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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

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| REGULATIONS ESTABLISHING SYSTEM OF RATEMAKING | ) ) | Docket No. RM2007-1 |

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND VALPAK DEALERS' ASSOCIATION, INC. COMMENTS ON REGULATIONS ESTABLISHING A SYSTEM OF RATEMAKING IN RESPONSE TO COMMISSION ORDER NO. 2**

(April 6, 2007)

On January 30, 2007, the Postal Regulatory Commission issued Order No. 2, Advanced Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking ("ANPRM"), which, *inter alia*, stated:

> Separate rules are to apply for **market dominant**, as opposed to competitive, postal services. The Commission is given **18 months** to develop and implement this system. [Order No. 2, p. 2 (emphasis added).]

Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association (hereafter "Valpak") submit these joint comments in response to this request for comments on ratesetting for market-dominant products.

The Postal Accountability and Enhancement Act ("PAEA"), Public Law 109-435, amended 39 U.S.C. section 3622 to state that, "[t]he Postal Regulatory Commission shall, within **18 months** after the date of enactment of this section, by regulation establish … a modern system for regulating rates and classes for market-dominant products." PAEA, sec. 201; 39 U.S.C. § 3622(a) (emphasis added). Section 3622 then goes on to list nine

"objectives" to be achieved, 14 "factors" to be taken into account, and five "requirements" that must be met in establishment of such a system. 39 U.S.C. § 3622(b)-(d).

Certainly, no one set of comments can reasonably respond to all important issues now on the table, but this rulemaking is viewed as a first step in that process. Accordingly, these comments are filed in the expectation that this is only the first of several rulemakings that appear to be needed for the Commission to exercise its responsibility to develop a new, modern system of regulations applicable to the rates and classes for market-dominant products as required by recently-amended section 3622, and such additional regulations as may be required by recently-amended section 3633.

Valpak recommends that the Commission take the **full 18 months** from the enactment of PAEA, December 20, 2006, for this process, or until June 19, 2008. Reply comments in this initial comment period are now due May 7, 2007, and that will leave only 13 additional months to develop proposed specific rules, receive comment on those proposed rules, and formulate revisions to those rules in addition to all of its other responsibilities under both the Postal Reform Act of 1970 ("PRA") and PAEA. Whatever system is created by the Commission will govern rate setting for a $77.6 billion enterprise vital to the economic health of the nation, and any effort to cut short this deadline established by Congress, which Congress presumably believed likely would be necessary to do the job properly, would be ill-advised indeed.

## I. THE COMMISSION IS RESPONSIBLE FOR DEVELOPING REGULATIONS CONSISTENT WITH THE LANGUAGE OF PAEA, AND WHICH DO NOT DEPEND ON SUBJECTIVE ASSERTIONS ABOUT SUPPOSED CONGRESSIONAL INTENT.

When an agency has been charged with implementing and enforcing an act of Congress and, to that end, has been granted authority to make rules and regulations pursuant to that act, it is well-established that a federal administrative "agency[] must give effect to the unambiguously **expressed** intent of Congress." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (emphasis added). To ascertain "whether Congress has directly spoken to the precise question at issue," one must examine the relevant statutory text and context, including the legislative history. *Id.,* 467 U.S. at 842-43 and cases cited in footnote 9 thereof. "[I]f the statute is silent or ambiguous with respect to the specific issue" — "[i]f Congress has explicitly left a gap for the agency to fill" — the agency has "authority … to elucidate a specific provision of the statute by regulation." *Id.*, 467 U.S. at 843-44. Nevertheless, it may do so only within the bounds of its regulatory authority (United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985)), as ascertained "in light of the language, policies, and legislative history of the Act." *Id.*, 474 U.S. at 131. If congressional intent can be determined from the statutory text, however, there is no room for agency discretion.

In light of these general rules, the Postal Regulatory Commission ("the Commission") — as it undertakes to promulgate rules and regulations to implement PAEA — must first identify the **precise statutory language** from which it derives its authority to make **each rule and regulation,** and then ascertain the meaning of that language "in the context of

achieving particular [statutory] objectives" expressly sanctioned by Congress. Chevron, 467 U.S. at 861; *see id.* at 859-62. Only if this exercise is not "dispositive" may the Commission look to the legislative history to discern congressional policy objectives that otherwise may not be discovered by an examination of the statutory text. *Id.*, 467 U.S. at 862-64. If the legislative history is "unilluminating," and the agency is faced with the task of "reconciling conflicting policies," it may do so if the matter at issue concerns "technical and complex" issues within the Commission's special expertise. *Id.*, 467 U.S. at 862-63, 865.

PAEA was signed into law by President Bush on December 20, 2006, with no conference committee report pertaining to the bill as finally enacted into law.

Earlier in the 109th Congress, both the House and the Senate had considered and passed different renditions of postal reform legislation. The House Committee on Government Reform reported H.R. 22 out on April 13, 2005, with a printed report. The House passed the bill on July 26, 2005.

The Senate Committee on Homeland Security and Governmental Affairs reported out S. 662 on June 22, 2005, without a printed report; the Senate passed it, and renamed it H.R. 22, on February 9, 2006.

The Senate appointed conferees for a conference committee to reconcile differences between the Senate and House versions of H.R. 22, but the House never appointed conferees, apparently believing that differences in the bills better could be worked out in private discussions between the House and Senate. When private negotiations were completed, in the last days of the 109th Congress shortly before consideration on the House floor, the manager's amendment to was posted for public review, presenting a new bill (H.R. 6407) which differed

from both bills previously reported by the House or Senate Committees. As revised by the manager's amendment, the bill passed the House in the late hours of December 8, 2006, and the Senate passed the identical bill in the early hours of December 9, 2006, thus avoiding the need for a conference. However, in avoiding a conference, Congress ensured that there would be no conference committee report to provide useful legislative history on the many changes incorporated in H.R. 6407, which had significant differences from either H.R. 22 as passed by the House or H.R. 22 as passed by the Senate.

In light of the paucity of pertinent legislative history explaining the policy objectives of PAEA as enacted, it is not surprising that, at the Commission's Summit Meeting on PAEA held at the William F. Bolger Center in Potomac, Maryland, on March 13, 2007, some speakers purported to state the congressional policy underlying the postal reforms contained in PAEA, while other speakers stated a quite different understanding. For example, one supposed congressional policy voiced at the Summit reflected Congress's "obvious" intent for PAEA to sever the link between rates and costs, while others expressed a contrary opinion. Unlike the responsibility now before the Commission, these rhetorical exchanges did not focus on the PAEA text as the source of this asserted severance policy. *Contrast*, *e.g.*, the statement of a postal economist (Summit Transcript, p. 174, l. 25 – p. 175, l. 10), with the statement of a trade association executive regarding various perceptions of congressional intent (*id.*, p. 186, ll. 14-21).

In fact, it is the Commission's first responsibility to fashion rules and regulations pursuant to Congress's intent as **expressed** in PAEA's text, not as fathomed by persons no

matter how closely they may have observed the process.[1] Particularly, in a situation as here, where no conference committee report or other reliable evidence of congressional intent exists with respect to the final bill, it would be a grave mistake for the Commission to exercise its rulemaking authority on the basis of any of the common mantras now in circulation as to congressional purpose. It is hoped that, in the several rounds of rulemaking before the Commission over the 18-month rulemaking period concerning PAEA regulations, assertions about congressional intent, disembodied from the PAEA text and from authentic legislative history, will be avoided by the parties and ignored by the Commission. If the Commission takes its eyes off PAEA, it may not succeed in its task of implementing PAEA as enacted, but rather could be diverted to implement what some may have hoped the law would be, but which it is not, because "a specific policy battle" was either "lost" or "never [even] waged in the Congress." *See* Chevron, 467 U.S. at 864.

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[1] Even an attempt to discern the "intent" of Congress by an examination of the words spoken by committee chairmen or other individual Senate or House sponsors on the Senate or House floor, or otherwise, is constitutionally and legally problematic. *See* Bank One Chicago v. Midwest Bank and Trust Co., 516 U.S. 264, 279-83 (1996) (Scalia, J., concurring).

## II. PAEA REQUIRES THE COMMISSION TO DEVELOP A MODERN SYSTEM FOR REGULATING RATES AND CLASSES FOR MARKET-DOMINANT PRODUCTS

PAEA section 201 requires that the Commission develop regulations to establish "a **modern** system for regulating rates and classes for market-dominant products." 39 U.S.C. § 3622(a) (emphasis added). This requirement warrants two observations here. First, at issue is a "system for regulating rates and classes," not a system for regulating any other activity of the Postal Service. Second, its implementation makes it necessary to distinguish what would constitute a "modern system" from a not-so-modern system: establishing the former is required, while establishing the latter would not be allowed.

The word **modern** as a descriptor is generally used to refer to things that are of the present time, *i.e.*, that are just now, and that are not ancient, old-fashioned, or out of date. In other words, if our understanding, or even our state of generally accepted practice, has advanced to the point that certain characteristics of ratesetting systems would be considered old-fashioned (*i.e.*, no longer in current use, or dated), it would follow that a system having one or more of those characteristics would not be modern. Accordingly, a system which drew effectively on the current state of understanding, while avoiding characteristics regarded by the community of ratesetting professionals as old-fashioned, should be considered modern. The requirement, then, is to draw heavily on the current state of our understanding of ratesetting principles, as applicable to the Postal Service, consistent with the literature dealing with such ratemaking issues.

In addition to this general requirement in subsection (a), section 3622 contains five additional subsections to govern the ratemaking process.

- Subsection (b) lists nine "**Objectives**" that the system "shall be designed to achieve."
- Subsection (c) lists 14 "**Factors**" that "shall [be] take[n] into account."
- Subsection (d) lists three "**Requirements**" (one of which, (d)(3), relates to a 10-year review and is not discussed herein).
- Subsection (e) contains provisions relating only to "**Workshare Discounts**."
- Subsection (f) is a "**Transition Rule**" anticipating a final rate case to be conducted under the PRA.

Omitting subsection (d)(3) (relating to the 10-year review) and subsection (f), PAEA provides 26 specific elements of guidance that must be considered, one of which, subsection (c)(14), refers to "the [other] policies of this title as well as such other factors as the Commission determines appropriate." (One of the most important other "policies of this title" is 39 U.S.C. § 403(c), which, *inter alia*, prohibits "undue or unreasonable discrimination among users of the mails.")

These statutory guidance elements can be arranged into five groups, according to their nature and the way in which they influence the regulation of ratesetting.

**A. Non-rate Guidance**.

One group contains guidance that principally pertains to matters other than rates.

- Subsection (b)(3) states that the "modern system for regulating rates" "shall be designed to achieve" the "maint[enance of] high quality service standards."[2]

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[2] Subsection (b)(3) does not refer to either maintaining high service levels or high service levels relative to standard service levels. Certainly service levels and service levels relative to standard are important to mailers. However, this subsection does not refer to them, but only to the standards themselves and more specifically to their maintenance. A high service standard might be taken to refer to a small number of days to delivery, but a "high quality" service standard does not necessarily mean any such thing. For example, a nine-day

However, maintenance of any set of service standards, whether they be of high quality or not, would be exogenous to the "system for regulating rates," except that if the service standards were changed, which is different from maintaining an existing set of standards, an extraordinary step might be taken to adjust the level of the rate cap.

- Subsection (b)(7) refers to setting rates "[t]o enhance mail security and deter terrorism." It seems possible that this might be taken into consideration in some kind of classification change, but it does not appear to have a specific relation to rate issues.

**B. Classification Guidance.**

A second group seemingly pertains primarily to classification decisions, as in what products to offer or how they are to be defined, rather than to ratesetting for defined products.

- Subsection (c)(9) refers to "providing classifications with extremely high degrees of reliability and speed of delivery."

- Subsection (c)(10) refers to "special classifications," which would appear to include what are commonly called "niche classifications" designed to be used by a few mailers, as well as "Negotiated Service Agreements" tailored to the needs of one mailer.

**C. Timing Guidance.**

A third group concerns **when** the rates will increase and what **notice** mailers should receive.

- Subsection (b)(2) refers to "creat[ing] predictability and stability."

- Subsection (d)(1)(B) refers to "change[s] at regular intervals by predictable amounts."

- Subsection (d)(1)(C) refers to notice of rate increases of at least 45 days.

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standard that mailers can expect to be met 90 percent of the time might be viewed as of higher quality than a six-day standard that mailers can expect to be met only 60 percent of the time.

Here questions arise, not about ratesetting principles, but rather about scheduling. It might be easy to pick a date, such as June 1, or the first Sunday in June, and say that rates will be changed annually on that date. This would provide regular intervals. But mailers often claim to need 90 or more days of notice regarding rate increases, depending on the complexity of the changes, for important reasons, such as in order to develop and test software. On these matters, notice of 45 days may not suffice. *See* discussion *infra*, section 4.

**D. Price Cap Guidance.**

Another group relates directly to the price cap.

- Subsection (d)(1)(A) sets forth a requirement that a cap will be used and that it 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 the Postal Service files notice of its intention to increase rates." If "the most recent available" is interpreted in a way that allows the Postal Service time to prepare a rate package before the date of notice, which could easily require that the CPI be two or three months old at the time of notice, this could work.

- Subsection (d)(2)(A) requires that the cap be applied at the level of a **class** of mail.

- Subsection (d)(2)(C) allows a portion of an unused cap to be banked, with constraints.

- Primacy of the cap is not absolute. Subsection (d)(1)(E) allows rates to exceed the cap if such is "necessary to enable the Postal Service … to maintain and continue … postal services of the kind and quality adapted to the needs of the United States."

- Subsection (b)(5) points to the need "[t]o assure adequate revenues, including retained earnings, to maintain financial stability." Requiring "assur[ance]" is certainly stronger than, say, requiring a reasonable expectation that revenues will be adequate. Similarly, the reference to "retained earnings" suggests that more than breakeven is permitted, even anticipated. A link certainly exists between the overall financial well-being of the Postal Service and any rate cap, in that, if the Postal Service finds itself practically unable to break even under

the cap, it may find ways to increase its productivity and efficiency. If this does not happen, however, then an obvious tension exists between the cap and the need "[t]o assure adequate revenues."

- Subsection (c)(2) (also discussed *infra*, under ratesetting guidance) includes "the requirement that each class … bear the … costs attributable to [it] … plus that portion of all other costs … reasonably assignable to [it]." Here, also, tension can arise in any class that has little or no coverage and unit costs increasing faster than the cap.

**E. Ratesetting Guidance.**

A final group applies to ratesetting, assuming requirements of the cap are met.

- Subsection (b)(1) relates to "incentives to **reduce costs** and increase **efficiency**" (emphasis added), and subsection (c)(12) relates to "the need for the Postal Service to increase its **efficiency** and **reduce its costs**" (emphasis added). Factor (c)(12) refers to the efficiency **of the Postal Service**, not of the nation, but (b)(1) is not so restricted. Economists universally recognize that rates provide mailers with important incentives and signals that can significantly promote reductions in costs and improvements in efficiency. Any modern ratesetting system must take this into account. Consider, for example, the lowly mail sack, which was in existence before the country was even founded. Sacks now are understood to be a key cost driver. The cost of handling a sack is largely independent of the number of pieces in the sack. This means that the Postal Service, and therefore the nation, incurs twice as much cost to handle two sacks as to handle one. If the rates charged neglect the cost of sack handling, or charge too low a rate, mailers may use an unnecessarily large number of sacks, causing the Postal Service to incur considerable cost. But if a mailer pays a sack charge proportionate to the cost of handling the sack, the mailer may reduce the number of sacks, at little or no cost to himself, but at a big savings to the Postal Service. Costs like these must be given appropriate recognition in rates, regardless of whether they are viewed as worksharing elements. To do otherwise would render the ratesetting system less than modern, and certainly less than efficient.

- Subsection (b)(6) refers to the importance of reducing "administrative burden[s]" and to "transparency," and subsection (c)(6) refers to "simplicity."

- Subsection (b)(8) requires that the rates be "just and reasonable," and goes on to say **specifically** that "the objective under this paragraph shall **not** be construed to prohibit the Postal Service from making changes of **unequal magnitude** within, between, or among classes of mail." (Emphasis added.) The fact that

Congress was explicit on this point is instructive. One or more factors in PAEA might be read to require that all rate changes either be of equal magnitude, or be constrained within some band around the cap. However, within the cap, which establishes a limit on the **average** percentage increase, it is possible, and perhaps may be appropriate, for percentage increases in some rates to exceed the cap, with others lower than the cap. Understanding this, Congress specifically pointed out that (b)(8) should not be read as providing a cap on individual rates within each class of mail, where it placed the cap. In the event cost changes of unequal magnitude occur over time, this provision allows rates to track costs within subclasses and individual categories. It also enables flexibility when setting rates, and flexibility — as opposed to rigidity — should be a hallmark of any modern system of regulating rates.

- Subsection (b)(9) refers "[t]o allocat[ing] … institutional costs … appropriately between market-dominant and competitive products." What is "appropriate" will be determined separately by the Commission.

- Subsection (c)(1) requires attention to the "value of the mail service actually provided."

- Subsection (c)(2) requires attention to the costs associated with each "class of mail or type of mail service." (This factor is also discussed with respect to the price cap, *infra*.)

- Subsection (c)(3) requires attention to the effects of any rate increases (but not the effects of rate decreases).

- Subsection (c)(4) requires attention to "alternative means of sending and receiving letters and other mail matter."

- Subsection (c)(5) requires attention to the "degree of preparation of mail."

- Subsection (c)(7) refers to recognizing "the importance of pricing flexibility to encourage increased mail volume and operational efficiency."

- Subsection (c)(8) requires attention to the value of the "mail matter."

- Subsection (c)(11) refers to "the educational, cultural, scientific, and informational [ECSI] value to the recipient."

- Subsection (c)(13) requires attention to the "value … of promoting intelligent mail."

- Subsection (d)(1)(C) requires Commission "review" of rate "adjustments."
- Subsection (d)(1)(D) refers to the "establish[ment of] procedures whereby the Postal Service may adjust rates not in excess of the annual limitations under" the CPI cap and subsection (b)(4) says "[t]o allow the Postal Service pricing flexibility." Subsection (d)(1)(D) must be read in conjunction with the immediately preceding subsection (d)(1)(C) which requires Commission review.
- Subsection (d)(2)(B) concerns rounding, which has been standard practice in the past.

In one way or another, virtually all of the objectives and factors in this group providing Ratesetting Guidance have been considered under the PRA law and can be considered easily under any new regulatory arrangement by both the Postal Service and Commission. Questions will arise as to how much weight each should be given in a particular pricing situation, but they need to be considered, and would be considered, under any modern regulatory scheme.

An important message in these objectives and factors is that, although the rates should be just and reasonable, and although other factors point to predictability (discussed *supra*, under Timing Guidance), subsection (b)(8) points out clearly that **nothing** under the heading of just and reasonable shall be "construed to prohibit … [rate] changes of unequal magnitude." (Emphasis added.) This means that a rate cap is to be applied only at the level of each class of mail, and does not affect the magnitude of rate increases for any particular rate cell, or cells.

**F. Conclusion.**

Congress clearly wanted a large number of factors to be considered. In that regard, a variety of phrases appear in PAEA, such as "take into account," "ensure," "shall be designed to achieve," and "requirements." How these objectives, factors, and requirements are

balanced will be decided by the Commission initially in the rulemakings that will occur over the next 18 months, and thereafter each time the Postal Service proposes an increase in rates.

Except for the obvious tension which a cap[3] imposes on the Postal Service's need to at least break even, none of the guidance cited above conflicts with the notion of a **modern** system for regulating rates, and all of the guidance can be accommodated in a modern system. Within this guidance, and in order for the system to be modern, it must draw on the best that contemporary ratesetting theory has to offer. This requires, without moderation, considerable emphasis on costs, cost recognition, economic efficiency, and the signals and incentives contained in the rates. Any system that fails to do this could not be considered modern. The importance of a requirement to recognize costs appropriately, consistent with the current understanding of such matters (which also is the subject of some of the workshare language in subsection (e)) is the subject of further discussion in the next section, and cannot be overemphasized.

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[3] It is interesting that the cap was imposed by Congress even after hearings which revealed criticism of this concept. *See, e.g.*, House Committee on Government Reform and Oversight, Subcommittee on the Postal Service, Hearings on H.R. 22, Apr. 17, 1997 (witnesses: John Kwoka, Kenneth Rose, Joel Popkin, Gregory Sidak, Paul Kleindorfer, Michael Crew). However, this criticism may have resulted in the cap being imposed only at the highest level — the class level.

## III. A MODERN SYSTEM FOR REGULATING RATES AND CLASSES MUST BE FOUNDED ON GOOD COSTING

### a. Marginal Costs Should Continue to Provide the Foundation and Principal Guidance for Determining the Costs of Individual Products and Services.

Contrary to certain statements made at the recent Summit Meeting, "Postal Customer Needs in a Changing Regulatory Environment, "which was held on March 13, 2007, Congress did not sever the relationship between costs and rates when it enacted PAEA. Indeed, PAEA did not modify in any way the basic "Postal Policy" of the United States set out in 39 U.S.C. section 101(d):

> Postal **rates** shall be established to **apportion** the **costs** of all postal operations to all users of the mail on a **fair and equitable** basis. [39 U.S.C. § 101(d) (emphasis added).]

When this language originally was incorporated into the Postal Reorganization Act of 1970, both the Postal Service and the Commission began the critically important process of developing new postal costing systems. For reasons explained herein, development of a modern system for regulating rates requires that the process now must be built upon — and not discarded.

Congress' focus on cost-based rates grew out of the Kappel Commission's observation that the Postal Office Department's "fully-allocated" (or "fully-distributed") costing method (known as the **Cost Ascertainment System**) had arrived at costing results that were "not only arbitrary but uninformative." *Towards Postal Excellence, The Report of The President's Commission on Postal Organization*, June, 1968, p. 30 (GPO).

The Kappel Commission's costing conclusions were supported by Foster Associates, a contractor to the Kappel Commission that specialized in costing and rates for government and regulated industries, whose report had stated:

> Our survey of the economic theory of pricing for public services did not lead to a formulation which could be directly served by a **fully-distributed cost** analysis such as the POD's [Post Office Department's] **Cost Ascertainment System**. The principal cost constraints, we found, are **marginal costs** and the total annual budget. A fully-distributed cost analysis **does not help** in the establishment or application of either of these constraints. [*Id.*, ANNEX, Contractor's Reports, Vol. II, p. 5-4 (emphasis added).][4]

In 1970, one could have observed that existing costing systems at the time were anything but modern, even for that time.

Subsequently, the Postal Service and the Commission have given a great deal of attention to costing. In Docket No. R74-1, testifying for the Postal Service, **William Vickery**, who was later elected President of the American Economic Association and awarded a Nobel Prize for his work in the area of regulation, stated:

> In my view, the primary focus should be on the economic consequences of alternative price structures.... Total cost per unit of small price-induced change is the **marginal cost** that is relevant to the present inquiry. [Docket No. R74-1, Direct

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[4] Similarly, Ernst & Ernst, another contractor for the Kappel Commission, wrote:

> We conclude that the present Cost Ascertainment System is not an appropriate basis for rate making. ... the fully allocated cost principle ... preclude[s] the use of the data for **marginal cost** analysis or control of operations. [Cost Accounting for Classes of Postal Service, Report to Foster Associates, *Id.*, p. IV-9 (emphasis added).]

> Testimony of William Vickery, Sept. 25, 1997, Tr. 3-78, (emphasis added).]

With respect to the use of fully-distributed costs, he stated:

> Of all the alternative price setting rules to be considered by this Commission, fully distributed costs (known as FDC and fully allocated costs) is, in principle, the worst. The allocations are not designed to achieve any economic objectives and are based arbitrarily on number of pieces, pounds, piece-miles, pound-miles, or some combination of these, or according to the historical sequence in which various classes of service were introduced. None of these methods of cost distribution, however, has any special merit apart from the availability of precise data inputs. [*Id.*]

The direction taken on costing by the Postal Service and the Commission is supported by positions applied in other areas. For example, the Commission observed in Docket No. R77-1:

> On April 20, 1977, President Carter submitted his National Energy Act to Congress that among other things would affect local utility regulation. The bill would require local agencies to prescribe methods for determining costs that would be consistent with marginal cost pricing. The chief economist of the Federal Power Commission later testified in favor of **marginal cost pricing**: 'The economic principle of marginal cost pricing provides the benchmark for distinguishing between economically efficient and inefficient rate structures.' [Docket No. R77-1, *Op. & Rec. Dec.*, p. 81, footnotes omitted (emphasis added).]

In Docket No. R87-1, **William J. Baumol** (noted regulatory economist, Professor of Economics at Princeton University and New York University, past President of the American Economic Association, and, for some years, Chairman of the Council of Economic Advisors to the Governor of New Jersey, who had testified similarly in Docket No. R74-1) said:

> I will show that rates should be based on costs that vary with volume at the margin, and that the choice of prices that are

> designed to cover total costs adequately should be determined on the basis of **marginal cost** data which do not include any portion of fixed and/or common costs. [Docket No. R74-1, USPS-T-3, Aug. 6, 1987, p. 5 (emphasis added).] [5]

Similarly, in Docket No. MC95-1, **Richard L. Schmalensee** (then Gordon Y. Ballard Professor of Economics and Management at the Massachusetts Institute of Technology and Director of MIT's Center for Energy and Environmental Policy Research, now Dean of the Sloan School of Management at MIT) stated:

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[5] Professor Baumol also testified in Docket No. R84-1, stating:

> It is clear, then, that the numbers that emerge from an FDC calculation are entirely arbitrary and can always be changed to follow any pattern the calculator wants by appropriate choice of allocation criterion. The fact that FDC figures can be calculated to as many decimal places as desired and that its allocation rule can be made to appear reasonable only adds to the perils posed by these figures by making them appear to have economic content, when they are in fact an exercise designed to attribute to individual services those common costs no part of which, by definition, is attributable on any rational economic basis to any particular output alone.
>
> Leading economists have strongly opposed the use of FDC at least since the 1880's when the issue of regulation of rates first arose in the United States with the creation of the Interstate Commerce Commission. They have objected to its use because it leads to pricing decisions that conflict with the public interest. There are several grounds on which economists have taken this position. First, prices based on FDC provide havens for inefficiency, and hence waste the economy's resources and increase costs to consumers. Second, such prices have a totally arbitrary relationship to true incremental costs and thus do not lead consumers to satisfy their desires in a manner that minimizes the economic costs of doing so. Third, such prices have no relation to the prices that would emerge from the free market and are absolutely unadaptable to the varying demand conditions facing the different products of the regulated firm. Finally, though ostensibly designed to assure adequacy of revenues, FDC prices ignore demand and thus may actually impede or preclude such revenues, driving the enterprise into deficit operations. [Docket No. R84-1, USPS-T-5, Feb. 14, 1984, pp. 13-14.]

> More specifically, rates that, like competitive prices, are based on **marginal cost** tend to promote three types of efficiency [allocative efficiency, productive efficiency, and dynamic efficiency]. [Docket No. MC95-1, USPS-RT-1, Oct. 2, 1995, pp. 7-10 (emphasis added).]

In his important book on regulated industries, which remains highly regarded, **Alfred E. Kahn** (Robert Julius Thorne Professor of Political Economy, Emeritus, Cornell University and economic adviser to President Carter and former chairman of the Civil Aeronautics Board) agrees, saying:

> The central policy prescription of microeconomics is the equation of price and **marginal cost**. If economic theory is to have any relevance to public utility pricing, that is the point at which the inquiry must begin. [*The Economics of Regulation: Principles and Institutions*, Vol. 1, Wiley, New York, 1970, p. 65 (emphasis added).]

In the introduction to a chapter on Marginal Cost Pricing, **Michael Crew** and **Paul Kleindorfer** also agree:

> the traditional social-welfare function W leads to a **marginal-cost** pricing solution. This is certainly reassuring since **marginal-cost** pricing is one of the corner-stones of economic efficiency. [*Public Utility Economics*, St. Martin's, New York, 1979, p. 14 (emphasis added).]

In Docket No. R97-1, economist **John C. Panzar** testified:

> My testimony has dealt with but two issues. **First**, I explained the economic framework which allows estimates of the forward-looking, economic concepts of **marginal** and incremental **costs** to be calculated consistently using Postal Service accounting data. It turns out that the traditional Postal Service measures of unit volume variable costs can be expected to accurately measure economic marginal costs. Determining economic incremental costs using Postal Service measures of volume variable costs and subclass specific fixed costs is much more complicated. I

> explained the general outline of the approach required, leaving the detailed calculations to the testimony of Witness Takis.
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> **Second**, I explained the important, but distinct, roles which marginal cost and incremental costs should play in any rational rate-making process. These can be summed up quite succinctly:
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> - **Marginal costs are the basic cost data to be used in setting rates**.
> - average incremental costs should be used to evaluate rates for cross-subsidization, but should not form the basis for mark-ups.
>
> [Docket No. R97-1, USPS-T-11, July 10, 1997, p. 30 (emphasis added).]

Costing guidance provided by these recognized authorities in the area of regulated industries, all recognized in areas of costing, regulation, and social welfare, has been consistent, stable over time, relied on by the Commission, and moreover, is current as of this day. Nothing these experts have said is considered to be old fashioned and nothing has been superseded. If a system of rate regulation is to be modern, and if it is to draw on the best that economic theory has to offer to the benefit of the nation, it must specify clearly that costing efforts should be directed to the estimation of **marginal costs** for each product or service as the first step in rate design. Any other approach would be out of line with accepted principles.

In the late 1990's, the Subcommittee on the Postal Service of the House Committee on Government Reform requested an independent review of the quality of the data used in ratemaking, including not only the suitability of the costing principles followed, but also an assessment of the efficacy with which the associated cost estimates have been made. On April 16, 1999, a **Data Quality Study** undertaken by LYNX (a division of A.T. Kearney) under the authority of the U.S. General Accounting Office, the Commission, and the Postal Service, was released. This study utilized the work of prominent outside scholars, including:

- **Paul R. Kleindorfer** (Professor of Decision Sciences and Economics at the Wharton School of the University of Pennsylvania, who has studied postal economics for many years);

- **Michael A. Crew** (Professor of Economics and Director of the Center for Research in Regulated Industries, Rutgers University); and

- **Donald B. Rubin** (Professor in the Department of Statistics, Harvard University, where he served as Chairman for three consecutive terms).

A principal conclusion of the Data Quality Study was "that the Postal Service asks the appropriate economic questions, uses the best available data, and applies an economically sound approach grounded in activity based concepts to calculate its sub-class costs with reasonable statistical accuracy" (p. 5). This approach is used "to determine its sub-class unit volume variable costs (UVVCs) on which Postal rates are based" (p. 106). Also, it stated: "The Postal Service's Unit Volume Variable Costs have a strong logical foundation in economic theory. The Postal Service has made a concentrated effort to provide a logical link between their procedures for estimation and relevant economic concepts, notably, **marginal cost**" (p. 110, emphasis added). In addition, it stated: "The most important cost concept for rational rate making is **marginal cost,**" and "According to established economic theory, **marginal cost** is the starting point for mark-up procedures to recover total costs." Technical Report #1, pp. 4 and 6 (emphasis added).

The situation presented today, therefore, differs substantially from that presented in 1970, when the costing approach used by the Postal Service was in need of repair, and basic principles guiding an appropriate costing process were still being debated. Today, little disagreement exists on what the basic principles should be. Although questions exist regarding how well those principles have been implemented, and whether further improvements are

possible, they do not concern the type of costs to be developed as a necessary part of the ratemaking process.

The Commission has a long and distinguished history of fostering improved costing, and substantial progress has been made. The clock should not be turned back. The progress to date should be built on, and marginal costing principles should be followed. It is well understood that a theory must guide costing activities. Cost measurement without theory is meandering, wayward, and arbitrary, and leads to results that have no meaning and that cannot be interpreted. Marginal cost analysis should not be abandoned or compromised.

**b. Cost-based Rates Should Continue to Be a Hallmark of Postal Ratemaking.**

Cost-based rates have been defined as rates that are based on a recognition of appropriate costs and then on reasoned and informed decisions concerning how far rates should be above those costs, *i.e.,* on what the markup should be. Defined in this way, cost-based rates are fully supported by the current literature.

The notion of cost-based rates applies at a disaggregate level. More specifically, it applies at the level of rate categories and rate elements, and their interrelationships. It does not apply at the level of overall breakeven. It should be clear, then, that cost-based rates do not conflict with application of a price cap. A price cap allows rates to rise to the level of the cap instead of to the level of breakeven. It does not carry implications for relationships among rate categories and rate elements.

If Congress had been opposed to cost-based rates, it would have made the cap applicable at a highly disaggregate level. In fact, it did almost the opposite — it made the cap applicable at the level of a **class** of mail, which is almost as far as one can get from the level of

rate categories and rate elements. Also, it expressly pointed out in section 3622(b)(8) that "the objective under this paragraph shall not be construed to prohibit the Postal Service from making changes of unequal magnitude within, between, or among classes of mail."

In numerous recent *Opinion and Recommended Decisions*, the Commission has expressed itself in favor of cost-based rates. In Docket No. R2005-1, for example, it said: "Cost-based rates have been the touchstone of postal ratemaking for 35 years, and the Commission has significant concerns about deviating from that policy, even for a limited time," and "proper cost-based rates foster efficiency and promote a healthy postal system" (Docket No. R2005-1, *Op. & Rec. Dec.*, pp. i and ii, respectively).

In the new, modern regulatory system for regulating and developing postal rates, the Commission should continue to place considerable emphasis on the importance of cost-based rates. Emphasis on cost-based rates does not hamstring the Postal Service; it merely requires that relevant costs be known and that decisions be made on transparent bases concerning what to do with them.

**c. Costing Studies Have Been an Essential Ingredient Supporting Improvements in Rates and Should Be Continued.**

One only has to glance at the current rate schedules to see that postal rates are considerably more complex now than at the time of postal reorganization in 1970. *See, e.g.,* Docket No. R2006-1, USPS-LR-L-73, Rate History. This growth in complexity should not be surprising. The amount of mail, the number and variety of mailers, and the degree of competition in the preparation of mail, as well as delivery of items not subject to the Private Express Statutes, are substantial by any measure. The number of mailer situations is large and

mailer capabilities are well developed. The Postal Service cannot keep rates simple and be both effective and competitive. In a dynamic marketplace, further increases in rate complexity should be expected.

Over the years, a considerable number of special studies, many focused on costs, have been done. In Docket No. R2006-1, for example, in addition to hundreds of pieces of direct testimony, 23 parties filed library references, including 198 by the Postal Service. Many of these library references contained special cost studies and related supporting materials, some containing major data bases and dozens of computer files of some size. And, as the Commission is well aware, improvements are needed and many important questions remain unanswered. *See, e.g.,* Docket No. R2006-1, *Op. & Rec. Dec.*, App. J, discussing the costing of mail processing.

After costing studies have been presented to Commission, they have been subject to the adversarial process. Questions have been posed; weaknesses have been uncovered; alternative analyses have been presented; suggestions for improvement have been made by experts in the postal community; and the Commission has resolved the conflicts. This kind of attention, at considerable cost to interested parties, has been responsible for some of the progress made to date. In addition, mailers have been able to provide valuable information that supports efficient decisions, some of which is unavailable or difficult to obtain by the Postal Service itself. Mailers' access to both the data and all material necessary to replicate the study has resulted in uncovering major weaknesses and has been critical to transparency, which is still important, if not more so. Such critical review should not cease. Mailers still want to be treated fairly, and mailers are interested in receiving reasons for the treatment they receive.

To support the increased complexity, and to make the rate setting process more transparent, consistent with section 3622(b)(6), as well as other sections in PAEA, costing studies[6] should continue to be conducted, and improved. Critical review by mailers and the Commission should continue to be an important part of the system for regulating rates. In fact, under PAEA, the Commission would appear to have an even larger role than in the past, providing direction with respect to which studies should be undertaken as well as how they should be performed.

39 U.S.C. sections 3622(b)(4) speaks of Postal Service having pricing flexibility. (Interestingly, section 3622(c)(7) discusses pricing flexibility generally, without reference to the Postal Service.) Whatever "pricing flexibility" might mean, it does not mean that the Postal Service should be free to make rate decisions over its monopoly products without Commission review. Furthermore, interested parties need to have an opportunity to examine and evaluate that analysis, and have some opportunity to be heard. As noted above, following analysis, review, and justification on a public record, hundreds of changes in rates have been made, not only to costs, but also to the methodology for estimating the marginal and attributable cost of individual postal products. None of this progress needs to cease under PAEA.

The nature of costing studies that have been submitted in support of rates, including worksharing discounts, has spanned a wide gamut. At one end of the spectrum, some costing

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[6] The term "costing studies" herein is used broadly to include both on-going costing systems as well as special studies done generally for presentation during rate cases, and also includes studies which could be viewed as non-cost in character, such as studies seeking information on elasticities, markets, and competition.

studies have been fairly straightforward, concentrating on collecting more recent data and simply updating prior studies. At the other end of the spectrum, some costing studies have been highly complex, technical, and controversial, especially those including proposals to effect major changes in costing methodology.

A key question is how much examination and evaluation should be done **before** rates change and how much should be done **after** rates change. Post-implementation review (annually or by the complaint process) comes too late to prevent damage to mailers. Critical review by the Commission will continue to be important, at least so long as the Postal Service is a government monopoly with substantial protection from competition, and with the apparent power to increase its rates up to, at least, a weighted-average cap. The best approach would appear to be to require that submissions accompanying a request for rate adjustments be based on existing classifications and cost methodology, and to establish a separate process for reviewing costing studies. One possibility would be to allow the Postal Service at any time to propose an improvement to a Commission-approved analysis or method. An opportunity for comment and testing on the record would be provided. Thereafter, the Commission would decide whether any change in the methodology is warranted. A similar approach could be taken for any analyses performed pursuant to a request of the Commission.

## IV. PAEA VESTS CRITICAL REVIEW AUTHORITY IN THE COMMISSION OVER THE RATESETTING PROCESS FOR MARKET-DOMINANT PRODUCTS.

Requirements concerning the timing for implementation of rate adjustments for market-dominant products are set out in one section of PAEA, and this one section of the statute appears central to explaining the respective roles of the Postal Service and the Commission concerning any such adjustment. The statute provides as follows:

> (d) REQUIREMENTS —
>
> (1) In General — The system for regulating rates and classes for market-dominant products shall —
>
> (A) include an annual limitation …
>
> (B) establish a schedule whereby rates, when necessary and appropriate, would change at regular intervals by predictable amounts;
>
> (C) **not later than 45 days before** the implementation of any adjustment in rates [subject to an annual limitation]
>
> (i) require the **Postal Service** to provide public notice of the adjustment;
>
> (ii) provide an opportunity for **review** by the **Postal Regulatory Commission**;[7] [39 U.S.C. § 3622(d)(1) (emphasis added).]

The above-quoted section of the statute appears to impose three primary requirements with respect to rate adjustments under the cap:

a. the "45-day" time frame constitutes a **minimum** period, not a maximum,

(i) beginning with the date of "public notice" of "rate adjustments," and

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[7] This subsection concludes with two provisions relating only to the cap. The issue of the cap provided for in subsections (A) and (C) (iii) and (iv) is not addressed here. The discussion herein assumes that the rate changes proposed by the Postal Service do not violate the statutory cap.

(ii) ending with the date that rates adjustments are effective ("implementation");

b. the **Commission** must have "an opportunity for review" of the proposed rate adjustments before they are implemented; and

c. the only expressly stated role of the **Postal Service** is to provide "public notice" of rate adjustments.

**a. Statutory Minimum Period.**

The establishment of a **minimum** period represents a change from the PRA, where former 39 U.S.C. section 3624, repealed by PAEA, mandated the **maximum** period between (i) the date of the filing of a proposal for rate changes by the Postal Service and (ii) the date of the Commission's issuance of its opinion and recommended decision.[8] The PRA had been silent with respect to the **minimum** number of days between notice of a rate increase (in the *Federal Register*) and the date of that increase (discussed in subsection c, *infra*). On the other hand, PAEA is silent with respect to duration of the Commission's review, which would be part of the maximum period before rates could be implemented by the Postal Service, leaving that matter to the Commission.

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[8] "[I]n any case in which the Postal Service makes a request under section 3622 of this title for a **recommended decision** by the Commission on changes in a rate or rates of postage or in a fee or fees for postal services the Commission shall transmit its **recommended decision** to the Governors … **no later than 10 months after** receiving such request from the Postal Service." 39 U.S.C. § 3624(c)(2), repealed by PAEA (emphasis added).

**b. Commission Review.**

**i. Nature of Commission Review.**

In this rulemaking, the Commission begins the process of determining the nature and duration of its mandated "review." At the outset, it should be noted that the provision governing ratesetting for market-dominant products in 39 U.S.C. section 3622 is completely unlike the provision governing ratesetting for competitive products, for which authority is vested in the Board of Governors:

> § 3632. Action of the Governors
> (a) Authority To Establish Rates and Classes.— **The Governors**, with the concurrence of a majority of all of the Governors then holding office, **shall establish rates and classes for products in the competitive category** of mail in accordance with the requirements of this subchapter and regulations promulgated under section 3633. [Emphasis added.]

Apparently, some view PAEA as vesting virtually unlimited pricing authority over **market-dominant** mail in the Postal Service, but a comparison of the language used by Congress in granting broad authority to the Governors over **competitiv**e services, and that used by Congress in mandating a substantive Commission review of rates proposed for market-dominant products, demonstrates that Congress did no such thing.

Based on the list of objectives, factors, and requirements that the Commission must implement, it appears that PAEA requires the Commission to undertake a meaningful, substantive, mult-faceted — not *pro forma* — review prior to implementation of any rate increase. In this context, the notion of "review" presupposes two further elements of the process.

From the statutory requirement of Commission review in section 3622, we can make three observations. First, the **Postal Service must propose** rates for review. The Commission cannot propose rate changes. Moreover, the Postal Service has not been given the unilateral authority to set rates — but only to make a proposal to the Commission. Certainly, as a provider with a statutory monopoly over letter mail, and additional monopoly power provided by the "mailbox rule," which Congress has now recognized as conferring "market-dominant" status on certain products, the Postal Service cannot be considered to have been granted the right to set its own rates unilaterally. Indeed, such a reading of the statute would be at odds with the plain language of PAEA. If the Postal Service must make a proposal to be reviewed, the Commission's rulemaking will need to determine what supporting information must accompany that proposal in order for its review to conform with the various standards set forth in PAEA.

Second, putting aside the issue of violations of the cap, which is dealt with separately in the PAEA, it appears that the Commission has final authority to decide on rates to be implemented for market-dominant products. Any reference to a "recommended decision" is now gone, indicating that the new "Postal Regulatory Commission" is now stronger than the "Postal Rate Commission" of the past, and certainly not weaker. Nothing in the statute indicates that the Commission's review is merely advisory. Once the Commission decides any matters in dispute, the Postal Service would notify the public as to when the new rates go into effect. 39 U.S.C. § 3622(d)(1)(C)(i).

Third, Congress demonstrated that it understood how to direct the Commission to send rate matters back to the Postal Service when it provided for notice of noncompliance to be

given to the Postal Service in the event of a violation of the cap. Specifically, Congress provided that Commission regulations would:

> (iii) provide for the Postal Regulatory Commission to notify the Postal Service of any noncompliance of the adjustment with the limitation under subparagraph (A); and
> (iv) require the Postal Service to respond to the notice provided under clause (iii) and describe the actions to be taken to comply with the limitation under subparagraph (A). [39 U.S.C. § 3622(d)(1)(C)(iii) and (iv).]

There is no such language providing that the Commission return a rate proposal back to the Postal Service in the event that its review should find a violation of the other objectives, factors, and requirements. If a Commission review results in disagreement with Postal Service rates, and since the Commission has not been told to send the matter back to the Postal Service, it appears that the Commission must make the decision on rates.

The Postal Service's authority to adjust rates under subsection (d)(1)(D) must be viewed in the context of the Commission's review under subsection (d)(1)(C). Final ratemaking authority must be vested somewhere, and these two subsections must be reconciled. However, if the Postal Service had final ratemaking authority, it would render null and void the provisions requiring Commission review. This would violate the basic rule of statutory construction that statutes must be interpreted so as to give effect to every word. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1970) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used"); Crandon v. U.S., 494 U.S. 152, 171 (1990) (Scalia, J., concurring) ("It is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect. An interpretation that needlessly renders some words superfluous is suspect").

**ii. Requirements for Postal Service Rate Proposal.**

In order for the Commission to fulfill its role in conducting its required independent review of the Postal Service's proposed adjustment in rates for market-dominant products, it is expected that the Commission would need to have presented to it a narrative discussion of the objectives, factors, and requirements set forth in PAEA as applied to the proposed adjustment in rates, as well as **some** of the same types of documents and data that traditionally have been required [9] in a rate case filing, including at a minimum:

- **Base year costs and Cost and Revenue Analysis ("CRA"), using Commission-approved methodology** (to ensure all products cover their attributable (and reasonably assignable) costs (39 U.S.C. section 3622(c)(2);
- **Roll-forward analyses of costs** to the period when rates are expected to be in effect, including updating of costs to reflect deployment of new equipment, new facilities, changes in technology and network, etc.;
- **Analyses of incremental costs** (to prevent cross-subsidy);
- **Billing determinant data** (to ascertain whether proposed rates will conform with the rate cap on a volume-weighted basis); and
- **Volume forecasts** (to assure adequacy of revenues).

However, PAEA appears to anticipate that many issues will be reviewed annually, after the fiscal year ends. Therefore, it may be that certain issues could be relegated to the annual

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[9] The Commission would need to provide for the eventuality of the Postal Service not providing all of the necessary documents and/or data in its initial filing. The PRA contained a provision related to this possible occurrence which was repealed by PAEA: "In any case in which the Commission determines that the Postal Service has unreasonably delayed consideration of a request made by the Postal Service under section 3622 by failing to respond within a reasonable time to any lawful order of the Commission, the Commission **may extend the 10 month period** … by one day for each day of such delay." 39 U.S.C. § 3624(c)(2), repealed by PAEA (emphasis added). How the Commission would deal with such a situation is the proper subject of a future rulemaking.

review process, or to special dockets, with only those issues pertinent to a rate increase reviewed in conjunction with the Postal Service's proposal for rate adjustments.

**iii. Duration of Review.**

As to the duration of Commission review, should the Postal Service elect to present a rate increase proposal in relatively simple rate adjustments that are unincumbered by any complications such as changes in mail classification or costing methods, review of the proposed rate increase could be swift indeed. All issues pertaining to costing methods and mail classification, which have been contentious, technical, and time-consuming, could be resolved as part of the annual review process, or in special dockets.

If the Postal Service's proposal were limited to a proposed increase in rates and revenue only — that is, if changes in costing methods and mail classification were excluded — it could be argued that in the rate review process the Commission would need to consider primarily:

(i) objective 5 (assure revenues are adequate);

(ii) objective 9 (assure appropriate allocation of institutional costs as between market dominant and competitive products);

(iii) factors 1-14 (which the Commission "**shall** take into account" (emphasis added) when reviewing rates for market dominant products); and

(iv) workshare discounts (39 U.S.C. § 3622(e)(1)).

Therefore, the time period required for Commission review of a specific rate adjustment would appear to depend on: (i) the number and classes of the market-dominant products affected by the adjustment; (ii) the number and types of documents provided by the Postal Service for review in connection with its proposal; and (iii) the number of issues to be

resolved during the rate review process, versus the number of issues reviewed annually or in separate ad hoc dockets. In addition, consideration needs to be given to the fact that "the Commission **shall** take into account" (emphasis added) 14 factors, some of which are subjective. For the Commission's review to be meaningful, as required by PAEA, taking all of these factors into account should mean more than simply ascertaining that (i) proposed rates do not exceed the cap and (ii) workshare discounts do not exceed the 100 percent passthrough stipulation in PAEA.

In other words, a certain tension arises from, on the one hand, allowing the Postal Service a measure of pricing flexibility and, on the other hand, requiring the Commission's review using independent judgement when taking all of these factors into account. Certainly, post-implementation review is not a solution to ratesetting. If there were not the "opportunity for review" by the Commission **prior to implementing** new rates, the Commission would be faced with a problem if a **post-implementation** review by the Commission were to determine that the proposed rates (despite being within the cap) did not conform appropriately or adequately to some of these factors. Would the Commission, for example, then impose changes (*e.g.*, reductions) in the rates which it deems necessary to conform to all 14 factors? If the Commission lowered some rates and did not increase others by an offsetting amount, then — although a formal revenue requirement no longer exists — could the Postal Service not consider the revenues to be adequate? However, should the Commission decide to impose an increase on some other rates, would affected mailers then require notice of the changes, and does that start the process over? Or, would the Commission return the proposed rates to the Postal Service (with its objections articulated) and ask the Postal Service to resubmit? All of

these problems could be avoided by meaningful pre-implementation review and a proper understanding of the important role of the Commission.

It is respectfully suggested that the Commission adopt a time frame of four months from (a) the date that the Postal Service proposes an adjustment in rates and files the necessary supporting documents with the Commission for review, to (b) the date the Commission must complete its review prior to implementation of new rates. This period would constitute 40 percent of the 10-month period existing under PRA between filing a request with the Commission and the issuance of an opinion and recommended decision, and increase Postal Service pricing flexibility. This time should be sufficient for the Commission and mailers to examine the Postal Service's proposal and comment thereon. It would give parties and the Commission time to request and obtain necessary supplemental information from the Postal Service, as well as time for the Commission to (i) review the documents filed by the Postal Service regarding the adjustment, (ii) request and receive any needed additional documents and/or data from the Postal Service, and (iii) determine whether the adjustment complied with the objectives, factors, and requirements of the new law. This time frame also would allow the Commission time to obtain mailer input, input from the Office of the Consumer Advocate ("OCA") (39 U.S.C. § 305), and to fairly and reasonably consider the Postal Service proposal and that input. After some experience is gained under the new law, in the event that the Commission were to find that it could conduct an adequate review in less time and rate adjustments could be put into effect sooner, on the basis of that accumulated experience the time frame could be revised.

**c. Postal Service Public Notice**

The Postal Service's only expressly stated role in subsection (d)(1)(C) with respect to the ratemaking process for market-dominant products is providing public notice of the proposed rate increase. The public notice requirement appears to be a matter wholly vested in the Board of Governors, and therefore it may appear inappropriate for the Commission to regulate with respect to what type of public notice would be required.[10]

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[10] Of course, the minimum period of public notice of rate changes has been the subject of much discussion in recent years. In Docket No. R2005-1, the Postal Service stated:

> In the complex environments in which many industries that rely heavily on mail operate today, **two months** is commonly regarded as the **bare minimum** time needed to prepare for global replacement of postal rate schedules. Rate schedules and the accompanying mail preparation requirements increasingly provide customers more options and more details to consider. Accordingly, more time is needed to reprogram computers and make other preparations for the changes. Even considering the **absence of any proposed classification or rate structure changes**, orderly transition to increased rates and fees is likely to take **six to eight weeks**. [Docket No. R2005-1, "United States Postal Service Request for Expedition and Early Consideration of Procedures Facilitating Settlement Efforts," Apr. 8, 2005, p. 3, n. 1 (emphasis added).]

A paper released in August 2006, by the Mailers Council discussed the benefits of an even longer period of at least **90 days** after final approval of new rates by the Board of Governors even to make "simple changes to rate cells," and a **longer** period if structural changes are involved. "Why a Standardized Postage Rate Implementation Period Would Benefit the United States Postal Service and Its Customers," Mailers Council, Aug. 24, 2006, p. 7, http://mailers.org/News_Releases/documents/MailersCouncilPaperonStandard.RateImpPeriod.pdf. After Docket No. R2006-1, the Governors announced on March 19, 2007, that the date for implementation of certain postal rate increases would be May 14, 2007, providing 56 days (8 weeks) notice, except for Periodicals rates. All of these time frames are longer than the minimum of 45 days provided for in section 3622(d)(1)(C).

## CONCLUSION

The number of issues raised by PAEA that will need to be thought through appears to be nearly limitless. It is urged that Commission Order No. 2 entered in this docket be only the first of a series of rulemakings which would allow parties the further opportunity to comment on specific proposals as to how this complex and challenging new law is to be implemented.

Respectfully submitted,

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