Homeland Security and Governmental Affairs, 111th Cong. 6 (2010) (statement of John E. Potter, Postmaster General, United States Postal Service) (“We would also ask that Congress pass legislation that requires an arbitrator to take the financial health of the Postal Service into consideration.”); Continuing to Deliver: An Examination of the Postal Service’s Current Financial Crisis and Its Future Viability: Hearing Before the Subcomm. on Federal Workforce, Postal Service, and the District of Columbia of the House Comm. on Oversight and Government Reform, 111th Cong. 7 (2010) (statement of John E. Potter, Postmaster General, United States Postal Service) (same);

Although nothing currently prohibits arbitrators from considering this factor, the role it has played is unclear as compared to other considerations. Surely AMA would concede that, in the face of such statutorily-induced constraints on the Postal Service's ability to cut labor costs in response to its dire financial circumstances, honest, efficient, and economical management would demand that one militate for the amelioration of such constraints, as the Postal Service is doing in the course of its multi-pronged strategy to overcome its present financial difficulties.

Other statutory constraints not faced by private industry bear mention. For example, 39 U.S.C. § 1004 grants supervisory and managerial employee organizations an express role in the development of their membership's pay policies, schedules, and benefits, including tying the process to that for bargaining-unit employees. As much as AMA may complain about benefits levels, substantial postal benefits costs, such as those relating to pensions and retiree health, are imposed by law and not subject to collective bargaining, unlike in the private sector. 39 U.S.C. § 1005(d). Moreover, 39 U.S.C. § 1005(f) generally prohibits the Postal Service from enacting a fringe benefits program that is less favorable than that in effect in 1971. While many private firms can

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Hearing on the Postal Service Before the Subcomm on Financial Services and General Government of the Senate Comm. on Appropriations, 111th Cong. 3 (2010) (statement of John E. Potter, Postmaster General, United States Postal Service) (same); The U.S. Postal Service in Crisis: Hearing Before the Subcomm. on Federal Financial Management, Government Information, Federal Services, and International Security of the Senate Comm. on Homeland Security and Governmental Affairs, 111th Cong. 11 (2009) (statement of John E. Potter, Postmaster General, United States Postal Service) ("The Postal Service supports the amendments added to S. 1507, particularly the amendment directed at our arbitration process. . . . The amendment included in S. 1507 simply balances [the pay comparability] requirement by including a consideration of the Postal Service's financial health."); Letter from Postal Service Governors to The Honorable Susan M. Collins, February 24, 2005, at 2 ("We believe that an arbitrator should be required by statute to factor into the decision the economic history of the employer, present financial health and ability to pay, as well as anticipated future growth, productivity, and total labor costs."). The latter document is attached to this pleading for reference.

seek to abrogate labor obligations by declaring bankruptcy,<sup>15</sup> nothing in the Postal Service's enabling statute allows that possibility. Because of these unique constraints on the Postal Service, it is disingenuous for AMA to argue that the Postal Service's past cost-control efforts should be judged with reference to the freedoms enjoyed by private businesses.<sup>16</sup>

**ii. Despite These Constraints, the Postal Service Has Achieved Cost-Control Gains in Its Labor Negotiations**

Not content to give short shrift to external legal constraints, AMA fails to acknowledge any of the Postal Service's achievements in controlling labor costs through collective bargaining. In fact, AMA fixates on FY 2008 wage increases for American Postal Workers Union (APWU) members, without acknowledging the highly anomalous nature of those increases. AMA Motion at 50-51. First, FY 2008 happened to be the year those employees received a position upgrade, but that must be understood in the context of an agreement that provided for no general wage increase in FY 2009. Even more significantly, the unexpected and severe run-up in oil prices in 2008 drove the CPI to levels that caused a much higher-than-expected COLA payout.

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<sup>15</sup> In 1984, the United States Supreme Court held that the Bankruptcy Code allowed a Chapter 11 debtor-in-possession to rescind collective bargaining agreements (other than those subject to the Railway Labor Act) like any other executory contracts. *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 521-22. In response, Congress amended the Bankruptcy Code to require a debtor-in-possession to negotiate with the relevant union before applying for court permission to modify or reject the agreement unilaterally. 11 U.S.C. § 1113. Although the process is now structured, it remains ultimately possible for a private firm to avoid or modify the collective bargaining agreement through Chapter 11 bankruptcy, while the Postal Service cannot.

<sup>16</sup> In selectively citing the Postal Service's interrogatory responses in Docket No. N2010-1, AMA appears to overlook responses – including those filed simultaneously to those it cites – that explain the external limitations on the Postal Service's present ability to achieve more substantial cost cuts. Responses of the United States Postal Service to MPA Interrogatories MPA/USPS-T2-2-7.a-c, 8-12, Redirected from Witness Corbett (hereinafter "USPS Responses to MPA Interrogatories"), Docket No. N2010-1, June 23, 2010, at 6, 14-15; Responses of the United States Postal Service to NNA Interrogatories NNA/USPS-T2-3, 7-8, 10-11, Redirected from Witness Corbett (hereinafter "USPS Responses to NNA Interrogatories"), Docket No. N2010-1, June 17, 2010, at 2-4.

As oil prices receded, there was no COLA payout in FY 2009, and none is expected in FY 2010. The AMA's isolated example thus fails to reflect the fact that APWU employees received no wage increase and no COLA in FY 2009, and that no additional COLA is forecast for the remainder of the contract term.

The Postal Service is fully cognizant of the potential volatility of the COLA clause and its affect on labor costs. The Postal Service has regularly sought in negotiations and interest arbitration to eliminate or modify the provision. While there has been success in some years (including with two postal unions in 2007) in paying COLA as a lump sum rather than as a wage increase, the clause itself remains as an issue for collective bargaining. Ironically, in the 1970s the COLA clause was uncapped because the very mailing industry now putatively represented by AMA pressured the Postal Service to make the concession rather than face a postal strike. JOHN WALSH AND GARTH MANGUM, LABOR STRUGGLE IN THE POST OFFICE: FROM SELECTIVE LOBBYING TO COLLECTIVE BARGAINING 114 (1992). The AMA motion therefore presents a thoroughly unbalanced view of the outcome of the most recent round of collective bargaining negotiations, particularly given the collective bargaining context discussed above and the economic forecasts that were prevalent at that time.

It should be borne in mind that the current collective bargaining agreements were negotiated under different economic circumstances, and in three cases before the enactment of the PAEA. The collective bargaining agreements with the APWU, the National Postal Mail Handlers Union (NPMHU), and the National Rural Letter Carriers' Association (NRLCA) were negotiated in 2006, and the National Association of Letter

Carriers (NALC) agreement was negotiated in 2007.<sup>17</sup> Throughout that period, housing and stock markets were climbing toward their late-2007 summits. Mail volume was at its all-time peak in FY 2006 and, rather than signaling a precarious future, leveled off by only a modest 0.4 percent in FY 2007.<sup>18</sup> By comparison, in 2006, FedEx's expectations were such that it approved an agreement with its only unionized labor segment – pilots – granting the workers a 9-percent wage increase that year and 3-percent increases in each of the following years.<sup>19</sup> In the face of these legitimate and unassailable explanations for the Postal Service's current labor commitments, AMA flails about for a way to attack the Postal Service, first by obsessing over a one-time 2008 wage increase attributable to extrinsic factors, then by sputtering an incoherent mix of messages, by turns hopeful and cynical, about opportunities in the next round of negotiations.<sup>20</sup> The former tack is explained in context above; the latter tack has little relevance to the instant request.

Nor does the AMA motion account for the Postal Service's recent achievements at negotiating labor cost reductions. For example, in the 2006 round of negotiations, restrictions on the Postal Service's ability to hire casual employees under the APWU agreement were significantly loosened, thousands of non-career employees were

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<sup>17</sup> The NRLCA agreement was eventually resolved in interest arbitration in 2007 after its rejection by union membership. See supra for a discussion of the Postal Service's limited control over interest arbitration.

<sup>18</sup> UNITED STATES POSTAL SERVICE, 2007 ANNUAL REPORT 3, 22, 54.

<sup>19</sup> E.g., "FedEx Pilots' Union Approves Tentative Contract," Memphis Daily News, Sept. 12, 2006, <http://www.memphisdailynews.com/editorial/Article.aspx?id=30977>.

<sup>20</sup> Compare Motion at 59 ("[t]he Postal Service has refused to ask postal labor even to consider ... reopening existing collective bargaining agreements.") with id. at 71 ("The interest groups that have inflated the Postal Service's input costs certainly will not reduce their claims on the Postal Service and its customers voluntarily."). At page 59, AMA remarks, apparently by way of criticism, that the Postal Service's financial projections in this case, which concern 2011 postage rates, do not account for the possible results of as-yet-uninitiated labor negotiations that will be effective in 2012 at the earliest. Surely, AMA understands that basic accounting principles and public policy would not favor such speculation in supporting a price increase.

added to the city carrier ranks, mail handler starting salaries were slashed over \$4,000, and the employer's contributions to health insurance premiums are being reduced every year with every union. Even mid-term, the Postal Service has negotiated changes to increase efficiency. The Postal Service and the NALC reached agreements to re-evaluate and reduce city carrier routes in the face of declining volumes. Over 10,000 routes have been eliminated as a result. The Postal Service also reached agreements with the APWU and the NPMHU for retirement incentives that reduced the rolls by over 20,000 employees. These successes demonstrate that the Postal Service has taken steps to negotiate cost controls to the extent it is able to secure labor organizations' willingness, given the statutory framework for negotiation.<sup>21</sup> The fact that AMA might point to other steps that it thinks the Postal Service arguably *could have* taken does not mean that the Postal Service's considered decision not to do so, after assessing costs and benefits, constitutes a failure of honest, efficient, and economical management.

**iii. The Postal Service Has Taken Other Steps to Control Labor Costs, to the Extent Efficient and Economical**

Cherry-picking and de-contextualizing statements from Postal Service interrogatory responses in other proceedings, AMA claims that the Postal Service has not taken advantage of the potential for layoffs<sup>22</sup> and furloughs, such as would be, in AMA's judgment, elementary to efficient and economical management:

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<sup>21</sup> In another instance of selective citation, AMA dredges up a GAO report from 1999 and the 2003 report of the President's Commission on the Postal Service to support accusations of poor labor-management relations. AMA Motion at 27. Of course, these dated quotations fail to reflect improvement in such relations in the interim, as shown by reductions in pending grievances and arbitrations of more than 50 percent since 1999.

<sup>22</sup> The Postal Service assumes that AMA uses the term "layoff" to refer both to layoffs and reductions in force. These terms can have different meanings depending on the postal employment context, but AMA's usage suggests an implication of both terms.

The Postal Service did not lay off *any* of the nearly 120,000 craft employees (with salary and benefit costs of nearly \$5 billion) who were not covered by the “no layoff” provisions of the current collective bargaining agreements.<sup>23</sup> . . . The Postal Service did not furlough any of its managerial employees, none of whom were protected by any anti-furlough provision.<sup>24</sup>

The truth, as the Postal Service has already explained in the same interrogatory responses that AMA cites, is less absolute than AMA would have the Commission believe.

First, AMA artfully restricts its assertion regarding layoffs to *bargaining-unit* employees, thereby obscuring the Postal Service’s efforts to reduce labor costs, to the extent efficient and economical, within the non-bargaining-unit sphere. The Postal Service’s explanation bears quoting at length:

**MPA/USPS-T2-10.** Please confirm that the Postal Service did not lay off any employees in FY 2009. If not confirmed, please provide, by craft, the total number of employees that were laid off in FY 2009, and the total FY 2009 cost savings from the layoffs.

**RESPONSE:**

Confirmed that the Postal Service did not lay off any craft employees in FY 2009. For non-bargaining employees, the Postal Service sent out 2016 RIF Specific Notices of Separation in FY 2009. There are two points to be made about that figure, however. First, this figure does not represent the number of employees who were ultimately separated pursuant to these RIF Specific Notices in FY 2009. In the time between issuance of the notice and the noticed separation date, some of the affected employees may have taken optional retirement, some may have taken VERAs, and some may have accepted assignments to other postal jobs. Second, RIF Specific Notices are generally issued towards the end of a lengthy process in which a restructuring occurs. The Postal Service makes substantial effort over the course of such processes to minimize the number of employees who ultimately receive a RIF Specific Notice. Therefore, the number of RIF Specific Notices sent would normally represent only a

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<sup>23</sup> Footnote in original: Docket No. N2010-1, USPS Institutional Responses to MPA/USPS-T2-9 and 10 and NNA/USPS-T2-3(e). [Although AMA cites the Postal Service’s response to NNA/USPS-T2-3(e), it appears the citation regarding layoffs should be NNA/USPS-T2-3(b).]

<sup>24</sup> AMA Motion at 58 (emphasis in original).

fraction of the positions eliminated by a given restructuring. Since the Postal Service has no aggregate records of actual involuntary separations emanating from these Notices, it has no estimate of total cost savings.

USPS Response to MPA Interrogatories at 21. In response to MPA/USPS-T2-11, the Postal Service gave a comparable explanation of the FY 2010 situation, including the 466 RIF Specific Notices of Separation that it had sent to non-bargaining-unit employees as of the date of filing. Id. at 22.

Second, AMA appears to expect that, just because approximately 120,000 bargaining-unit employees may technically not be protected by no-layoff provisions, efficient and economical management *demand*s that they be laid off. This illogical postulate fails to account for the degree to which those employees may be needed to provide postal services in accordance with efficient and economical management. For example, nearly half of the employees in question (50,458) are part-time rural carrier associates “on call” to substitute for career rural carriers who are on leave or otherwise off-duty. USPS Response to MPA Interrogatories at 20 (as revised in errata filed on June 24, 2010). Simply put, the existence of non-protected employees does not unconditionally or automatically correlate with the positions for which layoffs or reductions in force would produce the most benefits relative to costs. In fact, were there non-career employees to be let go, they would be replaced by more costly career employees to meet the 6-day per week mandate. For management to realize this is entirely in keeping with its considerations of efficiency and economy.

Third, although some personnel are not protected from Reductions in Force (RIFs), the Postal Service’s ability to implement such measures remains cabined by its mandate to observe veterans' preference. 39 U.S.C. § 1005(a)(2). This means that in

order to process a RIF, the Postal Service must first determine competitive levels, construct retention registers, and take other steps that consume both time and resources. At the same time, there is no guarantee that the post-RIF organization will have an optimum match of employees with jobs. Therefore, even if a certain number of postal employees are technically not protected from RIFs, the concept of efficient and economical management is clearly broad enough to encompass a more moderate decision by the Postal Service, in light of countervailing business needs. Again, it should be noted that the Postal Service is in fact implementing RIFs as a cost savings measure where it judges them to be feasible.

Finally, with respect to furloughs of non-bargaining-unit employees,<sup>25</sup> AMA's proposition again fails to acknowledge the nuance inherent in efficient and economical management decisions. Approximately three-quarters of non-bargaining-unit personnel are supervisors or postmasters, most of the latter of which are in offices where they are either the sole or one of a handful of employees.<sup>26</sup> Accordingly, it is not unreasonable for the Postal Service, in keeping with efficient and economical management, to weigh the potential for direct cost savings against likely losses in operational efficiency, customer access, or revenue, and to conclude that furloughs would not realize adequate savings on the whole to be warranted.

#### **b. Network Rationalization**

With regard to network consolidation, it is generally well-known in the postal community (though AMA chooses to essentially ignore it) that management discretion to

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<sup>25</sup> AMA's motion does not argue that the USPS should be furloughing bargaining-unit employees.

<sup>26</sup> Of 67,288 current non-bargaining-unit employees, 24,801 are supervisors and 24,445 are postmasters.

reduce processing plants is constrained, especially in the short-term. This was noted by Senator Carper in his statement at the hearing on August, 6, 2009 (emphasis added):

Congress also needs to re-evaluate the position it often takes on facility closures. The Postal Service currently maintains more than 35,000 retail outlets and more than 400 processing plants around the country. This network was developed for a time before e-mail, before electronic bill pay, before any number of communications revolutions in our society. We simply don't need all of those facilities in this day and age. *But, all too often, Congress puts up roadblocks whenever the Postal Service even mentions that it might be time to close or consolidate some facilities. We just can't afford to do that anymore.*"<sup>27</sup>

As noted above, Congress has routinely played a role in consolidation decisions through legislative enactments, reports, and informal communications. This can lead to unending demands for further analysis and additional data, to the point where attempting to close a facility under these circumstances often becomes a Sisyphean task. At the very least, the political context of network consolidation demonstrates that the Alliance's blithe assumption that the current situation is a manifestation of dishonest, inefficient, and uneconomical management is incomplete and misleading.

Furthermore, the focus by the AMA on the consolidation of physical plants ignores the fact that when it comes to the network, the biggest savings is in the reduction of staffing rather than the elimination of the brick and mortar facilities. The Postal Service has, using those tools within its control, significantly reduced its plants

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<sup>27</sup> Other mailers have also recognized this fact. For instance, Valpak has noted the "by-now-predictable Congressional resistance to closing and consolidation of plants." See Docket No. ACR2009, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Initial Comments of the United States Postal Service FY 2009 Annual Compliance Report at 7-8 (February 1, 2010). In addition, Time Warner, the parent company of Time Inc. (another member of the AMA), also recognized that "the political obstacles to needed network restructuring" as being a factor that is beyond the Postal Service's control and places "severe constraints" on the Postal Service's freedom of action. See Docket No. ACR2009, Initial Comments of Time Warner Inc. on ACR2009 Pursuant to Order No. 380 at 16, 20-21 (February 1, 2010).

costs, largely driven reducing its workforce through over 100,000 jobs. This has been done through attrition, which, as noted above, is consistent with management's tools concerning the control of its labor costs. This focus on staffing also follows a prudent and orderly path, in which rationalization focuses initially on the workforce, and only then on the brick and mortar facilities. Reversing that process would not make business sense.

**c. The AMA Makes Misleading Comparisons to UPS and FedEx.**

The AMA also argues that the Postal Service "has failed to respond effectively to the current recession, particularly in comparison to efficiently managed enterprises in the private sector." Motion at 20, 39-46. In particular, the AMA holds up UPS and FedEx as being paragons of "honest, efficient, and economical management," noting that they "illustrate how efficiently run firms responded to the downturn" (Motion at 43). It then excoriates the Postal Service for not undertaking the steps that UPS and FedEx did to return to profitability during the recession. Motion at 45 ("The basic lesson from these data is that efficient private companies typically responded quickly and aggressively to the recession by cutting their costs, allowing them to return to profitability within a few quarters or a year despite continuing sluggishness in volume and revenue. This is how enterprises with "honest, economical, and efficient management" perform."). As discussed above, it is misleading to make comparisons between the Postal Service and the private sector, without taking into account the fundamental differences in the legal and practical environments in which they operate.

This fact is amply demonstrated by the Report issued in December 2007 by the Federal Trade Commission (FTC), which conducted a detailed examination of the

differences between the Postal Service and private sector competitors, such as UPS and FedEx. The FTC evaluated both the burdens imposed on the Postal Service and the advantages conferred upon it, and concluded that the Postal Service's unique legal status "likely provides it with a net competitive disadvantage versus private carriers."

See Accounting for Laws That Apply Differently to the United States Postal Service and Its Private Competitors at 8 (December 2007). The FTC noted that because "of its status as a federal governmental entity, the USPS has legal and political restraints on its operations that reduce its efficiency in providing competitive products." *Id.* The FTC also found that:

Congressional action would be required to reduce the USPS's legal constraints. Elimination of these constraints, especially with respect to the ability to manage labor costs and configure its network, would help the USPS to reduce its costs of providing competitive products.

Id. at 9. While the focus of the FTC Report was on the effects of the legal constraints with respect to competitive products, there can be no doubt that the effects of the constraints it identified and discussed are equally binding with respect to market dominant products. Yet, the AMA fails to determine whether the Postal Service had the same ability to undertake the actions performed by UPS and FedEx. The AMA also fails to mention all the steps that UPS and FedEx took to address the economic downturn.

The AMA misleadingly suggests that the Postal Service's competitors responded to the recession exclusively through aggressive cost cutting. The AMA completely ignores the fact that UPS and FedEx also consistently increased their rates during the recession. In fact, both UPS and FedEx have annually increased their published prices by approximately the same amount as the Postal Service's proposed 5.6 percent overall

average increase in the exigent request (though these increases were generally accompanied by reductions in the fuel surcharge). The table below shows the percentage price increase announced each year between 2007 and 2010 by FedEx Ground, FedEx Express, UPS Ground, and UPS Air for its published prices. Additionally, UPS Freight announced a 5.7 percent increase for 2010. This completely belies the Alliance's claim that the only possible way an "honest, efficient, and economical" organization could possibly respond to a financial crisis is by cutting costs, and that raising revenue through price increases is diametrically inconsistent with the HEEM standard.<sup>28</sup> Rather, this demonstrates that a balanced approach of cost cuts and revenue increases being pursued by Postal Service management, including the price increases being proposed in this proceeding, is an eminently reasonable approach.

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<sup>28</sup> It is also ironic that newspapers (who appear to make up the bulk of the AMA's membership) are complaining about price raises in the face of a financial crisis when many of them have done exactly the same thing. See, for example, Andrew Alexander, *Post Revamping Sunday Paper to Boost Hope for Profit*, *The Washington Post*, August 1, 2010 at 1-2, available at [www.washingtonpost.com](http://www.washingtonpost.com)

**Table 1: FedEx and UPS Annual Published Price Increases, 2007 – 2010  
Percent Changes**

	<b>FedEx Ground<sup>29</sup></b>	<b>FedEx Express<sup>30</sup></b>	<b>UPS Ground<sup>31</sup></b>	<b>UPS Air<sup>32</sup></b>
2007	4.9	3.5	4.9	4.9
2008	4.9	4.9	4.9	4.9
2009	5.9	6.9	5.9	4.9
2010	4.9	5.9	4.9	4.9

In addition, the AMA incorrectly states that FedEx and UPS experienced comparable declines during the recession. While FedEx and UPS did experience declines, they were hardly comparable to those faced by the Postal Service. For example, according to FedEx's 2009 Annual Report, FedEx experienced a decline in average daily package volume from 3.399 million in 2007 to 3.376 million in 2009, or a decline of 0.7 percent.<sup>33</sup> Moreover, according to UPS's 2009 Annual Report, UPS experienced a decline in average daily package volume from 15.750 million in 2007 to 15.064 million in 2009, or a decline of 4.4 percent.<sup>34</sup> These figures are nowhere near as steep as the volume declines discussed by witness Corbett: in 2009, Postal Service volumes declined by 12.7 percent. This reflects that fact that Postal Service volumes are heavily weighted towards letters and flats, as opposed to parcels.

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<sup>29</sup> Source: FedEx Ground press releases, 2007-2010  
<sup>30</sup> Source: FedEx Express press releases, 2007-2010  
<sup>31</sup> Source: UPS press releases, 2007-2010  
<sup>32</sup> Source: UPS press releases, 2007-2010  
<sup>33</sup> Source: FedEx 2009 Annual Report, p.18.  
<sup>34</sup> Source: UPS 2009 Annual Report, p.23.

As noted above, these volume declines were especially detrimental to the Postal Service, because of the lost contribution to the coverage of institutional costs. Unlike its competitors, the Postal Service could not respond as quickly as its competitors in terms of cutting labor and service costs in order to return to profitability, because of restrictions that are not applicable to FedEx and UPS, including, but not limited to, their lack of a universal service obligation. The AMA notes, for example, that FedEx cut pay and deferred compensation, including cutting the company's 401k matching contributions, for most of its U.S. workforce. Motion at 44-45.<sup>35</sup> UPS took similar actions, meanwhile, including freezing management wages, reducing other compensation, and suspending its 401(k) match. Id. at 44<sup>36</sup> Such cost cutting measures are significant, and allow these companies to quickly optimize their workforce, leading to a quick return to profitability even if volumes do not stabilize (which, as noted above, they did). But, the Postal Service has no discretion under the law to suspend any benefits payments, including its matching contributions to workers' Thrift Savings Plans (equivalent to a 401(k)), nor does it have the authority to unilaterally reduce compensation for its bargaining unit employees.<sup>37</sup> Furthermore, with regard to service, it is noteworthy to point out that FedEx or UPS are able to size their delivery network on a daily basis to reflect volume trends (that is, they do not have to stop at every address), as well as the ability to alter delivery frequencies in lower-volume areas. The Postal Service, on the other hand, does not have this flexibility. Moreover, as witness Corbett discussed, the

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<sup>35</sup> See also <http://fedmx.com/fedex-cuts-workers-retirement-compensation-while-ceo-rakes-multi-million-dollar-pension>

<sup>36</sup> See also <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aZ4baobjLWaQ&refer=us>

<sup>37</sup> Labor costs are also a smaller proportion of costs for both UPS and FedEx, as compared to the Postal Service.

Postal Service took numerous steps within its control to keep costs in check. See Corbett Statement at 4-6.

In summary, the AMA ignores the fact that, unlike the Postal Service, FedEx and UPS have been able to maintain positive net incomes from 2007 through 2009 by raising prices each year by nearly 5 percent or more; by avoiding the severity of volume losses endured by the Postal Service; and by cutting costs in many ways the Postal Service is not permitted to do.

**2. CPI-U is a challenging cap that the Postal Service was operating under successfully until volumes declined precipitously.**

A CPI-U cap is inherently very challenging, because the Postal Service is a labor-intensive organization whose majority of input costs are outside of management's control, and which typically rise more rapidly (sometimes much more rapidly) than general inflation. These costs include statutory benefits costs, including the cost of health care, worker's compensation, and Federal pensions. They also include the costs of network expansion, which occurs each year without regard to trends in volume. Then, there are costs associated with compensation, discussed above, and fuel.

As such, AMA's claim on pages 61-62 of its Motion regarding the alleged leniency of the CPI price cap is false. The CPI index has embedded in it the rate of productivity growth for the U.S. economy, so there is a productivity target already included in this price index. The "X factor" is a productivity target over and above the economy's rate of productivity growth. See Jeffrey R. Bernstein and David E.M. Sappington, "Setting the X Factor in Price-Cap Regulation Plans," Journal of Regulatory Economics, 16, p. 22. The only U.S. industry in which the CPI-X type of price cap has been widely adopted is the telecommunications industry. (The railroad industry has a

different type of price cap formula.<sup>38</sup>) The telecommunications industry is a high technology, capital-intensive industry with labor costs accounting for a significantly smaller fraction of total input costs, which lends itself to very high rates of productivity growth. Furthermore, as private sector bodies, such firms have significantly greater control over their costs than the Postal Service does.<sup>39</sup>

In testimony before Congress on March 23, 2004, which AMA selectively cites, the Postmaster General noted strong concerns about a price cap that did not allow the Postal Service to recover costs over which it has little or no control, and also urged that any price cap be one part of a comprehensive reform that provided the Postal Service with greater flexibility in other areas. Page 9. While the PAEA did give the Postal Service additional pricing flexibility, particularly on the competitive side, it did not give the Postal Service any significant additional tools to cut its costs; indeed, as noted above, when it came to labor costs, the PAEA expressly noted that it was not to be interpreted as affecting the rights or privileges of postal employees. Furthermore, the PAEA imposed a significant new cost on the Postal Service, in the form of mandated retiree health benefits payments.<sup>40</sup>

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<sup>38</sup> See Verified Statement of Douglas W. Caves and Laurits R. Christensen in ICC Docket Ex Parte No. 290 (Sub-No.4) Railroad Cost Recovery Procedures – Productivity Adjustment, p. 2.

<sup>39</sup> In addition, these firms entered price cap regulation as for-profit firms. The Postal Service, on the other hand, entered its price cap from a break-even environment, and therefore did not have a large financial cushion when the recession occurred.

<sup>40</sup> Valpak filed comments in Docket No. ACR2009 that succinctly laid out the management challenges presented by the PAEA: In particular, Valpak has noted that “the PAEA requires the Postal Service over 10 years to deposit in the PSRHBF sufficient funds to pay all estimated future retiree health care benefits which have accumulated over many years,” while “also operating under a variety of other constraints,” including a statutory debt ceiling, mandated 6-day delivery, and the Congressional resistance to the closing and consolidation of plants and retail locations. See Docket No. ACR2009, Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Initial Comments of the United States Postal Service FY 2009 Annual Compliance Report at 7-8 (February 1, 2010). Another party in the same docket, Time Warner Inc. (the parent company of AMA member Time Inc.), also noted the challenges facing the Postal Service, including the “excessive funding requirements for retiree health care benefits, political obstacles to needed network restructuring, and the high initial costs and lagging realization of

Despite these challenges, Postal Service management was operating efficiently under the cap, even as the precipitous volume declines occurred. In FY 2009 alone, the Postal Service cut over \$6.0 billion in costs; over the past three years, the Postal Service has reduced its career workforce by the full-time equivalent of approximately 114,000 workers. In fact, as shown in the table below, the cumulative reductions in career complement and workhours over the last decade have resulted in annual savings of between \$12.5 and \$13.0 billion in each year going forward.

Annual Savings Based on Career Employees & Workhours

	10 Years Ended 9/09	3 Years Ended 9/09
Career Employee Reductions	175,000	73,000
Avg. Comp Rate (Annual)	\$ 71,490	\$ 79,602
Annual Savings (B)	\$ 12.5	\$ 5.8
Workhour Reductions	379,000,000	201,000,000
FTEs	215,341	114,205
Avg. Comp. Rate (Hourly)	\$ 34.37	\$ 38.27
Annual Savings (B)	\$ 13.0	\$ 7.7

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benefits associated with reducing the size of the workforce,” which it notes “have thus far proved to be effectively beyond the Postal Service's control.” See Docket No. ACR2009, Initial Comments of Time Warner Inc. on ACR2009 Pursuant to Order No. 380 at 20-21 (February 1, 2010).

These measures were undertaken while maintaining very high levels of service. Indeed, if it were not for the \$12.4 billion of P.L. 109-435 Scheduled Payments to prefund retiree health benefits paid by the Postal Service since the enactment of the PAEA (an expense that any normal firm facing a financial crisis would forgo), the Postal Service's revenues would have exceeded its costs, despite the extreme volume losses. Docket No. N2010-1, Tr. 3/592-95 (Corbett). These results reflect the practice of "honest, efficient, and economical management," using the tools within its control.<sup>41</sup>

The AMA Motion places substantial emphasis on the Postal Service's labor productivity and Total Factor Productivity (TFP) performance since the onset of the recession. AMA Motion at 47-50. The figures which AMA cites, however, are not reflections of poor management, but are rather manifestations of precisely the structural conditions which require the Postal Service to seek above-cap price adjustments in times of unprecedented volume declines. Postal Service labor productivity declined in 2009 due to the unprecedented decrease in Postal Service workload. Productivity gains are much more difficult to achieve when there are extraordinarily large workload decreases. During 2009, Postal Service workload decreased 8.4 percent. For purposes of comparison, the next largest annual decrease in Postal Service workload occurred in 2008, with a decline of 3.0 percent. One has to go back to 1976 to find

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<sup>41</sup> See Carper Statement (discussing how the Postal Service ended FY 2009 with a 13 percent decline in mail volume from 2008, and a year-end loss of \$3.8 billion, and stating that, "This loss came despite heroic efforts on the part of the Postmaster General and his team to achieve more than \$6 billion in cost savings over a very short period of time."); Docket No. ACR2009, Valpak Comments at 4 ("Of course, during FY 2009, the Postal Service fell victim to the recession. That, in large part, was responsible for the sharp decline in mail volume, accompanied by an unprecedented decline in total revenues of \$6.9 billion — over 9 percent. Expenses were cut by \$1.7 billion (as can be seen from Table I-1), but no matter how effectively the Postal Service managed its costs, it was unable to reduce operating expenses as fast as mail volume and revenue declined."); Docket No. ACR2008, Valassis and SMC Reply Comments (Feb. 13, 2009) at 3-4 (noting that "the Postal Service has been steadily reducing the costs over which it has control.").

another year when workload decreased by more than 2.0 percent.<sup>42</sup> The Postal Service's workload reduction in 2009 also far surpassed the 3.5 percent reduction in output for the U.S. economy.<sup>43</sup>

Under these extraordinary circumstances, it was not possible for the Postal Service to fully match the workload reduction with a corresponding reduction in labor. The Postal Service, however, did achieve a 7.9 percent reduction in labor in 2009.<sup>44</sup> So far in 2010, even though workload continues to decrease, the Postal Service has been able to make more than proportionate reductions in labor, and the year-to-date labor productivity growth is approximately 2.5 percent.

The contrast between the market for postal services and the rest of the economy is even starker when a focus is placed on Postal Service mail volume. Postal Service workload includes mail volume, as well as the network of delivery points that the Postal Service serves every day. The mail volume component of workload is called weighted mail volume, which weights the different subclasses of mail by their relative costs. In 2009, weighted mail volume decreased 13.1 percent, which far exceeds the economic contraction faced by the rest of the U.S. economy.<sup>45</sup>

Recent declines in workload are also related to the recent differences between Postal Service total factor productivity growth and private business sector multifactor productivity growth. The 1.2 percent increase in 2008 private business sector multifactor productivity cited by AMA on page 49 of its Motion came in a year when private business sector output also *grew* 0.8 percent (compared to the 3.0 percent

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<sup>42</sup> The 2009, 2008, and 1976 figures can all be found in USPS Annual Tables, FY 2009 TFP, Table 53 (filed with the Commission on March 2, 2010).

<sup>43</sup> Retrieved from <http://www.bls.gov/lpc/> on July 29, 2010.

<sup>44</sup> USPS Annual Tables, FY 2009 TFP, Table 53 (filed with the Commission on March 2, 2010).

<sup>45</sup> USPS Annual Tables, FY 2009 TFP, Table 45 (filed with the Commission on March 2, 2010).

*decline* in Postal Service workload). If one looks at the years prior to 2008, when Postal Service workload was growing, Postal Service total factor productivity growth compares favorably to private business multifactor productivity growth. From FY 2000 through FY 2007, Postal Service total factor productivity growth averaged 1.5 percent per year, exceeding the average rate of private business sector multifactor productivity growth of 1.4 percent per year.<sup>46</sup>

AMA's stubborn refusal to recognize the realities of postal economies is manifested quite clearly in its attempt to ignore the critical distinction between volume variable and institutional costs. As those generally familiar with postal ratemaking are aware, postal costs are routinely bifurcated into those that vary with changes in mail volume, and those that do not vary with changes in mail volume. Roughly speaking, the split between these two groups has been rather consistently in the neighborhood of 60 percent volume variable, and 40 percent non-volume variable. Putting aside the relatively minor portion of costs known as product specific costs, volume variable costs are considered "attributable" to postal products, and non-variable costs are referred to by a variety of terms, the most common being institutional costs, overhead costs, or network costs.

As suggested in the Postal Service's Request (pages 6-7) and in the Statement of Joseph Corbett (page 16), the limitations on the Postal Service's financial ability or inability to withstand major volume declines are closely related to the very different behavior of these two types of costs. Although the ability to reduce volume-variable costs in response to volume declines is not automatic, and is certainly not

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<sup>46</sup> Private business sector multifactor productivity and output retrieved from <http://www.bls.gov/mfp/> on July 29, 2010. Postal Service total factor productivity figures taken from USPS Annual Tables, FY 2009 TFP, Table 52 (filed with the Commission March 2, 2010)..

instantaneous, there is an expectation that, over time, such reductions are feasible. As volume declines steepen, of course, the challenge to capture those cost savings becomes even greater. On the other hand, virtually by definition, there can be no reasonable expectation that the Postal Service would be able to reduce non-volume variable costs directly in response to volume declines. The nature of such costs is that variations in mail volume do not change the level at which they are incurred. As a result, those costs must collectively be recovered from what is known as the “contribution” of various products – with contribution understood to be the difference between the volume-variable (or “attributable”) cost, and the price charged.

A price cap regime is designed to allow prices to increase with some type of inflation index that is intended to reflect changes in the general level of prices in the economy. In theory at least, there is no particular reason why volume variable costs and network or institutional costs would not react equally to changes in the general price levels in the economy, although there might be specific factors which lead to a contrary result. On the other hand, there is absolutely nothing within the PAEA price cap design to reflect volume changes. Changes in a CPI index within a year that would, for example, allow 3 percent increases in prices (or, alternatively, 0.5 percent increase in prices) remain the same whether the Postal Service has had no volume change over the year, a 10 percent increase in volume over the year, or a 12 percent decline in volume over the year. Yet volume variable and institutional or network costs do react very differently under those varying circumstances. Because of the substantial portion of its costs that are non-volume variable, it is simply unrealistic to expect the Postal Service to be able to keep its bottom line intact in the face of major and continuing

volume declines while attempting to stay within a price cap.<sup>47</sup> AMA, though, would rather gloss over the critical distinction between this aspect of volume variable costs and other costs, and equally ascribe failures to reduce either type of costs as symptoms of management “inefficiency.” See AMA Motion at 54, n.59. But, the nature of Postal Service costs demonstrates why it is vitally important that the exigency provision, as the sole exception to the price cap, not be read in the manner urged by the AMA, so as to essentially ignore sudden and severe volume declines simply because they were precipitated by an economic downturn, as opposed to a terrorist attack.

The AMA also claims that the Postal Service failed “to prepare itself for the long-anticipated loss of mail volume to the Internet.” Motion at 20, 35-39. These arguments are nothing more than a red herring. As an initial matter, the reason for the precipitous declines in Standard Mail was *not* Internet diversion, but rather the sudden and utterly unexpected tanking of the U.S. advertising market in general (discussed above). Moreover, while it is undoubtedly true that electronic diversion has long been

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<sup>47</sup> In the Reply Comments of Valassis and the Saturation Mailers Coalition in ACR2008, the parties noted that:

The Postal Service currently has substantial fixed and non-attributable costs associated with its universal system. In addition, it also must pay a tremendous amount of legacy costs (actually incurred in past years) annually. Both types of cost are largely “institutional” and together represent roughly 40 percent of total postal annual cost. Even for its remaining “attributable or variable” costs, the Postal Service cannot instantly adjust them in response to changes in volumes. Many “attributable or variable” costs are actually longer-term variable and require an extended time to reduce. In many cases, as suggested by the PR, beneficial cost reductions require substantial restructuring of postal operations, network facilities, and union contracts – clearly a necessary but longer-term project given the current postal management tools available. Further, a large portion of variable cost is also subject to scale and scope economies (e.g., transportation and delivery). Thus, the majority of postal costs is relatively fixed over the short-term and cannot immediately be saved when volumes are lost – as has occurred in the last several years.

See Reply Comments of Valassis Direct Mail, Inc. and the Saturation Mailers Coalition Concerning the Postal Service’s FY2008 Annual Compliance Report at 6-7 (February 13, 2009).

understood as constituting a threat to mail volumes, the Postal Service has consistently recognized this fact, and current management has cut costs throughout this decade in part to make the Postal Service leaner, in order to prepare for a future of lower volumes. This approach was proceeding successfully until the economic crisis occasioned a sudden and precipitous decline in volumes, including the acceleration of what was then a gradual trend. So, it is patently misleading for the AMA to suggest that the current financial situation in any way represents a failure to prepare for electronic diversion. What the current financial situation represents is a lack of the tools necessary to react quickly to a financial crisis and a 20 percent decline in mail volume in a few short years, only a portion of which can be conceivably blamed on electronic diversion. Indeed, the fact that the crisis is not worse is a testament to the fact that current management had cut costs significantly in the past decade, in recognition of the long-term challenge presented by electronic diversion.

### **3. The AMA Misstates Earlier Views of the Pre-PAEA Law Regarding Honest, Efficient, and Economical Management.**

In addition to a failure to address the context in which the Postal Service operates, the AMA also fails to set forth a coherent explanation of why the decades of alleged management failures suddenly preclude price increases, when they did not preclude them in the past. The AMA is quite adamant that the conditions which it now cites as barring rate relief for the Postal Service have “persisted for decades,” literally covering the period from the Postal Service’s creation to now. See Motion at 67. Taking this claim at face value, the immediate question that comes to mind is, if true, why did the many members of AMA, individually or jointly, fail to attempt to cite these conditions to defeat previous requests for postal rate increases? As the AMA admits at

page 10 of its Motion, virtually the same “honest, efficient, and economical management” language currently featured in section 3622(d)(1)(E) previously appeared under the PRA as part of what was then section 3621:

... Postal rates and fees shall be reasonable, equitable, and sufficient to enable the Postal Service under 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. ...

Previous 39 USC § 3621. While conceding the existence of that prior provision, however, the AMA claims that:

... the Second Circuit effectively wrote the condition out of former § 3621 by holding that disallowance of a portion of the Postal Service’s general revenue requirement for lack of “honest, efficient and economical” management “was an unlawful encroachment on the policymaking authority of the Board” of Governors. *Newsweek, Inc. v. USPS*, 663 F.2d 1186, 1203-1206 (2nd Cir. 1981), *aff’d on other grounds, Nat’l Ass’n of Greeting Card Publishers v. USPS*, 462 U.S. 810 (1983).

Motion at 10-11. Thus, the AMA would have us believe that, when appearing in the old statute, the “honest, efficient, and economical management” standard simply could not be employed in pursuit of the type of relief sought in the instant motion, or, at least could not be so employed after the *Newsweek* decision.

That version of history needs to be evaluated against the actual position previously taken by at least one key member of AMA, represented by the same counsel now as then, and of the Commission itself. In Docket No.

R2000-1, almost twenty years after *Newsweek*, the Alliance of Nonprofit Mailers (ANM) argued that the Commission should disallow certain costs because of an alleged previous failure of the Postal Service to adhere to the “honest, efficient, and economical management” standard (hereafter referred to as HEEM). See Initial Brief of Alliance of Nonprofit Mailers, Docket No. R2000-1 (Sept. 13, 2000). Not surprisingly, the Postal

Service opposed that proposal, restating its long held view that the HEEM standard under the PRA did not exist to allow the Commission to make a reduction in the Postal Service's revenue requirement, and that any doubts on that issue had been resolved by the *Newsweek* decision. See Initial Brief of the United States Postal Service, Docket No. R2000-1 (Sept. 13, 2000), at pages II-20 – II-26.

In response, ANM deemed the Postal Service's legal arguments to be "fanciful," and glibly dismissed the Postal Service's claim that its proposed application of the HEEM standard would run afoul of *Newsweek* as "another chestnut that the Commission has repeatedly interred." ANM Reply Brief, Docket No. R2000-1 (Sept. 22, 2000) at 2, 13. Instead, ANM claimed then, the court "clearly recognized that the Commission could adjust the revenue requirement under 39 USC § 3621 if the Commission's actions rested on reasoned findings and relevant statutory criteria." *Id.* at 13. Reviewing these competing interpretations of its legal authority, the Commission sided with ANM, indicating that, if sufficient factual support were presented, the Commission could disallow expenses set forth in the revenue requirement if they would be incurred in contravention of the HEEM standard. See PRC Op. & Rec. Dec., R2000-1, Vol. 1 at 37 (Nov. 13, 2000). Nothing in the Commission's R2000-1 Opinion supports AMA's current claim that the *Newsweek* decision wrote that authority out of the statute.

Appropriately viewed in the correct historical context, it is clear that it is not Postal Service management alone which has "tolerated" the legal, political, cultural, and economic realities within which the Postal Service exists. Mailers, such as the members of AMA,, many of whom have participated intensively in postal affairs for decades, have seen the same data and reports which are quoted on page after page of

the motion. If the parties now wish to argue that those conditions are evidence of a management complacency that precludes the requested price increases, simple fairness dictates that it is incumbent upon them to explain why, based on those same conditions, they did not pursue equally meritorious challenges to previous rate increases. The obvious reason they cannot provide such an explanation is that any such challenges would not be meritorious, either in the past, or now, because responsible parties would not have thought to allege these conditions were inconsistent with HEEM, for the simple fact that the HEEM standard must take into account the conditions under which Postal Service management operates.

**C. The AMA's other arguments as to why this increase is not "necessary" are unavailing.**

While the AMA's primary argument is that this increase is not "necessary" because the Postal Service has not satisfied the HEEM standard, as discussed above, the AMA also argues that an increase is not "necessary" because 1) the Postal Service is performing better than planned; 2) Congress has the ability to enact legislation providing the Postal Service with relief from its mandated retiree health payments, and correcting the Postal Service's overpayment into the Civil Service Retirement and Disability Fund; and 3) the increase will not be sufficient by itself to correct the Postal Service's financial situation. Motion at 67-70. None of these arguments have any merit.

The fact that the AMA makes the third argument completely undercuts its first argument. Indeed, while the Postal Service is seeing some results better than initially projected prior to the beginning of this fiscal year, that fact certainly does not eliminate the need for this exigent increase, because the Postal Service's loss will still be significant, as witnesses Corbett and Masse demonstrate. With regard to the

Commission's third argument, while it is true that this increase is not sufficient by itself to resolve the Postal Service's financial situation, but as noted below is one of a variety of measures being pursued by the Postal Service to close its financial gap, that fact certainly does not provide a basis to reject the Postal Service's request. Rather, to the extent that the AMA's apparent argument is correct, it would be a reason to *increase* the size of the Postal Service's request. Furthermore, the fact that this increase would not completely close the financial gap demonstrates that even if a party could identify efficiency savings that could be potentially achieved through HEEM, that fact would not dictate that the increase proposed by the Postal Service is legally "unnecessary."

The Postal Service has responded to its financial challenges by pursuing a broad-based and balanced plan, which shares the burden of closing the financial gap. Nothing in the statute compels the Postal Service to propose a larger increase simply because the increase it proposes may not be sufficient by itself to respond to the "extraordinary or exceptional circumstances" that justify the request: the statute requires the Commission to determine whether an above-cap increase is "necessary" for the Postal Service to provide adequate services going forward, not whether it is "sufficient."<sup>48</sup> At the same time, it is also evident that this rate increase could have been much higher. The Governors determined that a moderate increase was appropriate in recognition of the concerns of mailers, and in the hope that other components of the Postal Service's overall plan would be successful. This is a rational approach that is within the authority of the Governors to make, that should be given a chance to succeed.

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<sup>48</sup> Nor does the Postal Service think that the AMA would prefer that the statute be read in such a way.

One component of that plan is securing legislative action on the Postal Service's benefit costs. But, the prospect that such legislation *might* be enacted cannot be considered as part of the "necessary" analysis, and certainly should not be used to decrease the size of the requested increase. The Commission must determine whether an above-cap increase is "necessary" (though, again, not "sufficient") by reference to what is in management's ability to control through "honest, efficient, and economical management." The size of the increase proposed by the Postal Service should not be rejected as "unnecessary" on the basis of the Micawber principle that "something will turn up." While management has proposed certain legislative changes regarding its benefits costs and is working with the Congress in explaining why such action is necessary, it cannot control whether Congress will pass such legislation, just as it cannot control a decision reached by an arbitrator. As such, it would not be appropriate for the Commission to reduce the size of the increase in the belief that legislation may be passed. Furthermore, as noted above, even if such legislation is forthcoming, it would not eliminate the need for the full increase proposed by the Postal Service in this proceeding.

**CONCLUSION**

For the foregoing reasons, the Postal Service urges the Commission to dismiss the AMA's Motion, and to proceed with this case according to the established procedural schedule.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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August 2, 2010



This same letter was sent to  
Senator Lieberman,  
Congressmen Tom Davis  
and Henry Waxman

February 24, 2005

Honorable Susan M. Collins  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510-6250

Dear Chairman Collins:

As Congress and the Administration turn to further consideration of postal reform this year, we, the Governors of the United States Postal Service (USPS), wish to communicate our views. We believe that the years of study and hard work devoted to this endeavor will be rewarded only upon enactment of comprehensive legislation that promises substantial improvements in the postal system over the long run.

During the past five years, the Postal Service has made great strides in improving service and controlling costs. In fiscal year 2004, on-time delivery of overnight First-Class Mail reached a record 95 percent. The Service achieved a record fifth straight year of increased total factor productivity, with staffing that is down to pre-1985 levels. USPS debt is now at the lowest level in 20 years.

On the other hand, the Service faces significant challenges. Its decades-old business model, in which a continually-growing First-Class Mail volume with its large per-piece contribution defrays the major portion of infrastructure costs, is no longer valid. First-Class Mail volume has declined three straight years, and this trend is expected to accelerate. Moreover, USPS faces significant liabilities and pressures on costs. At the same time, the Service must maintain a delivery network to serve 142 million homes and expand it to accommodate 1.8 million additional addresses annually.

Thus, we take our position on pending legislation with full awareness of the difficulties as well as opportunities facing the Postal Service and our responsibility to insure the Postal Service continues to meet its universal service commitments with the level of service the American public has come to expect, while providing competitive products and services at reasonable prices.

In the Board meetings of January 11, 2005, and February 16-17, 2005, we reviewed with Postmaster General Potter the Service's operations, the need for remedial action, and the current state of the legislative process. We believe strongly that to be successful the reform package must incorporate the following elements.

First, the escrow requirement for the so-called savings in payments to the Civil Service Retirement System (CSRS) should be removed. The misnamed "savings" is actually a correction of a statutorily-mandated (over)payment into the retirement system. To continue to require the Postal Service to hold these funds in an escrow or other account would simply continue the overpayment and unfairly burden postal ratepayers.

Second, the portion of the costs of CSRS benefits for USPS employees attributable to their military service should not be borne by USPS. The requirement that military service count toward USPS retirement is a Federal policy and a national obligation. Moreover, the Postal Service is required by law to give preference to veterans when hiring new employees. It is unfair effectively to penalize USPS for hiring those with military service, and it is neither equitable nor efficient for this cost to be assessed effectively as a Postal tax upon the use of the mail by millions of Americans. If this were allowed to continue, the Postal Service would be the only agency with CSRS employees that is required to fund these benefits. And we know of no private-sector company that is required to credit military service toward retirement.

Nevertheless, we understand the concerns of Congress and the Administration over the current fiscal situation and also over the long-run cost obligations for USPS retiree health care. Accordingly, we have proposed an approach that we believe would address both concerns while mitigating customer uncertainties regarding future postage rates in the near- and mid-term. We hope you will give serious consideration to our proposal.

Third, the legislation should incorporate improvements in the labor area—which accounts for nearly 80 percent of USPS costs. Current law charges USPS management and labor with addressing wage issues through collective bargaining, but also imposes major federal benefit programs by statutory requirement or restriction. We believe that important employee benefit features that are part of total compensation strongly influence the USPS's future costs and thus should be subject to negotiation at the same table with wages. Also, when management and labor fail to reach a bargaining agreement, the law requires mandatory arbitration. We believe that an arbitrator should be required by statute to factor into the decision the economic history of the employer, present financial health and ability to pay, as well as anticipated future growth, productivity, and total labor costs.

Fourth, the USPS should be granted more rate flexibility and authority to introduce new postal services. At present, the ratemaking process is very costly and time-consuming. General rate cases take at least 18 months to conclude, by which time the market may have changed significantly. As we have seen in the recent past, USPS finances can be impacted dramatically by events outside its control, such as increases in the cost of fuel. We feel that it is imperative that an exigent rate case be provided for, to ensure the continued delivery of services in the face of serious adverse events. And while there are provisions for special new services ("Negotiated Service Agreements"), in such cases as well the impediments are costly and overdrawn. Consequently, we believe that the USPS should be granted authority to change rates and introduce appropriate new postal services (both with Board approval) within a range (determined by the Postal regulator) without prior approval.

Historically, postage rates have stayed within increases in the Consumer Price Index (CPI). We believe that CPI would be an acceptable, albeit very challenging, price cap on rates (that is, the top of the range). We also believe that the bottom of the range should be established sufficiently low to allow price competition while covering reasonable estimates of attributable costs. The cap should be applied at the aggregate level, and certainly no lower than each class, to allow the Board the requisite pricing flexibility.

Fifth, any future changes in the scope of the postal monopoly should be considered within the context of the Postal Service's universal service mission and other social policy obligations. We believe that Congress and the Administration, not the regulator, are best positioned to set national policy striking a balance among these dimensions.

Sixth, we believe that we should be held fully accountable for the governance of the USPS, but also that we should be granted requisite authority. We ask to be empowered to establish, without external review, levels of compensation, based on performance, for the chief officers of the organization rather than being limited to caps on federal pay. We should also continue to be responsible for the retention of auditors, as well as the organization's Inspector General. Moreover, we should continue to be responsible for pursuing the efficiencies and cost control available from continuously rationalizing postal networks. We would welcome inclusion of a provision in the reform legislation recognizing the ongoing need for network changes and the Board's responsibility to assure execution of an effective program. We should be responsible for establishing appropriate levels of service and making sure they are maintained. Finally, we (rather than Congress) should continue to approve USPS budgets and requests for appropriations.

We realize that in some areas we are requesting more authority, but we are perfectly willing to accept the added responsibility, including oversight by Congress and the Administration. Our objective is to make the USPS perform as efficiently and effectively as possible, and in a way that is increasingly competitive and customer-friendly. We believe that legislative reform is needed to make this possible.

We have discussed these issues extensively with the Postmaster General, and we are in agreement as to the necessary elements of reform. We have directed the Postmaster General to pursue these initiatives aggressively, in order to ensure that reform legislation enables USPS to continue to provide its service to the nation for many years to come. We, along with the Postmaster General, look forward to working with Congress and the Administration to fashion appropriate language.

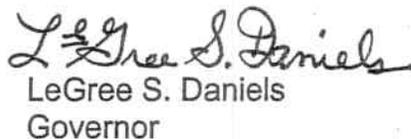
Sincerely yours,



James C. Miller III  
Chairman



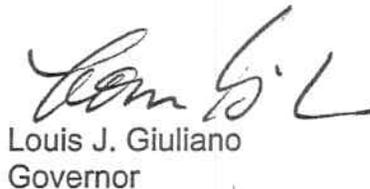
Alan C. Kessler  
Vice Chairman



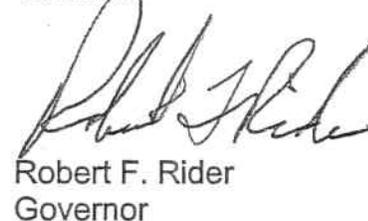
LeGree S. Daniels  
Governor



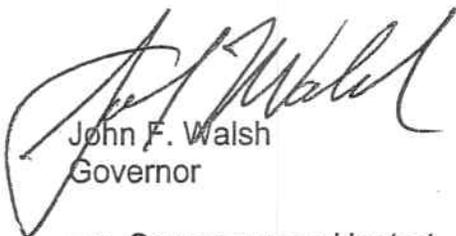
Carolyn Lewis Gallagher  
Governor



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Governor



Robert F. Rider  
Governor



John F. Walsh  
Governor

cc: Congressman Hastert  
Congresswoman Pelosi  
Congressman Tom Davis  
Congressman McHugh  
Congressman Danny Davis

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this date served the foregoing document in accordance with Section 12 of the Rules of Practice and Procedure.

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