

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON DC 20268-0001**

REGULATIONS ESTABLISHING SYSTEM )  
OF RATEMAKING )

Docket No. RM2007-1

**COMMENTS OF  
ALLIANCE OF NONPROFIT MAILERS AND  
MAGAZINE PUBLISHERS OF AMERICA, INC.  
ON ADVANCE NOTICE OF PROPOSED RULEMAKING**

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The Alliance of Nonprofit Mailers (“ANM”) and Magazine Publishers of America, Inc. (“MPA”) respectfully submit these joint comments in response to Order No. 2, the Advanced Notice of Proposed Rulemaking (“ANPR”) issued by the Commission on February 2, 2007, and published in the Federal Register at 72 Fed. Reg. 5230 (Feb. 5, 2007).

**I. INTRODUCTION AND SUMMARY**

These comments focus on two sets of issues of particular concern to the publishers that belong to ANM and MPA.<sup>1</sup> First, the Commission should make clear that the index-based rate cap established by 39 U.S.C. § 3622(d) is binding, and may not be trumped by allegations that rates for an individual class of mail fail to cover attributable costs. The language and legislative history of the 2006 legislation are clear on this point. A contrary interpretation would undermine the incentives created by the legislation by restoring the link between Postal Service costs and rates.

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<sup>1</sup> The publisher members of ANM, and many of the members of MPA, are eligible for the reduced periodical rates offered to qualified nonprofit organizations under 39 U.S.C. § 3626(a)(4). PAEA did not amend this provision, however, and we do not discuss it further here.

Second, the Commission should limit the issues that may be considered during the 45-day notice period for an index-based rate adjustment to the question of whether the proposed rate changes comply with the index. Adjudicating issues involving other ratemaking provisions of Section 3622 during the 45-day period would be unmanageable. For similar reasons, the Commission should encourage the Postal Service to provide greater than 45 days notice if the proposed rate changes are complex, or involve complex changes in mail preparation rules.

## **II. THE INDEX-BASED RATE CAP IMPOSED BY 39 U.S.C. § 3622(d) IS BINDING.**

Both the language and the legislative history of 39 U.S.C. § 3622 (“Section 3622”) show that Congress did not authorize the Commission or the Postal Service to breach the CPI “cap” for a class on the theory that the class would otherwise fail to cover its attributable costs.

### **A. The Language of the Statute**

The language of 39 U.S.C. § 3622 sets an absolute limit on overall percentage increases in rates for a class, with only limited exceptions spelled out in the statute. Section 3622(d)(1)(A) specifically provides that “The system for regulating rates and classes for market dominant products *shall . . . include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal variation over the most recent available 12-month period preceding the date on which the Postal Service files notice of its intention to increase rates.*” 36 U.S.C. § 3622(d)(1)(A) (emphasis added). Similarly, Section 3622(d)(1)(D) specifically

directs the Commission to “establish procedures whereby the Postal Service may adjust rates *not in excess of the annual limitations under subparagraph (A).*” *Id.* § 3622(d)(1)(D) (emphasis added). Neither provision creates any exception for mail that would otherwise fail to cover attributable costs.

Section 3622(d) also specifies that changes to the CPI shall constrain rate increases separately for each class of mail. Section 3622(d)(2)(A) provides that, except for the deferred use of banked or unused increase authority, “the annual limitations under paragraph (1)(A) *shall apply to a class of mail*, as defined in the Domestic Mail Classification Schedule as in effect on the date of enactment of” PAEA. *Id.*, § 3622(d)(2)(A) (emphasis added).<sup>2</sup> This provision, like Sections 3622(d)(1)(A) and (D), contains no restriction or exception for mail that would otherwise fail to cover attributable costs.

Section 3622(c)(2), which directs the Commission, “in establishing or revising” a “modern system” of ratemaking, to “take into account . . . the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to each class or type of mail service through reliably identified causal relationships plus that portion of all other costs of the Postal Service reasonably assignable to each such class or type,” does not support a contrary result. The structure and organization of Section 3622 make clear that the factors of § 3622(c) do not and cannot trump the CPI cap established by § 3622(d).

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<sup>2</sup> The intent of Congress to make the CPI cap a limit on each class of mail is also evidenced by Section 3622(d)(2)(B), which allows the Postal Service to round rates and fees to the nearest whole integer, “if the effect of rounding *does not cause the overall rate increase for any class to exceed the Consumer Price Index for All Urban Consumers.*” 36 U.S.C. § 3622(d)(2)(B) (emphasis added).

Section 3622 establishes a hierarchy of regulatory authority. At the bottom are Section 3622(c)(2) and the thirteen other factors enumerated in § 3622(c)(1) through (14). Section 3622(c) merely requires only that the Commission, in establishing and revising a system of ratemaking for market-dominant products, “take” these factors “into account.” Above the factors enumerated in § 3622(c) are the nine “objectives” enumerated in § 3622(b): the Commission is directed to design the ratemaking system “to achieve” those objectives. *Id.*

At the top of the hierarchy, however, is the CPI-based cap established by § 3622(d)(1). This is the only ratemaking standard that the legislation requires the Commission to enforce as an absolute requirement (“shall . . . include”). Moreover, § 3622(d)(2)(A) specifically states that, “except as provided under” § 3622(d)(2)(C)—i.e., the provision authorizing catch-up recovery of previously unused index authority—“the annual limitations under paragraph (1)(A)”—i.e., the annual cap on increases established by reference to the CPI under § 3622(d)(1)—“*shall apply to a class of mail*” (emphasis added). Section 3622(d)(1)(E) establishes a separate exception for exigent circumstances. By establishing the CPI cap as a mandatory constraint on each rate class (“shall apply”), § 3622(d)(2)(A), enumerating only two exceptions to it, §§ 3622(d)(2)(C) and 3622(d)(1)(E), and directing that the CPI cap shall be binding “except as provided” by those exceptions, § 3622(d)(2)(A), Congress has foreclosed any exception to the CPI cap based on any other “objective,” “factor” or other provision of PAEA.

Allowing Section 3622(c)(2) to override the *specific* provisions of Section 3622(d) limiting annual rate increases to the CPI (§ 3622(d)(1)(A)) and applying the annual

limitation separately to each class of mail (§ 3622(d)(2)(A)) would invert this clear statutory hierarchy. Such an expansive reading of § 3622(c)(2) would also violate the “fundamental rule of statutory construction” that, when two statutory provisions are arguably in conflict, “specific provisions trump general provisions.” *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5<sup>th</sup> Cir. 2003).

Our reading of the statute finds further support in Section 3622(d)(1)(D), which directs the Commission to “establish procedures whereby the Postal Service may adjust rates *not in excess of the annual limitations under subparagraph (A).*” 36 U.S.C. § 3622(d)(1)(D) (emphasis added). Allowing the attributable cost factor of § 3622(c)(2) to trump the CPI cap on classwide rate increases would effectively read the qualifying phrase “not in excess of the annual limitations under subparagraph (A)” out of § 3622(d)(1)(D).

Moreover, the absence of any exception to the CPI cap for classes that do not cover attributable cost contrasts starkly with the explicit and unambiguous wording of the handful of provisions of PAEA creating exceptions to the CPI cap or imposing an attributable cost floor on rates:

- (1) The exigent circumstances provision, Section 3622(d)(1)(E), authorizes rates to be increased by more than the CPI in “extraordinary or exceptional circumstances” within the meaning of that provision. The existence of the exception, and the procedures required for invoking it, are explicitly stated in Section 3622(d)(1)(E).

- (2) The banking provision, Section 3622(d)(2)(C), allows rate increases to exceed the annual CPI increase in certain circumstances when the Postal Service has not increased rates by the full amount of the CPI in previous years. The existence of this exception is expressly stated in Section 3622(d)(2)(C). So are the limits on use of this catch-up provision: “the rate increase may not exceed the annual CPI cap “for *any class or service* . . . by more than 2 percentage points.” 39 U.S.C. § 3622(d)(2)(C)(iii)(IV) (emphasis added).
- (3) Section 3633(a)(2) states that the Commission “shall” promulgate regulations to “ensure” that “each competitive product covers its costs attributable,” § 3633(a)(2). There is no comparable provision in PAEA for market dominant products.

In short, the language and structure of PAEA demonstrate that when Congress intended to create an exception to the CPI cap, or to make recovery of attributable costs a requirement in ratemaking, Congress did so expressly. In view of the absence of any such provision in Section 3622(d), there can be no doubt that Congress intended the CPI cap to be binding, irrespective of the level of the attributable costs of a particular class of mail.

If a particular class or service is not bearing its attributable costs, the Postal Service (or, under procedures authorized by the Act, the Commission) may continue to increase the rates for that class or service by the full amount of the CPI until full coverage of attributable costs is attained. This interpretation of the statute gives effect to

both the rate cap provisions of Section 3622(d)(1) and the attributable cost factor set forth in Section 3622(c)(2), without frustrating the intent of Congress.

## **B. Legislative History**

The legislative history of the PAEA provides further confirmation that Congress intended the index mechanism set forth in Section 3622(d)(1) to impose an absolute limit on overall increases in rates for a class in any given year, with no exceptions other than the two specified for exigent circumstances and the catch-up recovery of previously unused CPI authority.

Congress was well aware during the deliberations leading to the enactment of PAEA that a CPI cap on rate increases might result over time in the failure of one or more classes of mail to cover attributable costs. For example, at a 1999 hearing on the proposed “Postal Modernization Act of 1999” (H.R. 22), a prominent industry witness specifically proposed that the legislation allow above-index rate increases when “the Postal Service is not covering its costs in a class of mail”:

The third area when there could be some circumstances to go beyond the index, would be when a specific rate is too low, the Postal Service is not covering its costs in a class of mail. We think the Postal Service should have to go to the Regulatory Commission and adjust, one time, the index, make an adjustment in the index, to increase the rates for that class on a one-time basis and then go on, under the current provisions, with the index previously set by the Regulatory Commission for the remainder of the 5 years.

*See H.R. 22, The Postal Modernization Act of 1999, Hearings Before the Subcommittee on the Postal Service of the Committee on Government Reform, U.S. House of Representatives, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 374 (testimony of Jerry Cerasale, Senior Vice*

President, Direct Marketing Association).<sup>3</sup> No such provision was included in the bill that ultimately became law, however.

Congress was also aware of the possibility that one or more classes of mail arguably might fail to cover attributable costs from the outset of the indexing regime. In 1996, for example, Congress considered—but did not enact—a bill that would have established an attributable cost floor with priority over the other factors specified in Section 3622(c). H.R. 3717, introduced by Representative McHugh as the “Postal Reform Act of 1996,” would have required the Commission, in establishing “baseline rates” for future index adjustments, give weight to the factors and policies of the legislation in a “descending order of priority” enumerated in the draft legislation. The very first factor listed in the bill – and thus the factor to be given the highest priority – was the requirement that each class of mail or type of mail service bear its attributable costs. See H.R. 3717, 104th Cong., 2d Sess. (1997), § 1001 (proposed revisions of 39 U.S.C. § 3622(b)). This hierarchy was omitted from the version of the legislation that ultimately became law.

Congress also considered—but did not enact—provisions authorizing special index adjustments when a class of mail subsequently fails to cover its attributable costs. For example, the Senate bill (S. 662), as reported by the Senate Committee on

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<sup>3</sup> In 2004, Postmaster General Potter testified that because an imperfectly crafted price cap could be harmful “given the volatility of today’s marketplace,” the price cap should “be constructed to recognize the many cost factors which enter into the ratemaking process, many of which are beyond our control.” *The Postal Service in Crisis: A Joint Senate-House Hearing on Principles for Meaningful Reform*, Joint Hearing Before the Committee on Government Reform, U.S. House of Representatives, and Committee on Governmental Affairs, U.S. Senate, 108<sup>th</sup> Cong., 2d Sess. 63 (2004) (“2004 Joint Hearings”).

Homeland Security and Governmental Affairs to the full Senate in 2005, included a provision that would have allowed the Postal Service to apply unused rate increase authority in two specified circumstances, one of which was the failure of a class to cover its attributable costs. As proposed in the reported version of S. 662, 39 U.S.C. § 3622(d)(2)(C) would have provided:

(C) BANKING UNUSED PRICING AUTHORITY – Notwithstanding paragraph (1), *for any class or service that failed to recover its attributable costs in the previous fiscal year, or for any classes and services when the Postal Service has operated at a loss for the last 2 years, rate increases may exceed the Consumer Price Index for all Urban Consumers by the amount increases in the previous year were less than Consumer Price Index for All Urban Consumers.*

See S. 662, § 201 (proposed § 3622(d)(2)(C)) (July 14, 2005); *Congressional Record*, Feb. 9, 2006, at S913. That provision, however, was deleted before S. 662 passed the Senate. See *Congressional Record*, Feb. 9, 2005, at S926, S929; *Congressional Record*, Dec. 8, 2006, at H9162. Neither that bill nor the legislation that Congress ultimately enacted in December 2006 contained any provision requiring (or even authorizing) above-index rate increases for classes that failed to cover attributable costs.<sup>4</sup>

In short, Congress specifically considered and rejected the alternative of allowing special rate adjustments for rate classes which fail to cover their attributable costs, whether at the outset of index ratemaking or during its subsequent operation. Instead, Congress applied the provisions imposing the CPI cap on annual rate increases, subject to the exceptions for exigent circumstances and catch-up use of banked CPI authority , to all classes and services.

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<sup>4</sup> The bill enacted by the House, H.R. 22, did not contain any provision regarding unused rate authority. See, e.g., H. Rep. No. 109-66, Part I, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3-4, 46-48 (2005).

**C. Allowing The Attributable Cost Floor To Trump The Rate Cap For Individual Classes Would Undermine The Incentive For Efficiency That Congress Intended The Index To Create.**

Allowing the attributable cost floor to trump the Section 3622(d) rate cap would also undermine one of the central purposes of the index mechanism: creating an incentive for the Postal Service to control its costs. The fundamental logic of incentive ratemaking is to provide incentives for a regulated carrier to hold its cost increases below the level of the index, by “severing the linkage under traditional cost-of-service ratemaking” between a regulated company’s costs and rates.<sup>5</sup> To create the desired incentive, however, the commitment not to allow an above-index rate increase if the carrier fails to control its costs must be credible; if the carrier believes that nonrecovery of actual costs may plausibly cause the regulator to relent, the index mechanism loses its effectiveness as a control on costs.<sup>6</sup>

Allowing the Postal Service to breach the rate cap on the theory that one or more mail classes would fail otherwise to cover attributable costs would have this very effect. Allowing above-index rate increases on this ground would restore the link between Postal Service rates and costs—first for relatively low markup classes such as Periodicals Mail and Media and Library Mail, and then for other classes with progressively higher markups. At the extreme, the Postal Service could allow its reported costs to

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<sup>5</sup> *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985 (1993) (“*Order No. 561*”) at 30,948-49 & n. 37, *aff’d*, *Ass’n of Oil Pipelines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

<sup>6</sup> Michael A. Crew and Paul R. Kleindorfer, “A Critique of the Theory of Incentive Regulation: Implications for the Design of Performance Based Regulation for Postal Service,” in Crew and Kleindorfer, eds., *Future Directions in Postal Reform* (2001) (a “chorus of economists” has focused on “regulatory commitment as the Achilles heel of” price cap regulation).

increase by such a wide margin in a single year (perhaps by recognizing in a single year costs otherwise reported in multiple years) to justify a breach of the rate cap for every major class of mail.

**D. The exigency provision of 39 U.S.C. § 3622(d)(1)(E) applies only to cost increases that simultaneously affect all major classes of mail.**

For similar reasons, the Commission should likewise hold that the exigency clause does not authorize rate adjustments that are limited to individual classes or subclasses of service—and certainly not for classes as small as Periodicals Mail. The circumstances that the drafters had in mind as sufficiently extraordinary were national emergencies comparable in scale and severity to the “terrorist attacks of September 11, 2001, and the subsequent use of the mail to transmit anthrax . . .” H. R. Rep. No. 108-31, 108<sup>th</sup> Cong., 2d Sess. 11, 43 (2004). Moreover, Congress, when finalizing the language that became Section 3622(d)(1)(E) by changing the phraseology from “unexpected and extraordinary” to “extraordinary or exceptional,” added the further requirement that the resulting revenue shortfall must be large enough to threaten the ability of the Postal Service “to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” *Id.*; Cong. Rec. H9160, H9162 (December 8, 2006). This language, which was added to the Senate bill during the final deliberations over its wording, makes clear that the drafters did not intend the change in wording from “unexpected and extraordinary” to “extraordinary or exceptional” broaden the exigency exception to the cap.

For these reasons, revenue shortfalls within an individual class as small as Periodicals Mail are too small to constitute “extraordinary or exceptional” circumstances

under Section 3622(d)(1)(E). Moreover, allowing the Postal Service to use Section 3622(d)(1)(E) to impose above-index rate increases on individual mail classes would effectively nullify Section 3622(d)(2), which establishes the index as a cap on overall rate increases for each class of mail. As noted above, reinterpreting Section 3622(d)(1)(E) in this manner would also reestablish the traditional link between rates and the Postal Service's actual attributable costs, thereby attenuating or eliminating the incentive for efficiency created by severing this link.

### **III. CHALLENGES TO PROPOSED RATE CHANGES DURING THE 45-DAY NOTICE PERIOD SHOULD BE LIMITED TO ISSUES INVOLVING COMPLIANCE WITH THE INDEX FORMULA.**

The mailer counterparts to the exigent circumstances provision are the provisions that allow challenges to below-cap rates. While Congress clearly intended to leave the Commission some residual oversight, mailers and competitors should not be allowed to file challenges to index-based rate increases during the 45-day notice period on grounds other than noncompliance with the Commission rules defining the index formula index. Forty-five days are not enough time to litigate and adjudicate such broader issues. Parties wishing to challenge below-cap rates should be required to do so in the Commission's annual review of rates, or by initiating a complaint proceeding.

For similar reasons, the Commission should encourage the Postal Service to provide more than 45 days notice if the proposed rate changes are complex, or involve complex changes in eligibility requirements or mail preparation rules. The rate changes for Periodical Mail recently recommended by the Commission and approved by the Governors in Docket No. R2006-1 illustrate that implementation of highly complex rate

changes of this kind may, as a practical matter, require several months of advance notice.

### **CONCLUSION**

Alliance of Nonprofit Mailers and Magazine Publishers of America, Inc., respectfully request that the Commission adopt the standards and procedures proposed herein.

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