

ORDER NO. 2540

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman
Tony L. Hammond, Vice Chairman;
Mark Acton,
Ruth Y. Goldway; and
Nanci E. Langley

Rate Adjustment Due to Extraordinary or
Exceptional Circumstances

Docket No. R2013-11R

NOTICE AND ORDER ESTABLISHING PROCEDURES ON REMAND
AND SUSPENDING THE 45-DAY NOTICE REQUIREMENT
FOR REMOVING THE EXIGENT SURCHARGE

(Issued June 12, 2015)

I. INTRODUCTION

On June 5, 2015, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *Alliance of Nonprofit Mailers v. Postal Regulatory Commission*, 2015 WL 3513394 (D.C. Cir. June 5, 2015). In that opinion, the court granted in part a Postal Service petition for review of the Commission's December 24, 2013 order that had approved in part a Postal Service request for an exigent rate

adjustment under 39 U.S.C. 3622(d)(1)(E).¹ 2015 WL 3513394 at *10. Although the court largely affirmed Order No. 1926, it vacated the count once portion of the Commission's order and remanded the case for proceedings consistent with its opinion. *Id.*

On June 8, 2015, the Postal Service filed a motion requesting the Commission expeditiously implement remand proceedings and take a number of additional steps pending completion of the remand proceedings.²

On June 11, 2015, the Commission received two responses to the Postal Service Motion. The first response was filed by the American Postal Workers Union, AFL-CIO (APWU) in support of the Postal Service Motion.³ The second response was filed by a group of mailers (Mailers) in opposition to the Postal Service Motion.⁴

For the reasons set forth below, the Commission suspends the requirement that the Postal Service file a 45-day notice of intent to remove the exigent rate surcharge pending issuance of a further order.⁵ This action is appropriate in light of the May 19, 2015, letter from counsel for the Postal Service advising the court that the Postal

¹ Docket No. R2013-11, Order Granting Exigent Price Increase, December 24, 2013 (Order No. 1926).

² Docket No. R2013-11, Motion of the United States Postal Service to Suspend Exigent Surcharge Removal Provisions of Order No. 1926 and to Establish Remand Proceedings, June 8, 2015 (Postal Service Motion).

³ Comments of American Postal Workers Union, AFL-CIO in Support of Postal Service Motion to Suspend Exigent Surcharge Removal Procedures, June 11, 2015 (APWU Comments).

⁴ Response of Association for Postal Commerce, MPA—The Association of Magazine Media, Alliance of Nonprofit Mailers, Direct Marketing Association, Inc., American Catalog Mailers Association, Envelope Manufacturers Association, Epicomm, Idealliance, Major Mailers Association, National Newspaper Association, and Saturation Mailers Coalition to the Motion of the United States Postal Service to Suspend Exigent Surcharge Removal Provisions of Order No. 1926 and to Establish Remand Proceedings, June 11, 2015 (Mailers Response).

⁵ The 45-day notice requirement was originally imposed by the Commission order granting an exigent price increase. Order No. 1926 at 185. That requirement was subsequently confirmed in an order addressing the Postal Service's surcharge removal plan. Docket No. R2013-11, Order on Exigent Surcharge Removal, January 12, 2015, at 15 (Ordering Paragraph 1) (Order No. 2319).

Service is expected to recoup the entirety of the surcharge by early August.⁶ If this estimate is correct, the Postal Service stated that it would need to notify its customers of a prospective rescission as early as mid-June. *Id.* The Commission also establishes expedited comment procedures to afford all interested persons an opportunity to address the question of how to count the volume of lost mail in calculating the exigent surcharge, as well as any other relevant issues.

II. BACKGROUND

Underlying proceeding before the Commission. On September 26, 2013, the Postal Service renewed its request for an exigent rate adjustment pursuant to 39 U.S.C. 3622(d)(1)(E).⁷ In Order No. 1926, the Commission found that the Postal Service had justified the recovery of \$2.776 billion in additional contribution by showing a causal link between the extraordinary or exceptional circumstances of the Great Recession and mail volume losses. Order No. 1926 at 193 (Ordering Paragraph 1). The Commission therefore permitted an exigent rate surcharge to go into effect on January 26, 2014. *Id.* (Ordering Paragraph 2). The Commission also required the Postal Service to report periodically on the surcharge revenue it was collecting, to file a report with the Commission by May 1, 2014, that included a proposed plan for removing the exigent rate surcharge, and to file a notice of the surcharge's removal not less than 45 days prior to the effective date of such removal. *Id.* at 185.

The court's opinion. On appeal, the court affirmed the Commission's use of the new normal test to measure the causal effect of the exigent circumstance. 2015 WL 3513394 at *6. However, it found the Commission's count once rule to be inconsistent

⁶ Letter to Mark Langer, Clerk of Court, from Paul D. Clement, Counsel for Petitioner United States Postal Service, dated May 19, 2015, at 1.

⁷ Docket No. R2013-11, Renewed Exigent Request of the United States Postal Service in Response to Order No. 1059, September 26, 2013. The history underlying the Postal Service's renewed request is summarized by the court in its decision. See 2015 WL 3513394 at *2-3.

with the Commission's adoption of the new normal test. *Id.* at *8. Under the count once rule, lost mail volume was counted only in the first year in which it was lost, regardless of whether the new normal test showed the exigent circumstance was ongoing. The Court vacated and remanded the count once portion of Order No. 1926 for further proceedings. *Id.* at 10.

The Postal Service's motion. In its motion, the Postal Service seeks expedited implementation of the remand proceedings. Postal Service Motion at 1. It also presents an analysis which, it asserts, demonstrates that the floor for a revised estimate of the total contribution loss is no less than \$3.957 billion. *Id.* at 2. To arrive at its \$3.957 billion floor, the Postal Service offers a methodological approach for counting volume losses due to the Great Recession in a cumulative manner. The Postal Service uses volume losses, by year, from Table VI-5 in Order No. 1926 at 101. The Postal Service then calculates the cumulative volume loss in each year by combining the volume first lost in that year, plus annual volume lost in the previous year(s). Postal Service Motion at 5. It then translates the calculated cumulative volume loss into an increase in lost contribution from \$2.766 billion to \$3.957 billion. *Id.* at 6 (emphasis omitted). The Postal Service then applies the methodology of Table VII-2 in Order No. 1926 to calculate a revised Surcharge Revenue Limitation from the increase in lost contribution resulting from the cumulative volume loss. *Id.* The Postal Service estimates that the Surcharge Revenue Limitation increases from \$3.238 billion to \$4.633 billion as a result of the cumulative counting of volume losses. *Id.* at 7.

The Postal Service asserts that the additional amount to which it claims to be entitled provides a cushion for maintaining the surcharge while further proceedings are conducted. *Id.* at 2. The Postal Service, therefore, requests the suspension of the \$2.766 billion surcharge removal target. *Id.* at 3. In the Postal Service's view, the additional surcharge revenue made possible by suspension of the surcharge removal target will be sufficient to allow consideration of the full range of issues that need to be addressed in the remand proceeding. *Id.* at 7. In the meantime, the Postal Service

states that it would continue to track exigent surcharge revenue and file quarterly reports with the Commission as required under Order No. 1926. *Id.*

Without suspension of the surcharge removal target, the Postal Service asserts that the possibility of alternating rate decreases and increases would needlessly burden the public, the Postal Service, and the mailing industry as the Commission conducts the remand proceedings. *Id.* at 3. Finally, the Postal Service requests the Commission to establish a schedule and procedures for consideration of the range of remand issues. *Id.* at 8.

Responses to the Postal Service's motion. In its comments, APWU supports the relief requested by the Postal Service and argues that the court's order to vacate the count once rule necessitates the Commission suspending the mechanism for removal of the exigent rate surcharge. APWU Comments at 1-2.

The Mailers argue that the Postal Service has misstated the scope of the court's remand. Mailers Response at 1. In particular, they assert that the Postal Service seeks to relitigate the new normal limitation and argue that the scope of the Commission's remand proceedings should be limited to the count once analysis. *See id.* at 3-8. The Mailers also question the Commission's authority to grant the relief requested by the Postal Service prior to issuance of the court's mandate. *Id.* at 8-9. Finally, the Mailers claim that uncertainty over whether the Commission can complete its action on remand before the Postal Service reaches the surcharge cap requires the Commission to take steps to prevent an over collection of the surcharge. *Id.* at 1, 9-10.

III. COMMISSION ACTION ON REMAND

The Commission agrees with the Postal Service that a prompt response to the court's opinion is necessary. If the Postal Service were to file the 45-day notice of intent to remove the surcharge by mid-June, this notice could trigger a burdensome series of rate decreases and increases as described in the Postal Service's Motion. The Commission agrees that it is desirable to avoid such a circumstance.

While the Commission agrees that prompt action is necessary, it does not believe that it is necessary for the \$2.766 billion surcharge target to be suspended, as requested by the Postal Service, in order to accommodate the remand proceedings and avoid disruptive and burdensome rate changes. At this juncture, the Commission finds a more measured approach is appropriate and suspends the 45-day notice filing requirement. Such a suspension forestalls a series of rate fluctuations and provides the Commission the opportunity to conclude expedited remand proceedings before the \$2.766 billion surcharge target is reached.

The Commission is not persuaded by APWU's assertions that the Commission must suspend the procedures for removal of the exigent rate surcharge in light of the court's directive. The court has not yet issued its mandate. In the absence of further action by the court, the mandate will not, under the court's generally applicable rules, be issued until July 27, 2015. See Fed. R. App. P. 35(c), 40(a)(1) and 41(b). Pending issuance of the mandate, the Commission is not prevented from considering the impact of the court's opinion on collection of the exigent surcharge. As discussed above, the Commission is establishing procedures that will permit it to act once the court's mandate is issued. In the meantime, the Postal Service continues to be authorized to collect the exigent surcharge.

The Mailers express different concerns. They strongly oppose the Postal Service's interpretation of the court's opinion as a misstatement of the proper scope of the case on remand. Mailers Response at 1, 3-8. They also argue that a temporary extension of the exigent surcharge pending remand can only be given if the Postal Service agrees to conditions that would make mailers whole if the additional surcharge revenue is ultimately found unwarranted. The Mailers' arguments on these issues and any others they wish to present in the proceedings established by this Order will be considered by the Commission when it acts on remand.

The Mailers also question whether the Commission has jurisdiction to act in this docket until the court's mandate issues. Mailers Response at 8-9. The action taken by

the Commission in this Order is not precluded by the fact that the mandate has not yet issued. Even though the court's mandate has not been issued, its decision calls into question the volume of lost mail that should be used to calculate the exigent rate surcharge. The Commission's suspension of this 45-day notice requirement maintains the status quo in order to enable prompt action on remand without making any premature determination as to whether and when rate changes will be required. The 45-day notice requirement can be reinstated at the conclusion of the remand proceedings. The 45-day notice requirement was initially adopted by Order No. 1926, but it was also reexamined and independently confirmed as part of the Postal Service's surcharge removal plan approved by Order No. 2319. Order No. 1926 at 185; Order No. 2319 at 15 (Ordering Paragraph 1). Order No. 2319 was not the subject of the court's review proceeding.

In order to afford the Postal Service and other interested persons an opportunity to comment on the Postal Service's methodological approach for accounting for volume losses due to the Great Recession in a cumulative manner and any other relevant issues they wish to address, the Commission is inviting initial and reply comments. Initial comments are due no later than June 26, 2015. Reply comments are due no later than July 6, 2015.

The Commission establishes Docket No. R2013-11R to consider issues on remand. Since Docket Nos. R2013-11 and R2013-11R are part of the same proceeding, the Commission shall consider all documents filed to date in Docket No. R2013-11 as part of the record in Docket No. R2013-11R. All comments and other documents related to issues on remand must be filed under Docket No. R2013-11R.

IV. ORDERING PARAGRAPHS

It is ordered:

1. The Commission establishes Docket No. R2013-11R to consider issues on remand.
2. James Waclawski will continue to serve as officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.
3. Initial comments are due no later than June 26, 2015.
4. Reply comments addressing matters raised in initial comments are due no later than July 6, 2015.
5. All comments and other documents related to remand issues must be filed under Docket No. R2013-11R.
6. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Ruth Ann Abrams
Acting Secretary