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

POSTAL RATE AND FEE CHANGES **Docket No. R2006-1**

REPLY BRIEF OF THE AMERICAN POSTAL WORKERS UNION, AFL-CIO

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AMERICAN POSTAL WORKERS UNION, AFL-CIO
REPLY BRIEF
(January 4, 2007)

The American Postal Workers Union, AFL-CIO (APWU) hereby presents its reply brief in Docket No. R2006-1.

I. THE POSTAL SERVICE INITIAL BRIEF IGNORES THE STATUTORY REQUIREMENT OF UNIFORM RATES FOR FIRST CLASS MAIL; WHILE ITS DE-LINKING PROPOSAL RESULTS IN RATES THAT VIOLATE THAT REQUIREMENT.

The Postal Service errs in stating (USPS Initial Brief at 134):

> … The cornerstone of pricing is the application of the policies in 39 U.S.C. § 3622(b) to determine how much revenue to seek from each subclass… The pricing exercise is accomplished by a consideration and application of the nine enumerated postal ratemaking criteria in 39 U.S.C. § 3622(b)….

In contrast to this assertion by the Postal Service, Section 3622(b) requires that the Commission "shall make a recommended decision … <u>in accordance with the policies of this title</u> **<u>and</u>** the following factors… ." [Emphases added here.] The Postal Service, however, has ignored the "policies" of the Act, except to the extent that they are reflected in the "factors" listed in Section 3622(b).

As discussed in our initial brief (at 12-15), an important policy stated in Title 39 is the requirement that there be a uniform rate for all First Class Letter Mail. The Commission observed in MC95-1, ¶ 2048:

> …the first and most enduring objective of postal policy has been to bind the nation together.

Central to this objective is the statutory requirement of uniform First Class rates to serve every area of the country.

> A class such as First Class is necessary to comply with the statutory command [of Section 3623(d)] that …[t]he rate for [First Class] shall be uniform throughout the United States, its territories, and possessions.

Id., ¶ 3005.[1] When Congress deliberated the passage of the Postal Reorganization Act it was concerned with the prospect that rural areas would have to pay higher rates for mail service. It is clear that this concern was about more than just geography. Congress was fearful that low volume mailers, single piece mailers like the proverbial "Aunt Minnie," would be charged higher rates because of the inevitable higher cost of some of this letter mail. To guard against this, Congress made the uniform rate requirement a fundamental part of the Act. *See* APWU Initial Brief at 12-15.

Thus, if the Postal Service were to provide different First Class rates based on the intrinsic differences in cost or efficiency in the handling of heterogeneous

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[1] Section 3623(d) provides:

§ 3623. Mail Classification

* * * *

> (d) The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions.

First Class letter mail, it would violate the express statutory requirement of uniform rates for First Class letter mail. Discounted rates can only be justified by costs avoided by the Postal Service when the mailer performs a function that replaces work that would otherwise be performed by the Postal Service. By performing that work in place of the Postal Service, the mailer is in essence "paying" for the service in a different form.[2]

The Postal Service proposal to de-link rates for Single Piece and Presort First Class letters based on their differing cost characteristics would violate these precepts, as we explain in our Initial Brief at 12-15. The use of the Bulk Metered Mail (BMM) letter benchmark helps to ensure that discounts do not exceed costs avoided, and that similar pieces of First Class mail are required to make the same contribution to institutional costs regardless of whether or not they are presorted. This preserves the statutory requirement of rate uniformity. *See* APWU-T-1 at 15 lines 8-17.

II. THE POSTAL SERVICE'S FAILURE TO OBSERVE THESE STATUTORY REQUIREMENTS IS PARTICULARLY INSUPPORTABLE IN LIGHT OF THE FACT THAT CONGRESS HAS JUST RECONFIRMED THEM.

The fact that the Postal Service Initial Brief completely ignores the statutory requirement of uniform rates for First Class letter mail is particularly difficult to understand in light of the Postal Accountability and Enhancement Act that was signed into law by President Bush on December 20, 2006.[3] Under that law,

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[2] See the discussion of the "make or buy" determination based on the appropriateness of discount rates in APWU Initial Brief at 10-12.

[3] We offer this point in rebuttal of Postal Service arguments that (a) fail to mention the statutory requirement of uniform rates and (b) fail to mention the statutory reconfirmation of that requirement. We recognize that the new statute was signed on December 20, 2006, just one day before initial briefs were required to be filed in this case.

Section 3623(d) requiring uniform rates for letters sealed against inspection has been restated verbatim as a new subsection (c) to Section 404 of Title 39. Thus, Congress has just reiterated and reconfirmed the requirement of uniform First Class rates. It is well-settled that:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. [Citation omitted]. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard v. Pons, 434 U.S. 575, 580-581 (1978).

In the same statute, Congress has explicitly provided that the new regulations to be issued by the Postal Regulatory Commission must include a requirement that workshare discounts not exceed costs avoided.[4] This, too, is a confirmation of this Commission's decisions. The Commission has consistently held that, by establishing presort discounts, it was not establishing a new independent subclass. As a rate category within the First Class letter rate subclass, presort discount rates must comply with the requirement that First Class letter rates remain uniform. This is only the case where discounts are justified by costs avoided by the Postal Service. As the Commission explained (Opinion and Recommended Decision for R77-1, at 240-242):

> … [T]he OCC maintains that the Postal Service has followed legally sound ratemaking concepts. These consist of calculating "clearly capturable cost avoidance" per piece…due to presorting and, then, **offering a per piece**

[4] "The text of the workshare language of the legislation, 39 U.S.C. § 3622(e), part of P.L. 109-435 § 102(a), is attached to this Reply Brief at Appendix A.

The APWU brought the impending enactment of this provision to the attention of the Commission during the cross-examination of Postal Service witness Taufique. Tr. 38/13366-67; 38/13370-72.

> **discount from the regular first-class rate equal to that cost avoidance so that the per piece and overall contribution to residual costs for first-class mail would remain unchanged.** [Emphasis added here.]

There can be no question in this instance that Congress was well aware of the Commission's decisions on presort discounts. The recently-passed legislation was the culmination of a legislative effort that took many years and numerous public hearings. As explained by witness Kobe (APWU-T-1, at 4):

> From the inception of First Class workshare discounts, there has been an understanding by both the Postal Service and the Commission that discounts must be justified by costs avoided so that similar letters being provided First Class service bear the same amount of the institutional costs of the Postal network. [Citing Opinion and Recommended Decision for MC73-1, at 16].

Thus, Congress has re-confirmed the Commission's admonition that :

> A class such as First Class is necessary to comply with the statutory command that …[t]he rate for [First Class] shall be uniform throughout the United States, its territories, and possessions.

PRC Op. MC95-1, ¶ 3005

Under these circumstances, it would be anomalous, and inappropriate, for the Commission to depart from its well-known precedents using Bulk Metered Mail as a benchmark against which to measure presort discounts for First Class letter mail.[5]

[5] The central consequence of the Postal Service proposal to de-link Single Piece and Presort letter rates would be the creation of different and unrelated rates for First Class letters that are otherwise identical except for whether or not they are workshared. This is a consequence considered by the Commission in MC95-1 and rejected by the Commission.

III. BULK METERED MAIL IS THE CORRECT BENCHMARK, AND IT IS THE ONLY BENCHMARK SUPPORTED BY THE RECORD IN THIS CASE.

The Postal Service proposed rate methodology is not consistent with the fundamental principle of the Postal Reorganization Act that rates within classes of letter mail "shall be uniform throughout the United States." 39. U.S.C. 3623(d). In its initial brief, the National Association of Presort Mailers mischaracterizes Ms. Kobe's testimony in support of the BMM benchmark as pursuing the "chimera of uniformity of contribution." NAPM Initial Brief at 23. This is incorrect.[6] Given that First Class letters are heterogeneous and are destinated for many different areas, the requirement of uniform rates ensures differing per unit contributions to institutional costs. What is not permitted by the statute is for identical pieces to have different rates. That results in a shifting of costs from presorter to nonpresorter.

As Ms. Kobe has explained in her testimony, given the heterogeneous nature of the First Class letter mail, it is critical that a benchmark be used to measure costs avoided that is as similar as possible to the predominant presorted mail. With a system of worksharing discounts in place, such a benchmark is the only way to isolate the costs of the worksharing activities and ensure that identical pieces of mail implicitly pay the same rate for the same service, with the only difference being due to the costs saved for the actual worksharing activities. Making a comparison between the Presort letters and an average of all the Single Piece letters (and flats and parcels) as the Postal Service is proposing absolutely

[6] The NAPM brief also oversimplifies this case by making reference to upward sloping supply curves for homogenous products. This case deals with costs for a very heterogeneous product and is more complicated, as Dr. Panzar agrees.

ensures that identical pieces will be paying different rates for the same service, as Mr. Taufique has admitted in both his direct testimony and his rebuttal testimony. USPT-T-32 at 14 lines 9-21; USPS-RT-18 at 5 lines 12-16.

As Ms. Kobe's testimony illustrates and as the Commission has repeatedly confirmed, use of the BMM benchmark is the appropriate way to ensure that identical pieces of mail pay identical rates for the same service. *See* APWU-T-1; PRC Op. R2000-1, ¶ 5089; PRC Op. R97-1, ¶ 5027; and PRC Op. MC95-1, ¶ 4302. Using the BMM benchmark, Ms. Kobe has proposed rates in this case that are supported by cost savings calculations presented with PRC attributable cost methodology.[7] The Major Mailers Association advocates replacing the BMM with the Metered Mail Letter (MML) as the benchmark for calculating worksharing discounts. MMA Initial Brief at 29-30. This position is untenable and has already been rejected by the Commission. *See* PRC Op. R2000-1. MMLs are heterogeneous, with the mix of nonworksharing-related characteristics varying from period to period, and do not permit the same comparison of like pieces of workshared mail and non-workshared mail allowed by the use of the BMM as the benchmark.

Moreover, as explained more fully in our initial brief, there is no record basis in this case for the Commission to adopt any benchmark other than the BMM

[7] The MMA errs when it asserts that Ms. Kobe's "Step 1 and Step 2 presort discount proposals" are not supported by the PRC's methodology. MMA Initial Brief at 55. Ms. Kobe has not proposed Step 2 rates – the tables presented by the MMA that seem to show her "Step 2" rates are a construct of the MMA, not of Ms. Kobe. The rates proposed by Ms. Kobe in this case are supported by cost savings calculations presented using the PRC methodology. *See* Table 1, Library Reference LR-L-141.

benchmark.[8] APWU Initial Brief at 16-18. Postal Service witness Abdirahman repeatedly stated Postal Service support for the BMM letter if a benchmark is retained (Tr. 35/11968-69); that the BMM benchmark is the only one that has been litigated (Tr. 35/12050-51); and "unsubstantiated views [about BMM] should not warrant departure from the Commission findings in past cases supporting BMM benchmark." USPS-RT-7 at 5; *accord* United States Postal Service Initial Brief at 253.[9]

IV. THE POSTAL SERVICE'S DE-LINKING PROPOSAL IS NOT ONLY ILLEGAL, IT IS CONTROVERSIAL.

The Postal Service's Initial Brief argues, at 195, that witness Taufique has provided "compelling grounds for a fresh review of the benchmark issue" (citing USPS-T-32 at 12-17). Upon examination, Mr. Taufique's "compelling grounds" boil down to just one: the Postal Service considers the use of the Bulk Metered Mail letter benchmark to be "controversial" in that it has been opposed by large mailers seeking to shift costs from themselves onto individuals and small business mailers.[10] Thus, Mr. Taufique testified that the use of the BMM benchmark "has

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[8] In *Newsweek, Inc. v. USPS*, the Second Circuit Court of Appeals held that the findings of the Postal Rate Commission must be supported by "substantial evidence in the record." 663 F.2d 1186, 1208 (2nd Cir. 1981).

[9] Postal Service Initial Brief at 253:

> Even if the Commission does not adopt de-linking, these unsubstantiated views would not warrant departure from Commission findings in past cases supporting the BMM benchmark in favor of benchmarks apparently chosen solely because they would result in larger estimated cost differences.

[10] These mailers believe it would be fair and just to shift substantial institutional costs to Single Piece First Class letter mail. Thus, as ABA witness Kent testified:

> Good public policy, as well as sound business judgment, suggests that the more mail services cost, the more a mailer should pay, and conversely the less mail services cost, the less a mailer should pay. ABA-RT-1 at 8 lines 32-34.

generated considerable controversy" (USPS-T-32 at 12 line 27); that the mailers have sought to have all their costs considered, not just their workshare-related costs (*Id*. at13 lines 17-21); and that the USPS de-linking proposal would give them what they want (*Id.* at 14-15) and would avoid "debate" about cost pools and clean versus dirty mail (*Id.* at 15 lines 11-13).

This view of postal ratemaking – that the Postal Service can appease large mailers and thereby avoid "controversy" is beyond naïve, it is disproven by the arguments of the intervenors in this case. The APWU is one such intervenor. We consider the de-linking proposal to be illegal and, for the other reasons stated in our initial brief and above in this reply brief, very controversial.

Moreover, the Postal Service proposed rates based on the de-linking proposal have generated substantial controversy in this case among the large

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During cross examination by APWU Counsel Anderson Mr. Kent explained this position further:

> Q So if that policy were to be followed and if it were to lead to for example single piece mail costing $1 a letter to mail, Valentines, Aunt Minnie's handwritten notes to her grandchildren, whatever it is, if this policy led to that sort of dirty single piece mail costing $1 that's fair in your view and it's also good policy, correct, because it's the dirty mail and it's more expensive to process?
>
> A Assuming that all the mail were paying its fair share and the fair share of Aunt Minnie's mail as you referred to it resulted in a $1 rate would that be fair?
>
> Q Yes that's the question
>
> A Sure.

Tr. 38/13249.

mailers they are intended to favor. Both Pitney Bowes (Initial Brief at 2) and NAPM (Initial Brief at 10-12) have stated their positions that First Class rates should be completely de-averaged. The Major Mailers Association, is even more vehement in its criticism of the Postal Service proposal. MMA

> assails the Postal Service proposal as based on "some obviously inappropriate methodological changes incorporated in the USPS studies" (Initial Brief at 21);
>
> accuses USPS witness Abdirahman of ignoring "a substantial flaw that MMA has pointed out and proven with respect to the models' disparate results… . (*Id.* at 34); and
>
> describes the Postal Service's method for de-averaging Presorted letter costs as "entirely defective, providing results that are inaccurate, unreasonable and illogical" (*Id.*).

We also observe that there will continue to be controversy between groups of mailers. For example, the Greeting Card Association advocates

> decreasing the institutional cost coverage disparity between presort First Class and Standard Mail (Initial Brief at 32-34); and
>
> describes de-linking as "analogous to imposing a regressive tax" (*Id.* at 39).

The Major Mailers Association, has advocated shifting costs to lower volume presort mailers, arguing that the highly efficient large mailers' cost savings

> are spread over all presort mail volumes, allowing for unjustified, continued cross subsidizations of low volume presort mailers by high volume mailers" (MMA Initial Brief at 60).

In light of the blistering attacks on its de-linked rate proposal and the continuing controversy between groups of mailers, we anticipate that the Postal Service may recognize that its proposal has done nothing to diminish the controversy.

V. CONCLUSION

The Postal Service proposal to de-link First Class Single Piece and Presort letter rates must be rejected. The Commission should recommend the First Class letter rates proposed by Ms. Kobe

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