

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY**

POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

**CONSORTIUM MEMORANDUM
IN RESPONSE TO PRC ORDER NO. 1305**

INTRODUCTION

The Direct Marketing Association, Inc. and the parties identified below¹ (collectively, the "Consortium") respectfully submit this Memorandum, which sets forth the Consortium's views on the three questions raised by the Commission in its Order No. 1305: (1) whether the Commission can lawfully recommend higher rates as requested by the Governors; (2) whether the Commission should recommend higher rates as requested by the Governors; and (3) how higher rates should be developed if the answer to the first two questions is yes. PRC Order No. 1305 at 2-3.

The Consortium believes that the Commission may lawfully recommend higher rates, so long as its decision is based only on the record evidence in this case and so long as the other requirements of due process are met. In our view, however, the Commission should not

¹ The parties joining in support of the positions expressed in this Memorandum are: Advo, Inc., Alliance of Independent Store Owners and Professionals, Alliance of Nonprofit Mailers, Amazon.com, Inc., American Business Media, Association of American Publishers, Association of Priority Mail Users, Inc., Coalition of Religious Press Associations, Dow Jones & Company, Inc., Florida Gift Fruit Shippers Association, Magazine Publishers of America, Major Mailers Association, The McGraw-Hill Companies, Inc., National Newspaper Association, Parcel Shippers Association, and Time Warner Inc.

accede to the Governors' request. The revenue requirement established earlier by the Commission was fully justified on the basis of the evidence of record, and the Commission has already revisited its decision once. If, however, the Commission does decide to recommend higher rates, it should utilize the same pricing principles and procedures that it used when making its initial rate recommendations.

I. THE COMMISSION MAY LAWFULLY RECOMMEND HIGHER RATES, PROVIDED THEY ARE BASED ON SUBSTANTIAL EVIDENCE OF RECORD AND DO NOT VIOLATE DUE PROCESS REQUIREMENTS.

The Consortium believes that the Commission is authorized by the Postal Reorganization Act of 1970 (the "Act"), on reconsideration under section 3625(c) of the Act, to recommend rates estimated to produce total revenues higher than those estimated to be produced by the rates contained in its Further Recommended Decision of February 9, 2001. However, any recommendation to increase these rates, and the level of each specific rate so recommended, will be lawful only if based solely on "substantial evidence of record" and if the requirements of "due process" are met. In the rare circumstance where Postal Service has increased its requested revenue requirement during the pendency of a rate proceeding, it has provided a full justification on the record for the requested increase, and its supporting testimony has been subject to cross-examination by all interested parties. *See United Parcel Serv. v. USPS*, 184 F.3d 827, 834-36 (D.C. Cir. 1999). Because the Governors' recent assertions about the current financial state of the Postal Service are not part of the record, they may not be considered by the Commission in the course of its further reconsideration.

II. THE COMMISSION'S INITIAL REVENUE REQUIREMENT SHOULD NOT BE REVISED.

This is the second time that the Governors have asked the Commission to change its mind. As the record in R2000-1 has not been reopened since the Commission's Further

Recommended Decision, the Consortium sees no basis for the Commission reversing its earlier position. As many participants to R2000-1 have stated previously, the Commission's recommendation with respect to the revenue requirement was reasonable and amply supported on the record. *E.g.*, Consortium Memorandum In Response To USPS Memorandum On Reconsideration, January 12, 2001 (the "Consortium's January Memorandum") at 11-15. It should be affirmed.²

First of all, the Consortium would like to point out that the Commission has actually given the Postal Service almost all the revenue it requested. When this rate case was filed, the Postal Service sought approximately \$69.03 billion in revenue. Then, in response to Order No. 1294, the Postal Service presented revenue figures that totaled approximately \$69.83 billion. However, USPS witness Strasser testified several times that the Postal Service continued to support its original request (\$69.03 billion) and did not wish to revise this number. *See* Tr. 46/20205, 20307, 20340-41. Indeed, Strasser expressly stated that the "rebuttal testimony and the rollforward previously filed by witness Patelunas [in response to Order No. 1294] are not intended to supplant the Postal Service's request."³ The rates recommended by the Commission in its Further Recommended Decision are estimated to produce \$68.93 billion, or only slightly less than the Postal Service had requested. *See* Recommended Decision, Vol. 2, Appendix C; Further Recommended Decision at 51-54.

² Under applicable principles of administrative law, the Commission must have, and clearly articulate, a strong reason to change its prior decisions. *E.g.*, *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("reasoned analysis" is required).

³ *Id.* at 46/20209. Under these circumstances, establishing a revenue requirement higher than \$69.03 billion would raise substantial due process issues.

Second, even if the Postal Service had asked for \$69.83 billion rather than \$69.03 billion, the Commission's decision on the proper size of the revenue requirement was well-supported by the evidence of record. For example, the Commission was more than justified in providing the Postal Service with a 1.5% contingency rather than the 2.5% requested, as is fully explained in the Consortium's January Memorandum. The variance analysis, which is the main objective evidence on this point in the record, fully supported the Commission's view. Tr. 22/9543-44; *see also id.* at 22/9822-24. The bulk of the evidence offered by the Postal Service in support of its request consisted of either subjective management opinions or factors that were foreseeable and, therefore, properly incorporated into the cost projections themselves. *See, e.g.,* USPS-T-9 at 43; Tr. 2/280; Tr. 22/9820-21; Tr. 46/20183-184. Thus, the reasons adduced by the Postal Service to support a 2.5% contingency were carefully reviewed but ultimately rejected by the Commission.

In addition, the Commission was presented with testimony concerning the future of the overall economy. The Postal Service's witnesses contended that there could be significant economic difficulties ahead. *See, e.g.,* Tr. 46/20189-191. The weight of the evidence, however, supported the conclusion that these fears were exaggerated, at least insofar as they related to the Test Year (i.e., the next 13 months). For example, even USPS witness Zarnowitz conceded that economic forecasts are quite reliable over a one-year period, and that only after two years would they become seriously suspect. Tr. 41/18234; *see id.* at 41/18308 (OCA witness Rosenberg). Moreover, the Postal Service never explained why the economic risks it was worried about were not already reflected in the Test Year estimates. For the foregoing reasons, uncertainty in the general economy could not support the 2.5% contingency requested by the Postal Service. The

Commission had to make a judgment based on the record at that time, and its judgment was eminently reasonable.

Finally, the Act gives the Governors a way to increase rates, if they are utterly convinced that the Commission made a mistake with respect to the revenue requirement. Under section 3625, if the Governors unanimously find that the PRC-recommended rates will not provide adequate revenues, they may modify the Commission's rates accordingly. *See Time, Inc. v. USPS*, 710 F.2d 34, 37 (2d Cir. 1983). This decision, however, is the Governors' to make. It is legally improper for the Commission to make such a decision based on events that have occurred after the close of the record.

For these reasons, the Commission should reaffirm the rates it recommended in its Further Recommended Decision.

III. IF THE COMMISSION DECIDES TO DEVELOP HIGHER RATES, IT SHOULD DO SO ACCORDING TO THE STANDARD PRICING PROCESS.

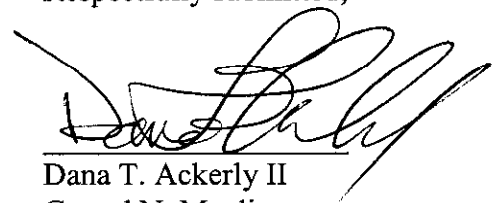
The Consortium, as stated previously, believes that the Commission should not recommend higher rates. If the Commission decides to do so, however, then the Commission should develop revised rates using the same pricing process and principles that it uses in every rate case. It should apply all the statutory pricing factors to the evidence of record, including the impact on volume of further rate increases, develop a new rate structure, and present a complete explanation and justification for the new rates based on these pricing factors. The Consortium understands that this is a long and complicated process, and that it may be difficult for the Commission to complete this task in a reasonably short period of time. However, in the Consortium's view, in order to protect the statutory rights of all parties and to avoid creating

legal infirmities in whatever rates it recommends, the Commission has no alternative to going through this entire process again.⁴

CONCLUSION

As discussed above, the Commission should decline to recommend higher rates and should reiterate without change the rates contained in its Further Recommended Decision.

Respectfully submitted,



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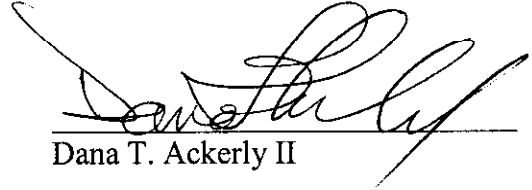
*On Behalf of the Members of the
Consortium*

Dated: March 19, 2001

⁴ Given the anticipated complexity of this process, the Commission may be tempted simply to spread any increase in the revenue requirement evenly across-the-board. In addition to the legal problems that such a process would create, there are a number of practical impediments to such an approach. For example, it would be impossible to increase the price of a First-Class stamp by 1.3% in light of the integer constraint; it would also be impossible to increase the Periodicals rates by 1.3% without increasing these rates above the 9.9% limit to which the Postal Service agreed. Tr. 43/18776 (USPS witness Taufique) These practical considerations constitute (continued...)

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document in accordance with the Commission's Rules of Practice.



Dana T. Ackerly II

March 19, 2001

another, independent reason supporting the Consortium's position that the Commission should reject the Governors' request to increase the revenue requirement in R2000-1.