

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

Before Commissioners:

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

Rate Adjustment Due to Extraordinary or
Exceptional Circumstances

Docket No. R2010-4R

ORDER DENYING MOTION TO STAY AND
ESTABLISHING FURTHER PROCEDURES

(Issued October 31, 2011)

On October 4, 2011, the Postal Service moved to stay this proceeding until December 15, 2011 pending the outcome of several postal legislative initiatives.¹ Two participants opposed the Motion to Stay,² and the Postal Service filed a response to the

¹ Motion of the United States Postal Service to Stay Its Request for Exigent Relief, October 4, 2011 (Motion to Stay).

² Opposition of Alliance of Nonprofit Mailers, American Business Media, Direct Market Association, Inc., and Magazine Publishers of America, Inc., to USPS Motion to Stay, October 7, 2011 (ANM, et al. Opposition); Response of Public Representative to Motion of the United States Postal Service to Stay Its Request for Exigent Relief, October 11, 2011 (PR Response) (cited together, Oppositions).

Oppositions.³ For the reasons set forth below, the Motion to Stay is denied, and the Commission establishes further procedures consistent with Order No. 864.⁴

I. BACKGROUND AND PROCEDURAL HISTORY

On July 6, 2010, the Postal Service filed the first-ever exigent request, seeking to increase rates above the price cap for each market dominant class of mail.⁵ On September 30, 2010, the Commission issued Order No. 547, denying the Exigent Request as inconsistent with 39 U.S.C. § 3622(d)(1)(E).⁶ It held that the 2008-2009 recession and its impact on postal volumes qualified as “extraordinary or exceptional” circumstances, but denied the Exigent Request because the Postal Service did not demonstrate that the proposed adjustments were “due to,” or causally related to, those circumstances. *Id.* at 3, 27.

The Postal Service appealed Order No. 547 to the United States Court of Appeals for the District of Columbia Circuit.⁷ On May 24, 2011, the Court issued its opinion denying in part and granting in part the Postal Service’s petition for review.⁸ The Court remanded the case to the Commission to determine “how closely the amount

³ Response of the United States Postal Service to Opposition and Response to Its Request for a Stay, October 17, 2011 (Postal Service Response). The Postal Service simultaneously filed the United States Postal Service Motion for Leave to Respond to Opposition and Response to Its Request for a Stay, October 17, 2011. The motion is granted.

⁴ Order Resolving Issues on Remand, September 20, 2011 (Order No. 864).

⁵ Docket No. R2010-4, Exigent Request of the United States Postal Service, July 6, 2010, at 1 (Exigent Request). The Postal Service proposed an overall percentage increase of 5.6 percent, which would have resulted in a net increase in annual contribution of approximately \$3 billion. Docket No. R2010-4, Statement of Joseph Corbett on Behalf of the United States Postal Service, July 6, 2010, at 19.

⁶ Docket No. R2010-4, Order Denying Request for Exigent Rate Adjustments, September 30, 2010, at 2, 87 (Order No. 547).

⁷ Petition for Review, *United States Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263 (D.C. Cir. 2011) (No. 10-1343).

⁸ *United States Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263 (D.C. Cir. 2011).

of the [exigent rate] adjustments must match the amount of the revenue lost as a result of the exigent circumstances.” *Id.* at 1268.

On the same day the Court issued its mandate, the Commission promptly established procedures on remand to consider the issues raised by the Court’s opinion.⁹ After receiving and analyzing extensive comments, the Commission issued Order No. 864 on September 20, 2011, interpreting the meaning of “due to” in section 3622(d)(1)(E) as directed by the Court. Order No. 864 at 2-3, 45-46. Order No. 864 also established further procedures and directed the Postal Service to file a statement indicating whether and how it wishes to pursue its pending Exigent Request. *Id.* at 54. This statement was due by October 4, 2011. *Id.*

II. MOTION TO STAY AND RELATED FILINGS

A. Motion to Stay

Instead of filing the statement as directed by the Commission, the Postal Service moved to stay this proceeding until December 15, 2011 because of pending legislative proposals. Motion to Stay at 1, 3. The Postal Service cites to pending bills in the House and Senate that would enable it to implement increases above the price cap. *Id.* at 3 (citations omitted). It also refers to the President’s proposal that would allow the Postal Service to increase rates consistent with the Exigent Request without any action by the Commission.¹⁰ The Postal Service argues that a stay would create “at least some potential for resolution of [these] pending legislative proposals” and that deciding whether to proceed with the Exigent Request at this time would be “premature and potentially counterproductive.” Motion to Stay at 3.

⁹ Order No. 757, Notice and Order Establishing Procedures on Remand, July 11, 2011.

¹⁰ *Id.*; see Office of Management and Budget, *Living Within Our Means and Investing in the Future – The President’s Plan for Economic Growth and Deficit Reduction* 23 (September 2011). The President’s plan is being considered by the Joint Select Committee on Deficit Reduction (Joint Committee) created by the Budget Control Act of 2011, Pub. L. No. 112-25, § 401, 125 Stat. 240, 259.

The Postal Service requests that the Commission grant a stay until December 15, 2011. *Id.* at 1. It explains that the Joint Committee will issue a report on proposals for reducing the Federal budget deficit by November 23, 2011, which may address the pending legislation. *Id.* at 4. Because the first meeting of the Board of Governors after that date is December 13, 2011, the Postal Service requests a stay until December 15, 2011. *Id.* By that date, the Postal Service asserts that it could either “inform the Commission as to the advisability of continuing the stay” or submit the statement directed by Order No. 864. *Id.*

The Postal Service states that “if the request is granted, the Postal Service intends to provisionally file, later in October, a notice of price adjustment under its CPI cap authority for implementation in January of 2012.”¹¹ It explains that the notice of price adjustment will provide “certainty regarding its ability to implement some type of market dominant price increases in January of 2012....” Motion to Stay at 4 n.1. The Postal Service notes that it may withdraw its notice of price adjustment “if subsequent developments, legislative or otherwise, so warrant.” *Id.*

The Postal Service submits that no harm would be caused to any participant by granting a stay. *Id.* at 4. It acknowledges that a stay could prolong uncertainty in this proceeding, but maintains that the existence of the legislative proposals “obviates any hope of meaningful certainty no matter what action the Postal Service and Commission take.” *Id.* It contends that the notice of price adjustment will provide concrete notions of what to expect in the short term. *Id.* It concludes that, although no solution is perfect, the best approach is to stay the exigent proceeding, file a notice of price adjustment, and monitor pending legislative developments. *Id.*

¹¹ *Id.* at 4 n.1. The Postal Service filed the notice of price adjustment on October 18, 2011. Docket No. R2012-3, United States Postal Service Notice of Market-Dominant Price Adjustment, October 18, 2011.

B. Oppositions to Motion to Stay

Oppositions to the Motion to Stay were filed by a group of mailer associations comprised of the Alliance of Nonprofit Mailers, American Business Media, Direct Marketing Association, Inc., and Magazine Publishers of America, Inc. (ANM, et al.) and the Public Representative. The Oppositions were filed on October 7 and October 11, 2011, respectively.

1. ANM, et al.

ANM, et al. argue that a stay of this proceeding is not justified because nothing remains to stay. ANM, et al. Opposition at 2. They assert that the Commission completed its task on remand when it issued Order No. 864 and that the Postal Service's opportunity to submit additional argument and evidence was conditioned on filing a statement as directed by the Commission by October 4, 2011. *Id.* Because the Postal Service failed to submit the required pleadings by the October 4, 2011 deadline, ANM, et al. contend that the record closed and Order No. 864 became final on that date. *Id.* at 3.

In addition, ANM, et al. submit that staying this proceeding is unnecessary to preserve the Postal Service's right to file a new exigent rate request at any time. *Id.* They assert that none of the legislative proposals, as currently drafted, would require any further action by the Commission on the Exigent Request. *Id.* at 4. They argue that the ultimate outcome of the legislative process is speculative, which weighs against, not in favor of, staying this proceeding. *Id.*

Finally, ANM, et al. maintain that courts and agencies, including the Commission, "decide cases on the basis of the law as it is, not as it might become." *Id.* They list five court cases denying motions to stay despite pending legislation that would have changed the governing law. *Id.* at 5 (citations omitted). They also cite to a Presiding Officer's Ruling in Docket No. R2005-1, which denied a motion to compel that was also

based on pending legislation.¹² POR 2005-1/84 stated that “the Commission and participants must act in accordance with the law as it is currently written, not speculate upon possible Congressional intervention into that process.” POR R2005-1/84 at 4.

2. Public Representative

The Public Representative also opposes the Motion to Stay, which he views as an attempt by the Postal Service to further delay resolution of the Exigent Request. PR Response at 2. He argues that delaying this proceeding is contrary to the intent of section 3622(d)(1)(E), which is to provide rapid financial relief to the Postal Service on an “expedited basis” when extraordinary or exceptional circumstances arise. *Id.* He asserts that under true exigent circumstances, the Postal Service would not delay resolving the Exigent Request based on the distant possibility that Congress may provide other relief. *Id.*

The Public Representative requests that the Commission bring this proceeding to a rapid conclusion because the Postal Service apparently is unable to proceed with its Exigent Request at this time. *Id.* at 2-3. Similar to ANM, et al., the Public Representative notes that the Postal Service may file a new exigent rate request at any time. *Id.* He argues that a new request would benefit the Commission and all participants because it would provide the Postal Service the opportunity to clearly define the alleged extraordinary or exceptional circumstances and present arguments based on the new standard established by the Commission in Order No. 864. *Id.* at 3.

C. Postal Service’s Response to Oppositions

On October 17, 2011, the Postal Service responded to the Oppositions and reiterated essential points made in the Motion to Stay. It argues that the Oppositions

¹² *Id.* at 4 (citing Docket No. R2005-1, Presiding Officer’s Ruling Denying the Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-196-207, September 21, 2005 (POR 2005-1/84)).

lack merit because they fail to explain how any harm would result from a stay. Postal Service Response at 1. The Postal Service concedes that the legislative proposals do not require the Commission to delay action in this proceeding, but it contends that the proposals are nonetheless relevant because they would affect its decision on whether and how to pursue the Exigent Request. *Id.* at 2. It argues that the legislative proposals are not speculative because the Joint Committee must issue a report by November 23, 2011. *Id.* It asserts that the report is likely to address, and potentially resolve, the issues raised in this proceeding. *Id.* at 2-3. Thus, the Postal Service maintains that deciding whether and how to proceed with its Exigent Request would be premature until that report has been issued. *Id.* at 3.

The Postal Service asserts that this proceeding remains open because the Motion to Stay suspended the deadline for filing the statement requested in Order No. 864. *Id.* It acknowledges that it may file a new exigent rate request in the future, but contends that “the ultimate outcome of the pending legislative proposals may be that it is more prudent for the Postal Service to continue pursuing its present request.” *Id.* at 3-4. It agrees that section 3622(d)(1)(E) was intended to provide the Postal Service with rapid financial relief, but argues that the stay requested is minor compared to the amount of time elapsed in this proceeding. *Id.* at 4. The Postal Service concludes that neither ANM, et al. nor the Public Representative has shown why the Motion to Stay should be denied and reiterates its request for a stay.

III. COMMISSION ANALYSIS

The Commission concludes that granting a stay based on pending legislation would not be appropriate. In many cases, motions to stay based on pending legislation have been denied because the legislative process is uncertain, and the results of

pending legislation are highly speculative.¹³ The Commission is persuaded by this reasoning and finds that it applies to the pending postal legislation. While the Joint Committee must issue a report by November 23, 2011, there is no guarantee that the report will even address postal-related proposals, much less include legislation enabling the Postal Service to implement increases above the price cap. Nor is there any guarantee that any of the other pending postal bills cited by the Postal Service will be enacted by the end of the year.

The Postal Service also states that on December 15, 2011, it may choose to “inform the Commission as to the advisability of continuing the stay....” Motion to Stay at 4. In doing so, the Postal Service itself acknowledges the real possibility that a grant of the current request may be followed by a request for further delay. Delay will prolong uncertainty and contravene the statutory objective of “creat[ing] predictability and stability in rates.” See 39 U.S.C. § 3622(b)(2).

The pending Exigent Request has as its basis the 2008-2009 recession and the impact of that recession on postal volumes. It is those historic circumstances that the Commission concluded were “extraordinary or exceptional circumstances” under section 3622(d)(1)(E), and it is those circumstances and their consequences on which a decision will depend. The Commission has responded to the Court’s remand order, and the case is now ready to proceed. If, and when, any legislation is enacted, its effects can be addressed.

For these reasons, the Commission denies the Motion to Stay.

¹³ See, e.g., *Garcia v. Thaler*, No. 11-70022, 2011 WL 2582880, at *5 (5th Cir. June 30, 2011) (“The pure speculation of future legislation that could aid [petitioner] in some way does not give rise to a substantial claim upon which relief may be granted.”); *San Francisco Tech., Inc. v. Dial Corp.*, No. 5:10-cv-04986-JF/PSG, 2011 WL 941152, at *4 (N.D. Cal. Mar. 17, 2011) (noting that “the unpredictability of the legislative process counsels against the imposition of a stay.”); *E.E.O.C. v. Bethlehem Steel Corp.*, 727 F. Supp. 952, 955 (E.D. Pa. 1990) (“There is great uncertainty that such legislative action will ever come, much less come quickly.”).

IV. FURTHER PROCEDURES

Order No. 864 directed the Postal Service “to file a statement indicating whether and how it wishes to pursue its pending Exigent Request.” Order No. 864 at 54. The Commission is not persuaded by ANM, et al.’s contention that the Postal Service’s opportunity to submit that statement has passed. In light of this Order, the Commission shall follow the procedures set forth in Order No. 864 and extend the applicable deadlines.

The Postal Service shall file a statement indicating whether and how it will pursue its Exigent Request, as described in Order No. 864. That statement is due by November 7, 2011. If the Postal Service decides to pursue its Exigent Request, it shall comply with the requirements set forth in Order No. 864 for either explaining how the record as of September 30, 2010 satisfies the causal nexus of “due to” or requesting leave to supplement the record. See Order No. 864 at 54-55. Interested persons will then have an appropriate opportunity to respond to additional evidence or arguments submitted by the Postal Service.

It is ordered:

1. The Motion of the United States Postal Service to Stay Its Request for Exigent Relief, filed October 4, 2011, is denied.
2. The Postal Service is directed to file a statement indicating whether and how it wishes to pursue its Exigent Request, as described in Order No. 864, no later than November 7, 2011.

3. If the Postal Service decides to pursue its Exigent Request, it shall comply with the requirements set forth in Order No. 864 for either explaining how the record as of September 30, 2010 satisfies the causal nexus of “due to” or requesting leave to supplement the record.

By the Commission.

Shoshana M. Grove
Secretary