

**BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001**

RATE ADJUSTMENT DUE TO)
EXTRAORDINARY OR EXCEPTIONAL) Docket No. R2010-4
CIRCUMSTANCES)

**REPLY COMMENTS OF
THE ASSOCIATION FOR POSTAL COMMERCE
(September 2, 2010)**

I. INTRODUCTION

The Association for Postal Commerce (“PostCom”) is constrained to reply to the comments of several parties who urge the Commission to use this docket as a vehicle for making (largely self-serving) changes to certain market dominant products and altering rate relationships and designs in ways that materially change the products, conditions of eligibility, and rate incentives that are now in effect.¹ In advancing these claims, these parties have written into the Postal Accountability and Enhancement Act (“PAEA”) provisions it simply does not contain and have written out of the PAEA provisions that explicitly govern the creation of new products and similar changes in rates and rate relationships.

¹ The Affordable Mail Alliance in its Motion to Dismiss and in its further comments has compellingly shown that the Postal Service’s filing fails to meet the standards embodied in 39 U.S.C. § 3622(d)(1)(E). We write separately here to address specifically the proposals for changes in conditions of eligibility that amount to new products and changes in rate incentives that are inextricably intertwined with the creation and modification of products; these departures from the statute and the Commission’s carefully developed rules constitute separate and independent grounds for dismissing the instant proceeding in its entirety.

As PostCom's initial comments establish and we further show in these reply comments, changes to products, including changes in conditions of eligibility and the modification of rate relationships, are outside the scope of a filing under §3622(d)(1)(E). Whether advanced by the Postal Service itself or by a third party, they must be dismissed. We further show that dismissal of all of these claims is the only way that the Commission can protect the integrity of the PAEA and its own rules in a manner that preserves the rights of all affected parties.

II. THE COMINGLING OF CHANGES IN RATE DESIGN AND RATE INCENTIVES WITH THE EXIGENT FILING IS UNLAWFUL WHETHER ADVANCED BY THE POSTAL SERVICE OR ANY OTHER PARTY.

In its attempt to pack into this exigent filing changes in the definitions of products and rate relationships, the Postal Service at least made some attempt to justify its position by arguing that these are merely technical changes to the Mail Classification Schedule ("MCS"). Exigent Request of the United States Postal Service ("USPS Request") at 19. The changes advanced by the Postal Service are not *ministerial*, however; they are substantive and cannot be considered in the context of this proceeding. PostCom Comments at 9-10. The same is equally true of the material changes advanced in the comments of interested parties.

Several of the commenting parties seek to expand the scope of the Commission's review in this case even further than the Postal Service has improperly done. The Public Representative, for example, having stated flatly that "[t]he Postal Service has not justified its exigent request," Public Representative Comments at 23-24, nonetheless

states that it “opposes rates for any product that do not cover attributable costs” and that some—but not all—classification changes “are inappropriate for consideration” within this docket, suggesting that an exigent request could be used to enact a broader realignment of rates and products. *Id.* at 3. The Public Representative cites no authority for any of these propositions.

Similarly untethered to the statute are the changes in rate design and rate relationships advanced by Valpak Direct Marketing Systems, Inc. (“Valpak”) and the American Postal Workers Union (“APWU”). The former’s position on the threshold question of whether an extraordinary or exceptional condition in fact exists is somewhat murky. *Compare* Valpak Comments at 3-12 *with* Valpak Comments at 33-44. Nonetheless, Valpak seeks to extract the words “reasonable and equitable” from 39 U.S.C. § 3622(d)(1)(E). Valpak would have the Commission treat these words as a free standing standard to be applied regardless of whether or not the Postal Service has in fact justified its claim for breaking the CPI cap. Valpak Comments at 20-29. APWU, although dutifully arguing that the Postal Service’s circumstances are extraordinary or exceptional, does not rest its argument about workshare discounts upon that Subparagraph (E). Rather, it inappropriately invokes a carefully truncated version of the workshare provisions of 39 U.S.C. § 3622(e).² APWU Comments at 2-4.

The statute just does not permit of the kinds of product redefinitions and rate realignments these parties advocate. The fundamental requirement established by the statute is that any change in postal rates may not exceed the corresponding change in CPI-U for the most recently available 12-month period. 39 U.S.C. § 3622(d)(1)(A).

² Even if §3622(e) entirely trumped the rest of the Act, which it does not, the subsection must be read in its entirety, including §3622(e)(2)(D) which requires the Commission to refrain from eliminating discounts when that would “impede the efficient operation of the Postal Service.” 39 U.S.C. § 3622(e).

Subparagraph (E) of §3622(d)(1) carves out an exception to that basic requirement but does so in very narrow and explicit terms. Subparagraph (E) specifically begins with the statement that “notwithstanding any *limitation* set under subparagraphs (A) and (C) . . . rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances.” 39 U.S.C. § 3622(d)(1)(E) (emphasis added). Subparagraph (A) defines the annual price cap and Subparagraph (C) sets forth the procedures to use in implementing rate changes subject to the cap. No other provision of Title 39 or of Chapter 36 of that title is suspended by or incorporated into Subparagraph (E). Thus, by its terms, the exception for extraordinary or exceptional circumstances operates to suspend, and only suspend, the otherwise applicable price cap. There is nothing in this language to support the proposition that the mere filing by the Postal Service of a change in system-wide rates based on alleged extraordinary or exceptional circumstances creates an open-ended and unrestricted reexamination of existing products, rate designs and rate relationships.

In substance—and in some cases literally—the Public Representative, APWU and Valpak attempt to write into Section 3622(d)(1)(E) words that it just does not contain. The Public Representative’s effort to distinguish between product changes which are related to the exigent filing and those which are claimed not to be related finds no support in the words of the statute. Similarly, APWU’s claim is that the exceptional circumstance exception to the price cap regime mandates a wholesale reexamination of workshare discounts. This effectively entails changes in products because “discounts” are subsumed within products under the PAEA. This claim, too, cannot be reconciled with the very narrow exception to the basic CPI cap regime contemplated by Subparagraph (E). Least

of all does the language of Subparagraph (E) permit the Commission to tear the “reasonable and equitable” language from that subparagraph and apply it as a free floating standard to certain products. The clause from which Valpak seeks to wrest these two words must be read in its entirety. It provides:

“[S]uch adjustment is reasonable and equitable and necessary to enable the Postal Service . . . to . . . continue the development of postal services of the kind and quality adapted to the needs of the United States.”

There is nothing in this language that one could possibly construe to permit the kind of product-by-product reexamination and realignment which these parties intend. Neither the Postal Service nor any interested party has standing to treat the Postal Service’s attempted invocation of § 3622(d)(1)(E) as grounds for a general review of eligibility requirements, product definitions, and rate incentives.

This conclusion is buttressed by two related and fundamental policy considerations. First, as the legislative history makes clear, the exception allowing the Postal Service to ask for above-CPI increases was designed to deal with a situation in which the crisis confronting the Postal Service is not only unforeseeable and unavoidable but is systemic in that it affects the entirety of the system. That is why the “reasonable and equitable and necessary” standard of Subparagraph (E) is designed to test whether the Postal Service needs to break the cap in order to “maintain and continue the development of postal services” generally.³

³ We note that Valpak elides the term “necessary” from its claims. None of the parties can or do claim that the changes they seek are necessary to fully satisfy the Postal Service’s needs. The omission of the word “necessary” is a critical flaw; that word signifies that, even when the cap is lifted, the Postal Service should not receive any more additional revenues than are necessary to “maintain postal services” generally. This test as a whole has nothing to do with changes in products or rate relationships.

While the Public Representative, APWU and ValPak seek to imply that the changes in product definition or rate relationship that they press upon the Commission would improve the overall financial position of the Postal Service, the inference they would have the Commission draw is improper as a matter of law. The enactment of a narrowly drawn exception to the CPI cap precludes any claim that 39 U.S.C. § 3622(b)(8), or any of the other objectives of §3622(b), may be read as a further or broader exception to the CPI cap merely because the Postal Service claims to be in financial distress.

The second principle is a corollary of the first. While the Commission has a critical role to play under the PAEA, and one that is particularly acute in the context of this docket, the Commission does not, even in this case, act as a Committee of Congress. The Supreme Court made plain in *United States v. Johnson* that “[w]hen Congress provides exceptions in a statute . . . [t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.” 529 U.S. 53, 58 (2000). The exception created by Congress in its ultimate enactment of § 3622(d)(1)(E) simply does not admit of an inference that the filing by the Postal Service of an above CPI increase constitutes a vehicle in which the Commission can lawfully entertain or consider on its own initiative proposals that would materially alter established product definitions, conditions of eligibility for products or rate categories, rate design, and rate incentives.

III. THE COMMISSION’S REJECTION OF THESE PROPOSED CHANGES IN PRODUCT DEFINITION AND RATE RELATIONS DOES NOT DEPRIVE ANY PARTY OF THEIR STATUTORY DUE PROCESS RIGHTS.

The fundamental problem with the changes in product definition and rate incentives advanced by the Postal Service and parties such as the Public Representative, APWU and ValPak in this docket is that they are “hidden in an exigent, 90-day case.” Additional Comments of Direct Marketing Association at 2. As PostCom pointed out in its initial comments, the first consequence of the attempt to pack these kinds of changes into this docket is that these changes in products and rate relationships would be subject to lesser scrutiny in the exigent context than they would receive in the normal course and that the outcome would be directly contrary to the structure and meaning of 39 U.S.C. §§ 3622 and 3642. PostCom Comments at 6. As a result, the Commission’s consideration of changes in product definition and rate incentives would deny affected parties a meaningful right to be heard and would contravene the fundamental notions of due process embodied in the Administration Procedures Act. *See United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251 (2d Cir. 1977); PostCom Comments at 11.

By contrast, the refusal by the Commission to consider on the merits changes in the definition of products and rate incentives advanced in this docket will not deprive the proponents of such changes of any rights at all. Section 3642 specifically allows “users of the mail” to propose substantive changes to the list of market dominant products. In addition, adhering to the statute, the Commission has established rules dealing specifically with such requests when made by users of the mails. 39 U.S.C. § 3642; 39

C.F.R. § 3020.50 *et seq.* The statute further permits “any interested person” (including an officer of the Postal Regulatory Commission representing the interest of the general public) to file a complaint with the Commission. 39 U.S.C. § 3662(a).

These provisions are entirely ignored by APWU and Valpak. The Public Representative does seemingly recognize the existence of Section 3642 but seeks to write into that section a distinction between product changes that are related to the Postal Service’s claim of need and those that are unrelated. Public Representative Comments at 2. That distinction is entirely an invention of the Public Representative and finds no support in the language of the statute, its purposes, or the Commission’s rules.

Of course, both § 3642 and § 3662 establish a very high standard of justification for the relief sought, and the burden of meeting that standard rests with the proponent of the change, whether the Postal Service, a user of the mail or an interested party. But that is exactly the point: allowing any party to avoid the elevated scrutiny that Congress plainly intended be given to material changes in products and rate incentives by burying them in (or behind) a Postal Service claim of extraordinary or exceptional financial need would confer upon the Commission powers and duties that it does not have and abrogate the Commission’s carefully crafted rules.

This does not mean that PostCom is categorically opposed to all changes in the definition of market dominant products, conditions of eligibility or rate incentives. As we have pointed out in our Initial Comments, at least one of the changes advanced by the Postal Service has previously been considered by the Commission and may be non-controversial. PostCom Comments at 12. Other changes advanced by the Postal Service and by the commenting parties are considerably more complex on legal, economic, and

policy grounds, and may well be improper as a matter of law or sound economic policy. That, however, underscores the point: there is simply no possible way in the context of a proceeding falling within the very narrow exception to the CPI-U requirement to afford interested parties a meaningful opportunity to express their views. It is equally impossible for the Commission to reach a decision which, taking account of those views, is both lawful and reasoned under *Novia Scotia Food Products, supra*.

For these reasons, PostCom submits that all of these proposals, whether offered by the Postal Service or by interested parties, must be dismissed outright and without prejudice. This outcome necessarily entails dismissal of the entire case on grounds separate and independent of the compelling reasons for that result advanced by AMA.

Respectfully submitted,

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