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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268

Rate Adjustment Due To Extraordinary or Exceptional Circumstances, 2010	:	Docket No. R2010-4

REPLY COMMENTS OF TIME WARNER INC.
ON UNITED STATES POSTAL SERVICE
EXIGENT REQUEST
(September 2, 2010)

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Pursuant to Order No. 485, Notice and Order Concerning Rate Adjustment for Extraordinary or Exceptional Circumstances (issued July 8, 2010), Time Warner Inc. (Time Warner) hereby submits its reply comments in the above-captioned docket.

I. THE EXIGENCY PROVISION DOES NOT AUTHORIZE THE POSTAL SERVICE TO BREACH THE RATE CAP IN ORDER TO BRING A MARKET-DOMINANT CLASS TO FULL COST COVERAGE

The Postal Service evidently believes that an exigency case provides an opportunity to raise rates by an unlimited amount above the statutory caps, in order to achieve full cost coverage. Time Warner does not agree. We believe that the "necessity" clause of the exigency provision sets an upper limit on any rate increase in an exigency proceeding. Before discussing our disagreement with the Postal Service on this issue, however, we do wish to commend the Postal Service's general refusal to torture the language of the exigency provision into something more congenial to its own preferences.

The Postal Service acknowledges that it possesses no authority, outside of an exigency case, to raise rates for an "underwater" market-dominant class above the caps. *See* note 19, *infra*. And in claiming that it is free to make such increases in the context of an exigency increase, it makes no claim that failure of a market-dominant class to cover attributable costs constitutes an exigency in itself. (As far as Time Warner is aware, no one has ever made such an assertion.) Rather, the Postal Service is candid in acknowledging that its proposed Periodicals rate increase in this proceeding is a result of the perceived opportunity to use the occasion of an exigent increase to address the issue of Periodicals cost coverage as well. When asked whether he had considered "waiting to increase the periodicals rate disproportionately[,] as was recommended to you [by the Commission,] in advance of the completion of the periodical study that has been mandated by Congress," Postal Service witness Kiefer replied:

> I was aware that the periodical study was going on, but we were also aware that under the current law that the only opportunity that we have to increase periodicals . . . above the general rate of inflation would be with an exigent price change. . . .
>
> Once this exigent price change case is closed, periodicals is going to be subject to a price cap with whatever the change in the CPI is.
>
> And so this was our opportunity where we felt that we needed to take to make whatever adjustment that we thought we could make. . . .
>
> So this was an opportunity -- and was sort of a unique opportunity to be able to make this change for periodicals.

(Tr. 3/418-19, 420.)

When asked whether some of his responses reflected "the Postal Service's frustration with the price cap mechanism," Kiefer's reply was similarly candid:

> I think we all feel that frustration that the only -- well, the only mechanism that I know of to break through the cap is the exigent price change, and it [i.e., the price cap system] doesn't handle the situation where a whole class is not covering its costs. I mean, it is applied at the class level, and so we can only increase the price of periodicals outside of an exigent price change at the regular CPI rate.

Tr. 3/446.

The Postal Service thus makes clear that it does not claim authority, or believe it possesses authority, outside the context of an exigency proceeding, to raise rates above the statutory caps in order to bring a market-dominant class to full cost coverage. However, the Postal Service does not attempt to justify its proposed 8% Periodicals Class rate increase under the necessity standard of § 3622(d)(1)(E).[1] Raising Periodicals Class cost coverage is the only justification given for the proposed increase. To the extent that this reflects a conclusion by the Postal Service that no justification under the necessity standard is possible, Time Warner agrees. Raising Periodicals Class cost coverage by imposing a rate increase of such magnitude is not "necessary . . . to maintain postal services of the kind and quality adapted to the needs of the United States."

The Postal Service apparently believes, however, that no justification under the necessity standard is *required* and that the exigency provision, once brought into play, gives it the authority to raise rates to levels that are higher than

[1] Section 3622(d)(1)(E) (the "exigency provision") of the Postal Accountability and Enhancement Act ("PAEA") provides for procedures under which, in "either extraordinary or exceptional circumstances," the Commission may approve rate adjustments without regard to the statutory caps when such adjustments are "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."

"necessary," as that term is used in the exigency provision, in order to increase the cost coverage of an "underwater" market-dominant class. This is where Time Warner parts company from the Postal Service's interpretation of the exigency provision.

The Postal Service does not explain the statutory basis for such authority. However, it is clear that it does assume that it possesses such authority, and that it must make this assumption in order to maintain that its proposed Periodicals rate increases are legally permissible.

What then is the argument for the position that, once an exigency is established, the exigency provision authorizes the Postal Service to increase rates without regard to the price caps, not only to address the effects of the exigency and to the extent necessary to maintain postal services adapted to the needs of the United States, but for the purpose of raising the cost coverage of a market-dominant class that is covering less than its full costs, and to whatever extent may serve that purpose?

One possible answer--that the Commission has provided such authority in its regulations for exigency proceedings--cannot be taken seriously. The requirement in § 3010.61(a) of the Commission's Rules of Practice that an exigency filing include a discussion of whether the requested rate increases are consistent with applicable statutory policies simply does not imply a grant of authority to raise rates in excess of, or for purposes different from, what the exigency provision itself authorizes. To require that a requested set of rate adjustments comply with all applicable statutory policies is not inconsistent with the existence of particular limitations on both the size and the purposes of the adjustments. Nor does the Commission possess--or claim to possess--authority to grant a request for rate increases, without regard to the statutory caps, beyond the authority that is conveyed by the terms of the exigency provision itself.

A more superficially plausible answer can best be summarized in the form of a question: If rates for a class of mail at the upper limit permitted under the price cap are insufficient to produce full cost coverage, how is it possible to enforce the statutory requirement under § 3622(c)(2) ("Factor 2") that each class must cover its full costs, other than by authorizing the rates to be increased by more than the caps would permit? This is the argument that we assume led the Postal Service to believe that its proposed 8% Periodicals rate increase in this proceeding is legally permissible, and that is reflected in the responses of Dr. Kiefer at his hearing quoted a few paragraphs above. It is reiterated, in its most succinct form, in a written response provided by Kiefer subsequent to the hearings: "the PAEA does not provide any pricing mechanism except for exigency to make a below-cost market dominant class cover its direct costs." Response of Kiefer to POIR No. 5, Q.12.b (filed August 25, 2010).

There are four reasons why this line of argument should be rejected.

First, it rests on a fallacy. It does not follow from the fact that the PAEA provides no *other* mechanism than the exigency provision for raising market-dominant rates above the caps in order to achieve full cost coverage either (1) that the exigency clause is such a mechanism, or (2) that the PAEA requires such a mechanism.

Second, the Postal Service's line of argument requires a convoluted and far-fetched interpretation of the exigency clause. There is no evidence in either the legislative history or the text of the PAEA that making a below-cost class cover its costs is one of the things that *the PAEA provides the exigency provision for*. The *only* thing that *the PAEA provides the exigency provision for* is *dealing with exigencies.* Moreover, no one has ever suggested that the failure of a class to cover its costs itself *constitutes* an exigent circumstance under the terms of the exigency provision. Neither the purpose nor the terms of the exigency provision suggest that it is an appropriate tool for achieving compliance with Factor 2.[2]

Third, it rests on an erroneous factual assumption and an incorrect factual assertion. The erroneous assumption is that there are no ways, or at least no effective ways, of bringing a below-cost class to full cost coverage other than by raising its rates. But there are two other obvious ways for increasing cost coverage: reducing costs and changing the mix of classifications within the class. The factual misstatement in Kiefer's response to POIR No. 5, Q12.b, is that raising rates above the caps is the only *pricing* mechanism for achieving full cost coverage. Another available pricing mechanism is reform of the rate structure of a class in order to maximize the appeal of rate categories that are not causes of the deficiency in cost coverage.[3] (In the case of Periodicals mail, the degree to

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[2] Whether, under some extraordinary set of facts not at issue in this proceeding, the losses incurred by an individual class could be determined to constitute an exigent circumstance, is a different question.

[3] In the same set of responses in which Kiefer states that "the PAEA does not provide any pricing mechanism except for exigency to make a below-cost market dominant class cover its direct costs" (POIR No. 5, Q.12), he responds in part as follows to a request to "indicate the maximum amount of time the Postal Service will allow Standard Mail Flats to continue to fail to recover their
[footnote continues]

which rate structure reform might ameliorate the cost-coverage problem is a subject of speculation and will not be known with certainty unless and until rate structure reform is implemented.)

Fourth, it is not the case that the attributable cost requirement (Factor 2) would become a dead letter or be "written out of" the PAEA if it could not be enforced by breaching the statutory price caps. It is not disputed that the PAEA contains both a "requirement" that each market-dominant class cover its full costs ("Factor 2") and a "requirement" that rate increases for each market-dominant class not exceed an upper limit that is defined by the CPI-U price cap, nor that fulfilling both of these "requirements" simultaneously may in particular cases be impossible. The question thus arises: In such cases, which "requirement" shall prevail? The answer, in Time Warner's view, is clear. Congress intended the CPI-U price caps to be the PAEA's central policy provision and regulatory mechanism for market-dominant rates. That provision occupies the pre-eminent position in a statutory hierarchy in which the "Factors" are subordinate. In the exigency and banking provisions, the Act carefully specifies the sole circumstances in which rates may be increased above the applicable caps, and nothing in those provisions suggests that fulfillment of Factor 2 is such a circumstance.

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direct costs before imposing a price increase that likely would produce revenues to recover all of the attributable costs for this product" (POIR No. 5, Q.13):

> the question seems to envisage price adjustments as the sole remedy in the case where the product does not appear likely to cover its costs within a stipulated period. In actuality, if a product does not have the prospect for covering its costs within a reasonable period of time, classification changes may offer additional sources for a solution to the problem.

In contrast to this extensive list of reasons for concluding that, under the PAEA, the price caps must take precedence over Factor 2, the case for the opposite view amounts to little more than the sentiment that "there ought to be a law," that the PAEA ought to say, and intend, something different from what it evidently does say and intend.

II. THE PROPOSED 8% PERIODICALS RATE INCREASE IS NOT NECESSARY TO ADDRESS THE PROBLEM OF LOW PERIODICALS CLASS COST COVERAGE AND EMBODIES AN ILL-ADVISED, SELF-DEFEATING PRICING STRATEGY

1. The Postal Service's rate proposals for Periodicals in this docket fail to address the well-documented causes of low Periodicals cost coverage

In Docket No. R90-1, Halstein Stralberg, Time Warner's postal consultant, first presented evidence that anomalous increases in Periodicals mail-processing costs which had begun in 1986 were due to the use of flats mail-processing operations as a convenient location for excess labor capacity, which had increased dramatically with the advent of letter mail automation.[4] Through most of the 1990s, the Postal Service stoutly denied the existence of what came to be known as the "automation refugee" phenomenon. But as, over time, the evidence confirming Stralberg's diagnosis continued to accumulate and the Postal Rate Commission became increasingly persuaded of the existence and seriousness of the problem, the initial skepticism of the Postal Service also

[4] *See* Docket No. R90-1, TW-T-2 and TW-RT-1 (direct and rebuttal testimony of Halstein Stralberg regarding the causes of increases in the mail-processing costs charged to Periodicals and Standard flats mail since 1986, increases that were vastly disproportionate to changes in mail-processing costs in other classes).

began to give way. In 1998 the Postal Service agreed to a study of Periodicals Class mail-processing operations by a Periodicals Operations Review Team (PORT) that included representatives of the magazine publishing industry (of whom Stralberg was one). And in accordance with recommendations made in the PORT's Report of 1999, the Postal Service subsequently committed itself to taking a number of steps to improve Periodicals mail-processing efficiency.[5] However, as is well known to the Commission, the results of such steps as were taken were disappointing. Moreover, the Postal Service continued to resist proposals to reassess the soundness of its cost-measurement systems and to reform the Periodicals rate structure to incorporate greater incentives for mailers to engage in more efficient mail preparation.

In Docket No. C2004-1, a complaint brought by Time Warner and a number of other magazine publishers, the Postal Rate Commission found that the complainants had presented "the most sophisticated Periodicals cost analysis and rate design theories" and that Stralberg's model of Periodicals mail-processing costs had "accurately captured the cost causing characteristics" of Periodicals mail (remarking that "his contribution can not be overstated"). The Commission "urge[d] the Postal Service to proceed forthwith to develop a rate design for Periodicals that better serves the needs of all interested stakeholders and thereafter file a request for a recommended decision with the Commission" (adding, "It is hoped that this Order will further inform the Postal Service and

[5] *See* Report of the Periodicals Operations Review Team, a joint review to improve mailer and postal operations affecting Periodicals Class Mail. Sponsored by the American Business Press, the Magazine Publishers of America and the United States Postal Service, March 1999.

spark prompt action").[6] But in its next omnibus rate filing, Docket No. R2006-1, the Postal Service virtually ignored those findings and recommendations, and so the Commission recommended the adoption of a reformed Periodicals rate structure over the objections of the Postal Service.[7]

The implementation of rates that would create incentives for more efficient mail preparation, however, has proceeded at a glacial pace. As recently as five months ago, the Commission was still trying to spark Postal Service implementation of the rate structure adopted in R2006-1.[8] Yet in its request for exigent rate increases in this docket, the Postal Service has chosen to proceed in the opposite direction, proposing rates that "contain little improvement and seem designed to punish the most efficient mailers" (e.g., proposing to pass through much more of the pallet than of the sack costs for origin-entered mail).[9] Meanwhile, mail-processing costs attributed to Periodicals continue to increase

[6] Docket No. C2004-1, Order No. 1446 (issued October 21, 2005), at 3, 22, and App. B, p. 7.

[7] *See* PRC Op. R2006-1 (issued February 26, 2007), at 324-49 [¶¶ 5685-767].

[8] *See* Docket No. ACD2009, Annual Compliance Determination for Fiscal Year 2009 (issued March 29, 2010), at 82, where the Commission stated the following regarding Periodicals Class rates:

> The low passthroughs [of bundle and container costs] are problematic for two reasons. First, they exacerbate the Periodicals cost/ revenue gap because mailers are not paying for the full cost of handling bundles and containers. Second, the combination of low and differential passthroughs may send conflicting price signals to mailers and prevent them from entering mail in a way that reduces the end-to-end cost. [footnote omitted]
>
> *As noted above, current opportunities exist to improve efficiency and to offer mailers appropriate pricing incentives. The Postal Service should implement such changes as soon as practicable.* [Emphasis in original.]

[9] *See* Comments of Halstein Stralberg in the instant docket, at 12, 13-14, and 16-17.

at an abnormal and seemingly inexplicable pace, and apparent Periodicals cost coverage accordingly continues to decline.

Some recent developments concerning Periodicals Class costs and cost coverage help to confirm the facts regarding the causes of apparently high Periodicals costs. For example, the Postal Service and the magazine publishing industry have long agreed that one cause of excessively high attribution of costs to Periodicals is that flats mail-processing costs are considerably less variable with volume than is assumed under the costing methodology approved by the Commission (which treats those costs as generally 100% volume-variable).[10] If the approved methodology were correct, the dramatic declines in volume experienced in FY 2008 and 2009 ought to have caused commensurate reductions in attributable costs and left Periodicals cost coverage more or less unchanged. But instead, the volume declines had the effect of driving nominal Periodicals cost coverage significantly lower. Kiefer summarizes this development in his response to POIR No. 3, Q. 5:

> [T]he volume of Flats declined by over 20 percent over a short period of time. Despite substantial efforts to trim costs in line with volume declines, it was not possible to reduce costs by the same percentage as the massive mail volume declines that occurred within a relatively short period of time. . . . If attributable costs do not shrink proportionately with volumes within a specific time window, the cost coverage (the ratio of revenues -- which do tend to shrink in line with volumes -- to attributable costs) must, of mathematical necessity, also shrink.

[10] *See* PRC Op. R2006-1 at 22 [¶ 3004] ("the Commission adheres to its view based on engineering and operational analysis, that most mail processing operations vary in proportion to volume"), *and generally* at 21-54 [¶¶ 3001-108] and App. J.

The inference that necessarily follows from these events is that Periodicals mail-processing costs are less variable, more fixed, than the approved costing methodology would have them be, and that actual Periodicals costs are lower, and actual Periodicals cost coverage is higher, than the official figures indicate.

Another recent development potentially helpful to an understanding of the facts affecting nominal Periodicals cost coverage is that the Postal Service, perhaps prompted by the PAEA's limitations on passing on cost increases to mailers in the form of rate increases, has acknowledged the existence of substantial unneeded excess capacity in its operations and has begun to address the problem by reducing its labor complement. The Postmaster General has publicly acknowledged the existence of substantial excess labor capacity in the system, and the Postal Service's witnesses in the instant proceeding have been frank in acknowledging that there is considerable fixity of costs in the Postal Service's mail-processing and delivery operations due to the difficulty of reducing the size and cost of its labor complement.[11] The Postal Service has also been candid in acknowledging that a substantial portion of these costs may appear in the costing system as costs that are incurred for the benefit of, and thus are attributed to, a particular class of mail.[12]

[11] *See, e.g.*, Statement of Kiefer at 27-28; Tr. 1/77-78 (Corbett); and Responses of the United States Postal Service to Questions 1-32 of POIR No. 5 (filed August 25, 2010), Response of the USPS to Q. 8.

[12] *See, for example*, the Postal Service's written response to the question, "Please provide the percentage of [flats] pieces currently processed in a non-optimal fashion by manual sort." In the not very distant past, the Postal Service would have responded to that question by disputing the assumption that manually processed flats are "processed in a non-optimal fashion." Its answer in this proceeding, however, was: "30 percent of volume was handled manually in FY 2009."

2. The Postal Service's proposed Periodicals rate increase does not reflect serious consideration of what measures would be effective in addressing the problem of excessively high Periodicals costs

The Postal Service now proposes to "take some steps" (Kiefer Statement at 39) toward solving the problem of low Periodicals cost coverage--a problem that is in part a consequence of its stubborn refusal to implement a more efficient Periodicals pricing structure--by raising Periodicals rates by eight times more than growth in the CPI-U since its last rate increase, and this while at the same time making the Periodicals rate structure *less* efficient, in order to "keep the price changes for most individual categories as close to the class average as possible to minimize the possibility that any group of publications [i.e., those that are least efficiently prepared for mailing and whose costs to process exceed what they pay in postage by the widest margins] would be affected much more severely than others." Kiefer Statement at 62. But Periodicals mailers should be reassured, says the Postal Service, because these "moderate, but above-average increases [were] developed in the context of the operational efficiency measures outlined in the Flats Strategies discussed in USPS-R2010-4/9," and "the operational efficiencies outlined are expected to result in substantial improvements in flats cost coverage." Kiefer Statement at 41.

Such an approach is identical in every feature, right down to the transparently hollow assurances of great strides in improving efficiency *tomorrow*, to every one of the Postal Service's Periodicals rate proposals since the problem of out-of-control mail-processing costs first came to light in the early 1990's, all of which produced the uniform result that the problem got even worse. And the impossibility of putting any faith in the Postal Service's current "plan" to improve the condition of the Periodicals Class is greatly reinforced by Stralberg's judgments that (1) the "document called 'Flats Strategies' . . . is not something that has been guiding the Postal Service’s flats policies [but] was assembled only recently by various managers at headquarters 'and their collective staff,' for presentation in this docket," and (2) "the rates [the Postal Service] has proposed contain little [structural] improvement and seem designed to punish the most efficient mailers." Stralberg Comments at 11, 12.

The impossibility of placing confidence in the Postal Service's plan is compounded by its operations and pricing witnesses' evident incomprehension of the major issues concerning Periodicals operations and pricing. A number of the Postal Service's statements in this proceeding concerning flats processing operations and Periodicals pricing are alarming. In particular, Mr. Neri's post-hearing response to a question concerning flats operational efficiency and Dr. Kiefer's post-hearing response to a question concerning Periodicals Class pricing incentives both raise serious concerns about senior Postal Service management's grasp of these subjects.

Mr. Neri, who was presented by the Postal Service to sponsor the "Flats Strategy," gave responses at his hearing that were reminiscent of the Postal Service's state of denial respecting questions about mail-processing efficiency throughout most of the 1990's. He could think of no reason why there might be problems with flats processing, and he stated that he was not aware of the existence of any such problems during the past ten years. In a subsequent written response to a question raised at his hearing, Neri advanced the incredible claim that "flats mail processing operation has experienced continuous improvement . . . from FY 2006 through July 2010," indicating that there was a 35.2% improvement in the productivity of flats processing during that period. How that improvement could have occurred at the same time that the two major components of flats, Periodicals and Standard flats, were experiencing huge unit mail-processing cost increases, Neri does not undertake to explain.[13]

In light of the Postal Service's failure to propose improvements in the Periodicals rate structure in this case, Dr. Kiefer was asked a series of questions about what plans the Postal Service has after this case, however tentative, to implement "pricing incentives . . . such as the ones that were requested [by the Commission] in the [FY 2009] ACD." Tr. 3/442. His response at his hearing was in two parts. Part one was reminiscent of Mr. Neri's explanation that very morning to the effect that the problem of inefficient Periodicals mail processing

[13] *See* Tr. 3/329-30 (Neri); and Response to Questions from the Bench at the Hearing for Mr. Neri (filed August 19, 2010), response to question at Tr. 3/333, 336.

Neri's post-hearing response includes (at page 2 of 2) some flats volume and flats hours estimates that he claims show an FY 2006-2009 35.2% improvement in flats sorting productivity. For example, he claims an FY 2006 volume equal to 54,221,639,437, versus 54,270,032,312 in FY2009, which would mean that flats volume was essentially the same in FY 2009 as in FY 2006. But, there has in fact been a very large drop in flats volume during that period, particularly in non-carrier route flats, which are the only flats that need to be sorted by mail-processing personnel. Kiefer, for example, indicates a 33 percent drop in non-carrier route flats during FY 2007 to FY 2009. *See* Responses of the United States Postal Service to Questions from the Bench at the Hearing for Dr. Kiefer (filed August 19, 2010), question at Tr. 3/416-17, page 3 of 4.

Neri does not specify where his volume and flats hours numbers come from, but since he uses them to estimate flats sorting productivity, the volume numbers must refer to the number of piece sorts performed on flats. Such estimates would come from MODS, and from the system known as "FLASH" for NonMODS (function 4) facilities. *See* Response of the Postal Service to POIR 5, Question 26b (filed August 25, 2010). Evidently then, one or both of those systems must be producing seriously biased volume data. (At least one Postal Service witness has expressed serious doubts about the reliability of the "FLASH" data in a previous docket. *See* Docket No. R2006-1, Rebuttal testimony of Michael Miller [USPS-RT-8], at 5). It is extremely troubling that Postal Service operations nevertheless rely on such seriously biased data for their evaluation of achieved productivity.

(whose existence he had not actually heard of) was being adequately dealt with, because senior managers have an expectation that local managers will process Periodicals efficiently. Kiefer said, "each time we change the prices, we expect to try to move in the appropriate direction," and "we now engage in fairly regular price changes, and in those price changes, we expect to be moving these prices in a way that should encourage efficiencies." But as for any plans, timetables, or benchmarks for improving pricing incentives, Kiefer said, "I am not aware of those." Tr. 3/440, 441, 442. The second part of his response, provided when Chairman Goldway pressed him as to whether he could provide "some sort of quantifiable, relatively reasonable, accomplishable goal," was as follows:

> Well, I think that last word is a key element, and perhaps one of the things that makes it difficult to-- let's say address some of the periodicals problems through pricing is that periodicals as a class is price capped, and that restricts the amount of price changes that we can make on an annual basis.

Tr. 3/442-43.

Kiefer did not try to explain why, if the price caps are what prevents the Postal Service from implementing such rate structure improvements, it is not proposing such improvements in this proceeding, where it considers itself free from the caps, or on what basis he expects the Postal Service to be "moving these prices in a way that should encourage efficiencies" in every future rate adjustment under a price cap mechanism that supposedly impedes such improvements.

Dr. Kiefer's post-hearing written response to the same questions simply plunges the issue into deeper confusion. *See* Responses of the United States Postal Service to Questions from the Bench at the Hearing for Dr. Kiefer (filed August 19, 2010), question at Tr. 3/433-36. He begins by conducting a baffling mathematical exercise in which he assumes that, if bundle and container prices were "raised to 100 percent of their costs," no other element of the Periodicals rates would change. Consequently, he assumes, the average rate increase of 8% requested in the exigency case would balloon into "a 21 percent average increase for the Periodicals class." Apparently searching for a bright side in this scenario, he concludes: "The resulting cost coverage would be approximately 97 percent, assuming any mailer response does not affect unit costs or revenues disproportionately." That sentence raises the disquieting possibility that Dr. Kiefer does not understand that the rationale of a more efficient rate structure is to prompt mailers to act in ways that will affect unit costs and revenues disproportionately, with the result that costs will be lower and revenues higher.

Kiefer then proceeds to describe an aspect of the Postal Service's most recent changes in Periodicals prices that had the effect of increasing incentives for *inefficiency* by encouraging mailers to continue using sacks rather than converting to the use of pallets, in the evident belief that he is providing an example of the kind of improved pricing incentives that the Commission has called for:

> Increasing the percentage of cost reflected in the bundle and container prices has been a Postal Service objective since this price structure was introduced. The May 2009 price increases were near 50 percent for most pallets, about 20-30 percent for dropshipped sacks, and over 100 percent for many bundles.

In the paragraph that immediately follows, Kiefer apparently takes back everything he has said on the subject thus far in both his oral and written statements. He states: "The price cap itself need not be a major barrier to further progress in this area[, because] above-cap price increases for bundles, sacks and pallets can be offset by below-cap increases for piece and/or pound prices, at least in the early stages of moving toward 100 percent of costs." That is correct. Whatever the intended percentage rate increase for Periodicals, the Postal Service could achieve it by first raising the passthrough factors on all bundles, sacks, and pallets to some reasonably high level (up to 100%) and then, after calculating how much additional revenue that would bring, modifying the piece rates by a factor (greater or less than one) calculated to make the overall percent increase equal to that desired. With such an approach, Periodicals mailers would face a more balanced set of price incentives, which would lead to more nearly optimal mail preparation and reduced Periodicals costs. Thus the Postal Service could have done--and still can do--much more to improve incentives in Periodicals rates without being impeded by the existence of the rate caps.

3. Despite Postal Service assertions to the contrary, the proposed 8% Periodicals Class rate increase is not "moderate"

Despite many Postal Service assertions to the contrary, the proposed Periodicals Class rate increase, which is 8 times more than inflation in the general economy since the last rate increase (and therefore 8 times more than the increase that is permissible under the PAEA's price cap provision) is not, by any stretch of the imagination, "moderate." *See, e.g.*: Kiefer Statement at 41 ("This price change proposes moderate, but above-average increases"); Tr. 3/337-38 (Kiefer); and Corbett Statement at 17 ("The moderate level of increase proposed is consistent with the result of the circumstances that have given rise to the exigent situation") and 19 ("Given the dire financial situation, and the moderate level of the proposed increases . . .").

According to Kiefer (Statement at 39):

> the Postal Service believes that an above-average increase of 8 percent together with a plan of gradual improvement of cost coverage represents a judicious balance between quickly resolving the Periodicals cost coverage problem and ensuring the best prospects for the long-term health of the Periodicals industry.

In light of the following, however, it is difficult to take that and similar confident pronouncements seriously:

> The Postal Service did not conduct studies or analyses to evaluate and compare the relative financial health of the periodicals industry, the catalogue industry and industries that use First-Class Mail presort flats. Also, the Postal Service did not conduct studies or analyses to evaluate the relative ability of each industry to withstand postal rate increases of various sizes.

Kiefer Response to POIR No. 3, Q. 2 (filed August 9, 2010); *see also* Tr. 3/394 (Kiefer).

The Postal Service's protestations that it "proposes moderate, but above average increases" for Periodicals (Kiefer Statement at 41) and that "[w]ithout authority to increase rates beyond current limitations, [it] would be confined to an increase based on the change in the Consumer Price Index since the last general increase in market dominant rates" (Exigent Request at 2) are neither, with respect to the first, very credible nor, with respect to the second, very sympathetic. A remark by Commissioner Blair to Mr. Corbett puts such claims in perspective:

> Where I'm having a problem is, to me, as you just said, everyone else's prices are going down, but yours is going up. There seems to be a divorce from reality here, and that's what I'm trying to bridge right now.

Tr. 1/65 (Corbett hearing).

The troubles suffered by a shrinking magazine publishing industry in recent years and the damage the industry has suffered during the current severe economic downturn are facts of which the Postal Service (even without studies) is well aware. As Kiefer accurately states:

> The publishing industry is facing unprecedented challenges, particularly from the recent economic downturn, and from longer-term pressures arising from falling advertising, generally reduced subscriber bases, and electronic publishing. All of these factors seriously threaten the health of the industry.

Kiefer Statement at 39; *see also* Kiefer Response to POIR No. 3, Q. 11.a. As the Postal Service is also undoubtedly aware, the magazine publishing industry is unusually dependent on the Postal Service and vulnerable to excessive increases in postage rates. Postage represents approximately 32% of Time Inc.'s total production and distribution costs. An 8% increase in an expense item that constitutes so high a percentage of the industry's costs, at a time when the national economy is stagnant and the industry is contracting, looks anything but moderate to the publishers who will have to find the money to pay it if the Postal Service's exigent request is approved.

4. The Postal Service's own witnesses apparently do not believe that the proposed Periodicals Class rate increase represents sensible business practice

An enterprise that considers only the cost coverage of a single product when setting rates for customers who typically consume a range of the enterprise's products would have to be regarded, by companies that operate in competitive markets, as extremely unsophisticated.

The Postal Service acknowledges that Periodicals mail "has long been recognized as having particularly high value in the mailbox"--i.e., particularly high value in promoting the Postal Service's "brand" and the overall use of its services. It further acknowledges that the top 100 Periodicals mailers spend more on other Postal Service products than on Periodicals and that "the bulk" of this spending is for First-Class and Standard mail, "both high contribution classes."[14]

In such circumstances, any private business would be extremely reluctant to raise Periodicals rates by a disproportionately high amount. Witness Corbett was surprisingly frank in explaining that the proposed Periodicals rate increases are *not* made necessary by prudent business practice and that the alleged "problem" of Periodicals cost coverage is essentially formal rather than substantive, a consequence of inadequacies in the regulatory scheme for pricing postal products. Asked a question whose answer must have seemed obvious, Corbett provided an unexpected response:

> CHAIRMAN GOLDWAY: So the final question, is pricing that results in continued losses on market dominant product consistent or inconsistent with best practices of economical management?
>
> THE WITNESS [Corbett]: I think it's consistent in the context of what we're doing here, and that's why I was trying to be clear to say that you have to indicate or determine what impact on your overall profitability a drop in volume of a particular type of mail will bring about. For example periodicals, why do people go to their mailbox? Because there are magazines there. Is that make it more attractive for advertisers to also advertise in the mail because they know people are picking up their mail et cetera. What is the indirect

[14] Response of Kiefer to POIR No. 3, Q. 10.b; *see also* Tr. 1/80-82.

> impact of a particular piece of mail on other pieces of mail, will it generate additional mail either through back end delivery of products that are sold in that piece of mail, of reply cards or other types of things? So you have to consider a whole lot of things when you're pricing an individual product.

Tr. 1/79-80.

That response, Time Warner submits, is difficult to reconcile with the Postal Service's statement in its initial filing of this proceeding that its proposed 8% Periodicals Class rate increase "is, in our considered view, the highest increase we can ask Periodicals mailers to pay at this time without risking permanent damage to this industry." Kiefer Statement at 39. The Postal Service's own witnesses stop just short of saying--but not of implying--that in their view a Periodicals rate increase of that magnitude is a risky and potentially self-defeating step, one that is driven by a perceived--but not, we think, accurate--statutory imperative to seize the opportunity of this exigency proceeding to achieve rapid progress toward full Periodicals cost coverage without addressing the true causes of the cost coverage problem that have been clearly identified in prior proceedings before the Commission.

III. VALPAK CONSISTENTLY SHIFTS THE EMPHASIS OF THE PAEA AWAY FROM THE POLICIES THAT THE ENACTING CONGRESS DEEMED CENTRAL AND BACK TOWARD PRA POLICIES WHICH CONGRESS INTENDED TO REPLACE

1. Valpak would displace the central role of the CPI-U price caps under the PAEA

Valpak has a singular and counterintuitive view on the question of what is central to the PAEA. According to Valpak:

> With both new revenue initiatives and cost-reduction options severely limited by Congress, it has become evident that the principal tool provided to the Postal Service is the increased **pricing flexibility** given to it by PAEA. . . . [I]ts central feature is the Postal Service's authority to price products so as to **stem losses from unprofitable products, and generate additional profits on existing and new volume.**[15]

One would have thought that the chief feature of the PAEA is the *curtailment* of the kind of pricing flexibility afforded by the Postal Reorganization Act of 1970 ("PRA")–i.e., the flexibility to raise rates high enough to recover all Postal Service costs, whatever they may be. That the intended effect of the PAEA was to exert pressure on the Postal Service to *restrain costs* and *increase efficiency* is amply supported by the legislative history of the PAEA and by the theoretical literature on price cap regulation.

If, contrary to the conventional wisdom, a central purpose of the PAEA were to provide the Postal Service with "authority to price products so as to stem losses from unprofitable products, and generate additional profits on existing and

[15] Initial Comments of Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (filed August 17, 2010) ("Valpak Comments"), at 10 (Valpak's emphasis).

new volume," a number of well-established facts about the PAEA would suddenly become difficult to understand or account for.

For example, as Valpak points out (at 19), Periodicals Class had been "underwater" for nearly a decade when Congress passed the PAEA, a fact of which the enacting Congress was well aware. Why then did the PAEA conspicuously fail to provide the Postal Service with authority to raise the cost coverage of a market-dominant class that was covering less that 100% of its attributable costs by increasing rates by more than the amount permitted by the rate caps? Clearly, it did not convey such authority in the rate cap provision itself (§ 3622(d)(1)(A)&(C)), although it easily could have done so. Moreover, it did not convey such authority to the Commission in either the Annual Determination of Compliance ("ADC") or Complaint provisions (§§ 3653 and 3662), although these would seem obvious places to have conveyed such authority if it intended the cost-attribution Factor (§ 3622(c)(2)) to supersede the rate caps.[16] Moreover, it would have been absurd for Congress to grant the Commission power to raise rates above the caps as a remedy for failure of a class to cover 100% of its costs, but to deny both the Postal Service and the Commission the authority to raise rates above the caps for the identical purpose (in order to achieve 100% cost coverage) when setting the rates in the first place. Nor, obviously, did Congress

[16] The authority granted to the Commission in those provisions to raise "unlawful" rates to "*lawful*" levels (§ 3662(c)) cannot rationally be interpreted as authority to raise rates for "underwater" classes to levels above the caps, since above-cap rates are plainly *not* "lawful." The argument to the contrary is at best a classic example of begging the question, since the very point at issue is whether above-cap rates are rendered lawful by virtue of being used to remedy some characteristic of a rate that transgresses a provision of the Act other than the rate cap. Absent an express resolution in the language of the Act, the point cannot be determined without establishing which of the two provisions carries superior authority.

deem the failure of a class to cover its attributable costs an exigent circumstance in itself within the meaning of § 3622(d)(1)(E). Had it done so, surely someone in the Congress that enacted the PAEA would have mentioned that grounds for an exigent rate increase existed from the very date on which the Act took effect.

If the "authority to price products so as to stem losses from unprofitable products" is a "central feature" of the pricing flexibility given to the Postal Service by the PAEA, as Valpak asserts, how does Valpak account for the fact that the PAEA does not give the Postal Service the authority to price market-dominant products above the cap for this purpose but does expressly require (in § 3633) that "each *competitive* product" (emphasis added) must cover its attributable costs?[17]

2. Valpak's misidentification of cost recovery as the central objective of the PAEA systematically skews its interpretation of the Act's individual provisions

Valpak's Comments on the PAEA are suffused by the commonest of errors in statutory interpretation: namely, reading the Act as saying what Valpak wishes it said.

Obviously, Valpak wishes that the PAEA authorized the Commission to establish procedures whereby rates might be adjusted, notwithstanding the

[17] One might speculate that Congress elevated the price caps to a pre-eminent position in the hierarchy of statutory policies governing market-dominant products because it regarded market-dominant products as representing an admixture of commercial and public-service values, or that the difference between its treatment of market-dominant and competitive products in this respect was related to the well documented tendency of regulated monopolies to attribute as much of their costs as possible to their monopoly products. Whatever the reason, the difference in the treatment of market-dominant and competitive products is manifest and must be recognized in any discussion of "stem[ming] losses from unprofitable products."

statutory rate caps, "whenever rates for any market-dominant product or class fail to recover 100% of attributable costs." The Act does not say that. Nowhere does it grant or imply such authority.

Valpak strives mightily to read such authority into every conceivable provision of the PAEA where such authority, if it existed, might be found. Thus, Valpak states (at 15):

> In Annual Compliance Reviews and Complaint Dockets, the Commission is granted the power to modify rates and even eliminate products, and it would be a strange reading of PAEA to say that Congress would have empowered the Commission to order the Postal Service to discontinue an entire product for being underwater, but powerless to order the price of that product raised a few percentage points more than the cap to recover costs. . . .

Two responses are called for here.

As to the Commission's being granted power "to modify rates [by adjusting them to "lawful levels"] and even eliminate products" in ACR and Complaint Dockets, under the very familiar principle that when a law expressly grants certain powers those which are not expressed are not granted ("*Expressio unius est exclusio alteris*"), that fact weighs against Valpak's conclusion. The Commission is given these powers, but it is not given the power to order that rates be adjusted to levels in excess of the statutory rate caps. It would be odd indeed to think that Congress simply overlooked the question of whether to provide authority to breach the applicable caps--which constitute "the administrative cornerstone of the new rate setting system for market dominant products"[18]-- in the ACR and Complaint provisions.

As to Valpak's argument that "it would be a strange reading of PAEA to say that Congress would have empowered the Commission to order the Postal Service to discontinue an entire product for being underwater, but powerless to order the price of that product raised a few percentage points more than the cap to recover costs," we are impelled to ask: Why would this be a strange reading of the PAEA, since that is precisely the constraint that the Act places on the Postal Service? We are not aware that even Valpak argues that *the Postal Service* has authority to raise the price of a product "a few percentage points more than the cap to recover costs."[19]

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[18] Docket No. RM2007-1, Order No. 26, at 9.

[19] Nor does the Postal Service claim such authority in any circumstances other than the opportunity provided by the purely fortuitous occurrence of an exigency proceeding. (*See, e.g.*, Response of the United States Postal Service to Questions 1-32 of Presiding Officer's Information Request No. 5 (filed August 25, 2010), Response of Kiefer to Q.12 ("the PAEA does not provide any pricing mechanism except for exigency to make a below-cost market-dominant class cover its direct costs"); see also section I, *supra*.

It should not go unremarked in this proceeding that a Periodicals rate increase of the size proposed by the Postal Service cannot be regarded as an act of compliance with any instruction, recommendation, or expression of opinion by the Commission. In its most recent ADC, the Commission's conclusions respecting the issue of Periodicals Class cost coverage were: (1) that "[t]he Postal Service shall develop and *present a plan* explaining how it intends to increase Periodicals cost coverage to a reasonable level *in its next notice of general price adjustments for market dominant products, or its next annual compliance* report"; but (2) that " the best course . . . is to await the issuance of the Joint Report *before addressing Periodicals rates in specific detail*." FY 2009 ACD at 74-75 (emphasis deleted and added). Only with respect to improving the efficiency of the Periodicals price structure did the Commission direct the Postal Service "to implement . . . changes as soon as practicable." *Id*. at 82. The Postal Service, Time Warner submits, has neglected to develop the requested plan, has rushed ahead, before completion of the Joint Report, with the dramatic rate increases proposed in the instant docket, and has disregarded the Commission's repeated directions to improve incentives in the Periodicals rate structure.

3. Valpak's analysis of the alleged benefits of aggressive rate increases for "money losing" products is out of step with the state of the facts

Valpak (at 10-11) lists four "beneficial effects" that would flow from the Postal Service's "focusing rate increases aggressively on its underwater, money-losing products."

One of these alleged benefits is that

> a higher rate increase would give an accurate price signal which may induce mailers to switch to some other product which the Postal Service handles more efficiently and profitably.

Valpak Comments at 11 [footnote omitted].

Since there is no other product that competes with Periodicals Class for the delivery of magazines (and since, in any event, the inefficiencies that plague Periodicals mail processing plague Standard mail flats processing as well), that alleged benefit has no possible application to Periodicals.

Another of the benefits alleged by Valpak is that

> some [mailers] may elect to avoid a higher rate increase by sharply reducing the volume which they mail. That should not be a worry, though. All reductions in such unprofitable volume would result in attributable costs declining even more than revenues, which in turn would help increase the Postal Service's operating profits.

Valpak Comments at 11.

Unfortunately for Valpak's argument, the Postal Service, through its chief financial officer, has repeatedly stated in this proceeding that some substantial portion of costs currently being classified as variable are in fact fixed, and that reduction of volumes which the current costing system categorizes as "underwater" will in fact *reduce* the Postal Service's operating profits. According to Postal Service witness Corbett:

> We have a fixed cost, primarily a fixed cost network when you really get down to it. The majority of our costs are in delivery, we're going to the house, to the mailbox every day anyway, for six days a week currently, so incremental, any volume loss actually will cause, all other things equal, will cause a decrease in our profits.

Tr. 1/77-78 (Corbett).

Asked by Commissioner Goldway whether "pricing that results in continued losses on market dominant product[s] [is] consistent or inconsistent with best practices of economical management," Corbett replied:

> I think it's consistent in the context of what we're doing here, and that's why I was trying to be clear to say that you have to indicate or determine what impact on your overall profitability a drop in volume of a particular type of mail will bring about.

Id. at 79-80.

Commissioner Hammond then pressed the point and inquired:

> Okay, all right. So, well as Chief Financial Officer, CFO, which you are of the Postal Service, do you think that you have an obligation to include in your business model or in your plans the elimination of everything that doesn't make a profit for the Postal Service? I mean as CFO, just, you know, that's what your very difficult job is, would that be one of the goals that you think that you're responsible for?

Id. at 81-82.

Corbett replied:

> No I don't actually. I think our primary, my primary objective in the organization is to be, obviously to serve the American public and to do it in a profitable way. We have largely a fixed cost network, before as I said, so that the incremental, whereas the allocated cost of product is determinable if you lose a million pieces of that particular product quickly you will not make more money, you'll lose money, even if that product was underwater in most cases. So it's a balancing act between the fixed cost nature of the overall business and the profitability of each individual product.

Id. at 82.

In view of those statements, along with extensive evidence of fixity of costs in flats mail-processing operations (discussed in section I, *supra*), the Commission cannot rely on Valpak's assertion that "[a]ll reductions in such unprofitable volume would result in attributable costs declining even more than revenues, which in turn would help increase the Postal Service's operating profits." Valpak Comments at 11.

IV. NPMHU's ARGUMENTS THAT THE PAEA's STANDARD FOR EXIGENT RATE INCREASES IS NOT VERY DEMANDING ARE UNPERSUASIVE

1. The comments of Senator Collins regarding the intentions of the authors of the PAEA are far more persuasive than NPMHU is willing to admit

The Initial Comments of the National Postal Mail Handlers Union (NPMHU) in this docket are devoted almost exclusively to the interpretation of the words "extraordinary or exceptional" in § 3622(d)(1)(E). NPMHU argues that Senator Collins errs in stating, in her comments filed with the Commission on August 9, 2010, "that Congress 'adopted the Senate's more stringent . . . standard,' and that Congressional action resulted in 'the adoption of the Senate exigent rate case standard.'"[20] NPMHU asserts that the "compromise language" ultimately adopted in § 3622(d)(1)(E) "essentially incorporated the standard [for exceptions to the price cap provisions that was] originally contained in H.R. 22, and combined that

[20] Initial Comments of the National Postal Mail Handlers Union Regarding Postal Service Request for a Rate Adjustment Due to Extraordinary or Exceptional Circumstances (filed August 18, 2010) ("NPMHU Comments"), at 12.

House-initiated standard with a substantially more flexible version of the standard that was originally contained in S. 662." NPMHU Comments at 8.

Time Warner, like NPMHU, was active in the discussions and negotiations that led to the adoption of the compromise language. We cannot assert, nor do we believe that NPMHU can assert, that the import of the legislative history surrounding the exigency provision is of crystalline clarity. But we do assert that the evidence is more consistent with the view that the final version essentially incorporated the Senate standard, of which Senator Collins was the author and which was universally recognized as imposing much the more stringent standard. We do not think that NPMHU's arguments for dismissing the views of Senator Collins can bear the weight of even casual examination.

In response to the statement by Senator Collins that she was the "author of the exigent rate authority," NPMHU observes that "the 'exigent' language was the result of a process that included many Members of Congress in both Houses of Congress." NPMHU Comments at 13. The literal correctness of NPMHU's assertion is evident, but its relevance to the point under discussion is not. The undoubted fact that the *process* included many members of Congress should not be mistaken for evidence that many members of Congress were informed about, or even cognizant of, the matters at issue or took any part in resolving them. Moreover, the fact that Senator Collins was the author not only of the *original*

Senate language *but also of the language that was ultimately adopted* must surely confirm her claim to authorship of the exigency provision.[21]

Pointing out that "the citations and quotations that Senator Collins offers to support *her personal recollections* of the standard for above-CPI rate increases" in her submission to the Commission are all "taken from documents or materials that were created prior to the development of the legislative compromise that now appears in the PAEA," NPMHU argues that her comments on the meaning of the provision "*merely reflect the Senator's recollections of the record*, and are not accurate." NPMHU Comments at 11, 12 (emphasis added). NPMHU's assertions, along with the insinuation they were intended to convey, might have a superficial plausibility if the remarks in the submission of Senator Collins to the Commission in this docket were the *only* remarks that Senator Collins had ever made about the meaning of the exigency provision. But the record reveals not only that she has made remarks to the same effect on previous occasions, but that she made such remarks to the Commission, on the record, less than four months after the passage of the PAEA. Moreover, those remarks appear over not only her own signature but that of the committee of jurisdiction's ranking member of the opposite party (who in the interim had become chairman), Senator Carper. In a letter to the Commission dated April 6, 2007, the two senators stated:

> In our view, the "extraordinary or exceptional circumstances"

[21] See NPMHU's Comments at 7: "The compromise language, which now appears in Section 3622(d)(1)(E), *first appeared in an updated and amended version of the Senate bill that was circulated to interested stakeholders by Senator Collins* in October 2006" (emphasis added).

> referenced in the language may include terrorist attacks, natural disasters, and other events that may cause significant and substantial declines in mail volume or increases in operating costs that the Postal Service cannot reasonably be expected to adjust to in the normal course of business. We expect that, in accordance with the requirement written into the bill, the Commission will closely examine any request from the Postal Service for permission to raise rates above the cap. . . . [22]

It is a stretch to assume that the memory not only of Senator Collins but also of Senator Carper had dimmed so quickly following passage of the PAEA.

2. NPMHU's reliance on the "plain language" of the exigency provision might be justified if the language in question were plain, but it is not

Appeals to the "plain language" of a statutory provision, on which NPMHU places heavy reliance for its interpretation of the PAEA's exigency provision, are availing only if the language is in fact plain. The words "extraordinary or exceptional," in the context of the exigency provision and its disputed legislative history, do not have a plain meaning. In common usage, each of those words can mean anything from "atypical" or "not average" to "exceedingly rare" or "almost unheard of." There appears to be no disagreement on the point that those terms as used in the exigency provision mean something more than merely "atypical" or "not average"--but how *much* more is an issue that cannot be

[22] Docket No. RM2007-1, Letter from Senators Carper and Collins to Hon. Dan C. Blair, Chairman, Postal Regulatory Commission (April 6, 2007). To forestall careless misconstruction of the quoted passage, Time Warner hastens to observe that the senators do not suggest that "declines in mail volume or increases in operating costs" in themselves may constitute exigent circumstances, but rather only that some "*events that may cause* significant and substantial declines in mail volume or increases in operating costs *that the Postal Service cannot reasonably be expected to adjust to in the normal course of business*" may constitute exigent circumstances. It is clear that their mention of "other events" refers to other events that are "extraordinary or exceptional" in the same sense that a terrorist attack is "extraordinary or exceptional."

resolved by resort to any number of dictionaries or any amount of contemplation of the "plain meaning" of the words.

V. THE PUBLIC REPRESENTATIVE ESPOUSES SOUND GENERAL PRINCIPLES IN INTERPRETING THE PAEA'S EXIGENCY PROVISION, BUT FAILS TO APPLY THOSE PRINCIPLES TO SPECIFIC APPLICATIONS OF THE PROVISION

The Public Representative arrives at the same ultimate conclusion as Time Warner and "urges the Commission to deny the Postal Service's Request."[23] However, the Public Representative's discussion also reaches conclusions that are contradictory to the logic of his main argument and that have no proper place in comments on a request for exigent rate increases that the Public Representative believes should be rejected.

The Public Representative begins his discussion of the exigency provision by enunciating several sound principles that reflect the text and structure of the PAEA. For example, he states (at 9-10) that "there should be substantial indications that the Request filed by the Postal Service addresses the effects of the exigency, and is not merely an attempt to circumvent the CPI-U rate cap provisions." Time Warner agrees. But, as discussed in Time Warner's initial comments in this docket and further in section I of these reply comments, the Postal Service does not agree. The Postal Service acknowledges: (1) that it proposes to raise Periodicals Class rates by approximately eight times more than the amount permissible under the applicable price cap, 2.5 percent more than its

[23] Public Representative Comments in Response to the Exigent Request of the United States Postal Service ("PR Comments") (filed August 17, 2010), at 11.

average proposed exigent increase of 5.6 percent, not in order to address any effects of the asserted exigency but to increase Periodicals Class cost coverage, in consideration of § 3622(c)(2) of the PAEA (Factor 2);[24] and (2) that it regards this exigency proceeding as an occasion to make that proposal solely because an exigency proceeding provides "a unique opportunity" to avoid the application of the CPI-U rate cap provisions (Kiefer Statement at 39).

The Public Representative is also on solid interpretative ground when he states:

> Contrary to what the Postal Service implies, the Public Representative believes that the application of a “reasonable and equitable and necessary” standard cannot be divorced from consideration of the “either extraordinary or exceptional circumstances.” In the context of an exigent request, there must be a connection between the circumstance and the funding request in order to meet the “reasonable and equitable and necessary” standard.

PR Comments at 10.

Again, the Postal Service takes a different view. Far from even asserting any "connection between the [exigent] circumstance and the funding request" for Periodicals Class, it acknowledges that its Periodicals rate proposal is based on circumstances (the failure, beginning in 1997, of Periodicals Class to cover 100% of its attributable costs) that long antedate and have no connection with the

[24] *See* Statement of James M. Kiefer on Behalf of the United States Postal Service (filed July 6, 2010) ("Kiefer Statement"), at 62:

> Periodicals will receive an increase of 8.0 percent in this price adjustment, well above the average for market dominant products as a whole. *This above average increase is in direct response to the fact that the Periodicals class has failed to cover its attributable costs for several years (Factor 2)* [emphasis added].

exigency alleged in this proceeding (the precipitous systemwide decline in mail volumes in the years 2008 and 2009).

The Public Representative asserts a fundamental conclusion about the meaning of the exigency provision with which Time Warner emphatically agrees: the exigency provision does not grant an unlimited license for above-cap increases but rather permits increases above the caps only to levels made "necessary" by the exigency. The Public Representative therefore concludes that an exigency request "should be denied to the extent that rate adjustments address issues unrelated to the proffered exigent circumstance." PR Comments at 27. Time Warner would add that Periodicals cost coverage is an issue "unrelated to the proffered exigent circumstance" in this proceeding.

But having endorsed sound conclusions about the meaning of the exigency provision, the Public Representative then fails to apply those conclusions consistently when it discusses specific elements of the Postal Service's proposed rates. For example, having properly objected to the use of the exigency provision "merely . . . to circumvent the CPI-U rate cap provisions," the Public Representative proceeds to commend specific uses of the provision for exactly that purpose.

The instance of such inconsistency that especially concerns Time Warner is the Public Representative's commendation of the proposed exigent increase in Periodicals Class rates:

> The Postal Service has taken the opportunity afforded by this exigent rate adjustment to request an above CPI-U price adjustment that increases Periodicals' rates 8.0 percent, the largest rate increase (by class) requested. . . .

> While a larger price increase could solve the cost coverage problems within the Periodicals class, it potentially may result in rate shock. Thus, the Public Representative believes that the Postal Service is taking an appropriate action by increasing rates by 8.0 percent.

PR Comments at 49, 50.

Here there is no mention of whether the proposed rate increases address the effects of the proffered exigency, or of whether the exigency provision is invoked only to make circumvention of the CPI-U caps possible. Had those issues been mentioned, Time Warner believes, it would have been impossible not to notice the inconsistency of the Public Representative's statements about the proposed Periodicals rate increase with his statements regarding limitations on the proper uses of the exigency provision.

Assuming for argument's sake that the severe volume declines of FY 2008 and 2009 constituted "extraordinary or exceptional circumstances" within the meaning of the exigency provision, it would appear obvious that the proposed Periodicals rate increase described by the Public Representative does not satisfy the principle that "[i]n the context of an exigent request, there must be a connection between the [exigent] circumstance and the funding request in order to meet the 'reasonable and equitable and necessary' standard" (PR Comments at 10).

That the Public Representative endorses the proposed Periodicals rate increases while at the same time "urg[ing] the Commission to deny the Postal Service's Request" on the grounds that "the Postal Service fails to demonstrate that its exigent request is anything more than a business-as-usual request to increase rates" (PR Comments at 11) appears to be a complete abandonment of the principle that a proposed rate increase under the exigency provision must address the effects of an actual exigency and not be "merely an attempt to circumvent the CPI-U rate cap provisions" (*id.*).[25]

Conclusion

For the foregoing reasons, the reasons stated in the Initial Comments of Time Warner in this docket (filed August 17, 2010), and the reasons stated by the Affordable Mail Alliance in its Motion to Dismiss Request (filed July 26, 2010), its initial Comments (filed August 17, 2010) and reply comments (filed this date), Time Warner respectfully urges the Commission to reject the Postal Service's Exigent Request in its entirety, but in the event that it approves a Postal Service request for exigent rate increases, to reject the Postal Service's request for a

[25] The co-existence of such irreconcilable positions in the same argument may be attributable to the Public Representative's extraordinary adamancy on the subject of products that fall below 100% cost coverage. The Public Representative's comments in the instant docket (at 3) state that, "[r]egardless [of whether proposed rates are consistent with the guidance provided by the Commission in Annual Compliance Determinations], the Public Representative opposes rates for any product that do not cover attributable costs at a time when the Postal Service is experiencing financial difficulties." In filings in a variety of dockets, the Public Representative has adhered to the position that all market-dominant products must be priced to recover their full costs, even if this requires raising rates above the statutory rate caps, despite the following facts: (1) Congress knew when it passed the PAEA that one of the four major classes of mail, Periodicals, had failed for some years to cover its full attributable costs, and provided no mechanism or authority in the Act to achieve full cost coverage by breaching the statutory price caps; (2) the PAEA contains no requirement that each market-dominant product must fully recover its costs; (3) Congress intended the provision for price-caps to be the central policy provision of the PAEA's system for regulating market-dominant rates, and for that provision to take precedence over enumerated statutory "Factors" and "Objectives," should the two come into conflict with one another; (4) the provision requiring that market-dominant classes recover their full costs is one of the statutory "Factors," which occupy the lowest level in the hierarchy of statutory policies; (5) the exigency provision was plainly not intended as a mechanism for dealing with failures of cost coverage, and failures of cost coverage do not themselves constitute exigent circumstances under the standards of § 3622(d)(1)(E); and (6) other than under the exigency provision (and the banking provision), no authority is provided anywhere in the Act to breach the requirement of the rate cap provision and raise market-dominant rates above the level of the caps.

Periodicals Class rate increase insofar as the requested increase exceeds the average percentage rate increase for all market-dominant mail.

Respectfully submitted,

s/____________________________

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