

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

INSTITUTIONAL COST CONTRIBUTION)
REQUIREMENT FOR COMPETITIVE PRODUCTS) Docket No. RM2017-1

COMMENTS OF
AMAZON.COM SERVICES, INC.
ON ORDER NO. 4742

(September 12, 2018)

Amazon.com Services, Inc. (“ASI”), respectfully submits these comments on the Commission’s revised notice of proposed rulemaking contained in Order No. 4742 (August 7, 2018), republished at 83 Fed. Reg. 39,939 (August 13, 2018) (“Order No. 4742”). The revised notice proposes modifications to a formula-based approach the Commission has proposed, to calculate the minimum amount that competitive products as a whole are required to annually contribute to the Postal Service’s institutional costs, known as the “appropriate share.”

Introduction and Summary

ASI, a wholly-owned logistics and distribution subsidiary of Amazon.com, Inc. (“Amazon”), has submitted several prior comments in this rulemaking docket.¹ Amazon relies on delivery service providers, including the U.S. Postal Service, UPS, FedEx, and others, to provide customers with the price, convenience, selection, and innovation needed in the highly competitive parcel delivery segment. ASI is concerned about the persistent

¹ Amazon Fulfillment Services, Inc. (“AFSI”), changed its corporate name to Amazon.com Services, Inc. (“ASI”), effective January 1, 2018. For clarity, prior comments in this proceeding filed in the name of AFSI will be referred to herein as ASI comments.

and well-funded efforts of the Postal Service’s private competitors to misuse the Commission’s processes, including the appropriate share proceedings, to suppress price competition by forcing the Postal Service to artificially raise its prices on competitive package delivery services. An increase in the minimum contribution requirement that forces the Postal Service to raise its prices would allow these competitors to either increase their own price, set their prices below the artificial price floor imposed on the Postal Service, or some combination of both. Raising prices in coordination with a minimum price floor on Postal Service products would increase the profits of these competitors at the expense of businesses and consumers. Setting prices below the price floor imposed on the Postal Service would cause a devastating loss of volume and contribution to the Postal Service that would impair its operations and potential viability, again, to the detriment of businesses and consumers.

ASI is reassured that the Commission continues to reject efforts of the Postal Service’s competitors to hamstring the Postal Service’s pricing flexibility by requiring the use of arbitrary costing methods that overstate competitive product costs, and notes that the Commission’s correct costing approach continues to be upheld by the courts. *See United Parcel Service v. PRC*, 890 F.3d 1053, 1061, 1067, 1069 (D.C. Cir. 2018) (“*UPS v. PRC*”) (denying UPS’s petition for review in its entirety and holding that the Commission exercised reasonable judgment in “settling on a cost-attribution methodology that implements its statutory mandate and falls well within the scope of its considerable discretion”). *See* Order No. 4742, at 7, n.8. Adopting the incorrect and self-serving views of the Postal Service’s competitors would undermine the Postal Service’s financial stability and increase the cost of postal package delivery services to American consumers and to the many millions of small

businesses who rely on the Postal Service. Consumers and small businesses in remote and rural areas with few affordable alternatives would be disproportionately harmed.

Order No. 4742 affirms the finding in Order No. 4402 that the actual contribution of competitive products to the Postal Service's institutional costs has risen to more than \$7 billion, or more than 23 percent of all institutional costs (*i.e.*, four times the current minimum contribution of 5.5 percent). *See* Order No. 4742, at 17 (noting increases in competitive contribution margin from FY2007 to FY2017). Contribution from competitive products continues to rise as the Postal Service raises prices on increasing package volumes. The contribution from a growing, profitable package business is increasingly necessary to help defray the costs of maintaining the Postal Service's obligation to provide universal mail and package delivery services to all Americans.

As ASI noted in its comments on Order No. 4402, the existing statutory protections, as implemented by the Commission, that require the prices for all competitive products to cover their attributable costs, provide complete protection against anticompetitive underpricing of competitive products and ensure there is no cross-subsidization by market-dominant products. UPS seeks to use this proceeding to raise the minimum price floor for competitive products but offers no persuasive challenge to the conceptual sufficiency of the attributable cost test. Order No. 4742 also affirms the Commission's finding in Order No. 4402 that "the FTC's conclusion that the Postal Service operates at a net economic disadvantage continues to be valid." Order No. 4742, at 58. In sum, Order No. 4742 fully supports the position advanced by ASI, the Postal Service, and others, that the current appropriate share and costing requirements are more than adequate to address statutory requirements and any competitive issues.

For these same reasons and the reasons set forth in ASI's prior comments, the Commission's proposal to retain any minimum contribution requirement at all is inconsistent with the findings in Order No. 4402. The Commission should instead eliminate the minimum contribution requirement. Elimination of the minimum contribution requirement is specifically authorized by 39 U.S.C. § 3633(b) and is supported by precedent from other regulated industries, as set out in ASI's prior comments.

If the Commission chooses, however, to maintain the minimum contribution requirement then it should adopt a flexible methodology that considers both qualitative and quantitative factors, and that uses numerical formulas only as part of a broader exercise of judgment—not as a limit on the Commission's discretion.

1. The Commission has provided adequate process in this proceeding and should promptly resolve it.

As the U.S. Court of Appeals for the District of Columbia Circuit recently reaffirmed, the Commission has “considerable discretion” and has “properly recognized that its role is to carry out the particulars of the scheme Congress created, not to engineer specific market outcomes.” *UPS v. PRC*, 890 F.3d at 1067. The Commission has provided interested parties, including UPS and others, substantial opportunities to assess the accuracy of postal costing methods and to propose specific changes in costing methods via petition for rulemaking.² Order No. 4742 continues the Commission's practice of providing all

² See, e.g., Order No. 2792 in Docket No. RM2015-7, *Periodic Reporting (Proposal Thirteen)* (October 29, 2015); Order No. 3506 in Docket No. RM2016-2, *Periodic Reporting (UPS Proposals One, Two, and Three)* (September 9, 2016), petition for review pending *sub nom. United Parcel Service, Inc. v. PRC*, No. 16-1354 (D.C. Cir.); Order No. 2915 in Docket No. RM2016-3, *Periodic Reporting (Proposal Twelve)* (Dec. 22, 2015); Order No. 3973 in Docket No. RM2016-12, *Periodic Reporting (Proposal Four)* (June 22, 2017); Order No. 3641 in Docket No. RM2016-13, *Changes Concerning Attributable Costing* (Dec. 1, 2016), petition for review pending *sub nom. United Parcel Service, Inc. v. PRC*, No. 16-1354 (D.C. Cir.); Order No. 4259 in Docket No. RM2017-8, *Periodic Reporting (Proposal Four)* (Dec. 1, 2017); Order No. 4399 in Docket No. RM2017-9, *Periodic Reporting (Proposal Five)* (Feb. 6, 2018); Order No. 4228 in Docket No. RM2017-10, *Periodic Reporting (Proposal Six)* (Nov. 20, 2017); Comments of UPS in Docket No. RM2018-2, *Periodic Reporting Rules* (March 7, 2018).

interested parties the opportunity to participate in these important issues. Order No. 4742 represents the culmination of a multi-year deliberative process; the current proposal responds to the numerous rounds of comments by interested parties.

Order No. 4742 correctly finds, as the evidence confirms, that the Postal Service is seeking to maximize the contribution from competitive products and that any inequalities in the competitive playing field for package services favor private carriers over the Postal Service. The Order reaffirms that “because the PAEA allows the Postal Service to retain earnings, the Postal Service is incentivized to maximize its profits on competitive products.” Order No. 4742, at 16. The Order further reaffirms that “the last 5 years have been a time of significant innovation and development in the delivery industry,” and that the Federal Trade Commission’s comprehensive report concluding that the Postal Service “operates at a net economic disadvantage[,]” relative to private competitors “continues to be valid.” Order No. 4742, at 54, 58. The Order also reaffirms that there is “minimal risk” to setting the appropriate share too low because “the Postal Service has little incentive to discount prices in order to gain market share because discounting prices to gain market share would decrease the Postal Service’s profitability at a time when it continues to face financial challenges.” *Id.* at 56-57.

In sum, the industry is performing well under the current rules and there is no statutory, regulatory, or equitable problem to be resolved. Accordingly, as ASI has previously submitted, the Commission ought to eliminate the minimum contribution requirement altogether because the current attributable cost floor adequately resolves any cross-subsidy concerns and the risks of setting the required minimum contribution too high are substantial, while any risks of setting the minimum required contribution too low are

minimal. UPS and others have had more than a fair opportunity to make their case for imposing a higher minimum contribution requirement and have failed to offer any persuasive legal or economic rationale for doing so. This proceeding should be promptly resolved.

2. If the Commission adopts a formula-based approach, it should implement the formula in a manner that preserves the Commission's discretion.

Section 3633(b) expressly authorizes the Commission to eliminate the minimum contribution requirement. Supplanting the Postal Service's business judgment with a regulatory minimum contribution requirement would likely *reduce* rather than increase the contribution from competitive products. Therefore, ASI maintains that neither a minimum contribution requirement nor a formula to implement it is necessary.

If the Commission adopts a formula-based approach, however, it should be applied as guidance, rather than as a binding constraint. The rigid use of a formula-based approach to set the minimum contribution requirement would be inconsistent with the flexibility and discretion Congress intended the Commission to exercise in making its determination under section 3633(b). Congress sought to vest the Commission with the maximum flexibility and discretion in making its determination on the minimum contribution requirement, *see* Order No. 4402 at 13-14, and even authorized the Commission to eliminate it altogether. The Commission must take all relevant factors and circumstances into account in assessing the appropriate share. If the formula yields a result that would not serve the purposes of the Act, the Commission must retain the flexibility and discretion to make an appropriate determination regardless of the outcome of a rigid formula.

3. If the Commission uses a formula-based approach, the actual appropriate share in FY2017 should serve as the baseline for prospective calculations.

As set out above, ASI does not believe the Commission should retain the minimum contribution requirement; thus, adjusting the formula is unnecessary. If the formula is to be used, however, ASI submits that there is no rational basis for using a baseline year of FY2007, thereby creating an artificial construct of an FY2017 appropriate share rather than starting from the appropriate share (5.5 percent) that was actually in effect in FY2017.³

Responding to the Postal Service's argument on the point, Order No. 4742 concedes that "the actual appropriate share is known" to be 5.5 percent for FY2017 and prior years and that this FY2017 figure, rather than the hypothetical construct the Commission has developed by applying its formula to the FY2007 base, could be used as the starting point for applying the formula. Order No. 4742, at 42-43. The Commission states that using FY2007 as the baseyear "allows the appropriate share to reflect the cumulative effect of developments in competitive market conditions since the PAEA's enactment." *Id.* The focus on cumulative effects finds no support in the statute. The plain language of section 3633(b) requires the Commission to assess the "prevailing competitive conditions in the market." 39 U.S.C. § 3633(b).

The use of FY2007 as the baseline is also inconsistent with the Commission's prior actions. There were undoubtedly changes since 2007 when the Commission undertook its review in 2012 and determined to maintain an appropriate share of 5.5 percent, and the cumulative effect of changes since 2007 existed each year since 2007 when the Commission reaffirmed the Postal Service's compliance with the existing 5.5 percent appropriate share as

³ Using FY2017, rather than FY2007, as the starting point would yield appropriate shares of 6.6 percent and 6.8 percent, respectively, in FY2018 and FY2019. These figures can be calculated by inserting 5.5 percent into cell B28 of PRC-LR-RM2017-1-2.xlsx, "Appropriate Share Calculations."

part of its annual compliance determination. The Commission does not explain why these conclusions are now being overridden in favor of hypothetical appropriate share figures grossed up from the FY2007 base by formula.

An agency is not at liberty to ignore its prior decisions, *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 60–61 (D.C. Cir. 2004), but must instead provide a reasoned justification for departing from precedent, *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 446 (D.C. Cir. 2004). As explained in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), an agency changing its course “must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed.” Here, the agency has not explained why the actual appropriate shares that it has approved through FY2017 are not being used, and a formula yielding different results put in its place. If the Commission is going to use a formula to assist in determining the appropriate share, it should start from the 5.5 percent appropriate share that is currently in force, rather than the retrospective application of hypothetical appropriate shares based on a formula.

CONCLUSION

ASI continues to believe that neither a minimum contribution requirement nor a formula to implement it is necessary. For the reasons stated above, if the Commission does determine to use a formula it should adopt it as a guide and leave itself free to make a full assessment of the appropriate share, and should use a baseline of FY2017 rather than FY2007 in applying it.

Respectfully submitted,

/s/

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