

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

POSTAL RATE AND FEE CHANGES,)
2006) Docket No. R2006-1

**RESPONSE OF
FINANCIAL SERVICES ROUNDTABLE,
MAJOR MAILERS ASSOCIATION,
NATIONAL ASSOCIATION OF PRESORT MAILERS
AND NATIONAL POSTAL POLICY COUNCIL
TO MOTION OF COALITION OF CATALOG MAILERS
TO REOPEN THE RECORD
(April 19, 2006)**

The undersigned parties respectfully respond to the April 12 motion of the Coalition of Catalog Mailers (“CCM”) to reopen the record concerning rates for flat-shaped Standard Mail.

The Financial Services Roundtable (“Roundtable”) is a trade association representing 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. These firms directly account for \$65.8 trillion in managed assets, \$1 trillion in annual revenue, and 2.4 million jobs. Many members of the Roundtable rely heavily on letter-shaped Standard Mail to grow their businesses. These financial institutions collectively spend several billion dollars annually on Standard Mail postage to market their products and services. Most of this Standard Mail is letter-shaped. The Roundtable is an intervenor and full participant in this case.

The Major Mailers Association (“MMA”) is an association of financial institutions, retailers, public utilities and common carriers, and other large users of presorted and prebarcoded mail. Many of MMA’s members rely heavily on letter-shaped Standard Mail to market their products and services. MMA is an intervenor and full participant in this case.

The National Association of Presort Mailers (“NAPM”) is a national trade association of presort mailers, the majority of which are presort service bureaus. NAPM members produce or process substantial volumes of letter-shaped Standard Mail for their mailer customers, which include large and small businesses, nonprofit organizations and government bodies. NAPM is an intervenor and full participant in this case.

The National Postal Policy Council (“NPPC”) is an organization of large business users of First-Class Mail, many of which are also substantial users or processors of letter-shaped Standard Mail. NPPC’s members come from the banking, financial services, telecommunications, insurance, utilities, and mail service industries. NPPC is an intervenor and full participant in this case.

We are sympathetic to the concerns of CCM’s members about the size of the rate increases for flat shaped mail, and we believe that a reasonable solution for this issue would be for the Postal Service to order a brief additional delay in the implementation of the Standard Mail rate changes that are currently scheduled to take effect on May 14. We continue to urge the Postal Service to show some additional flexibility in this regard. For the reasons explained here, however, CCM’s motion to reopen the record must be denied. Moreover, if the Commission finds that CCM has

justified reopening the record for any further evidence, we request a full opportunity for discovery, cross-examination and rebuttal of that testimony, as well as post-hearing briefing, all of which are required elements of due process. See *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 428-430 (D.C. Cir. 1993) (“MOAA”); accord, Order No. 1482 at 4-5.

INTRODUCTION AND SUMMARY

CCM has not offered an adequate justification for failing to submit its proffered evidence before the close of the record. *First*, CCM’s members were on notice even before the beginning of this case that it was likely to result in large rate increases for flat-shaped Standard Mail.

Second, CCM’s members, along with the entire world, received specific notice on May 5, 2006, through the issuance of Order No. 1464, that (1) the Postal Service was proposing changes in Standard Mail rates generally and “shape-related changes” specifically, (2) the Commission could ultimately recommend rates that “differ from the proposed rates,” and (3) the deadline for intervening in the case was May 31, 2006.¹ That the order did not attempt to predict in May 2006 what rates the Commission would ultimately recommend in late February 2007 did not relieve CCM from intervening by May 31 if it wished to preserve its rights. The degree of specificity that CCM demands is impossible: regulatory commissions cannot predict so far in advance how they will rule. Hence, orderly procedure requires that interventions occur before, not after, the record is built and the case decided.

¹ Order No. 1464 (issued May 5, 2006), published at 71 Fed. Reg. 27436 (May 11, 2006).

Third, two and one-half months elapsed between September 6, 2006, when Valpak filed the testimony of its witness Robert Mitchell proposing to modify the Postal Service's rate design to incorporate virtually full passthrough of shape-related cost differences, and November 20, 2006, the deadline for filing rebuttal testimony. If CCM or its members had sought leave to intervene out of time and file rebuttal testimony by the latter date, the testimony that CCM now proffers could have been entered into the record without delaying the final resolution of the case.

CCM has also failed to demonstrate that its proffered testimony is material and probative enough to warrant reopening. The proffer, even if construed in its most favorable light, is insufficient to support the rate reductions sought by CCM. The Postal Service certainly could implement on its own initiative a brief additional delay in the May 14 effective date of the Standard Mail rate changes; and we urge the Postal Service to do so. The Commission has no authority to order such a delay, however: the Board of Governors have sole jurisdiction over the timing of rate changes.

Nor is CCM's proffer sufficient to support new recommended rates more favorable to flat-shaped mail. Unless the Postal Service shows more flexibility regarding its aggregate After Rates revenue than shown so far, relief for flats unfortunately will require offsetting rate increases for letters. CCM has not attempted to make the *comparative* showing required to justify such offsetting rate changes: the proffered evidence focuses solely on flat-shaped mail and its mailers alone.

Finally, if the Commission reopens the record for any evidence from CCM, due process entitles letter mailers not only to engage in full discovery and cross-examination, but also to submit rebuttal testimony and post-hearing briefs. CCM's

prediction that the taking of additional evidence can be completed “under an expedited schedule” by “mid-June” (Motion to Reopen at 9) is overly optimistic. Reopening the record is likely to defer a further Commission recommended decision to late summer or early fall. Indeed, even if the Commission were to deny reopening, the issuance of a further recommended decision in time for new rates to take effect by May 14 is no longer a practical possibility.

ARGUMENT

I. CCM HAS FAILED TO OFFER AN ADEQUATE JUSTIFICATION FOR NOT SUBMITTING ITS EVIDENCE BEFORE THE CLOSE OF THE RECORD.

In Order No. 8, the Commission ruled that any participant seeking to reopen the record on reconsideration of this case “must provide thorough justification for its request, including specific identification of the purported deficiencies in the current record for purposes of reconsideration and an explanation why that participant did not proffer the purportedly necessary materials during the hearing.” Order No. 8 (issued Mar. 29, 2007) at 2. This ruling is consistent with established precedent, which allows reopening of the record only in extraordinary and unusual circumstances:

Typically, the Commission will reopen a record in a fully concluded and litigated docket only for the purpose of administrative corrections, or to make non-substantive changes. In extraordinary circumstances, the Commission could reopen a record if there is an acceptable demonstration of why material could not have been initially presented during the course of the proceeding, and why it should be considered late in the proceeding. The Commission might also reopen the record if the material was directly on point and there would be an injustice if the record were not reopened.

Order No. 1443, Docket No. MC2004-3 (Aug. 23, 2005) at 8.

Late intervention in a proceeding, particularly after the close of the evidentiary record, is also an extraordinary remedy. As a general rule, intervention, “whether of right or permissive, must be timely and if it is not timely it must be denied.” *Consolidated Edison Co. of New York v. Breznay*, 873 F.2d 301, 307 (Em. App. 1989) (citing *NAACP v. New York*, 413 U.S. 345, 365-66 (1973)). Rule 20(c) of the Commission’s Rules provides that notices of intervention “shall be filed *no later than the date fixed for such filing*” by the Commission in the notice instituting the case, “unless in extraordinary circumstances for good cause shown.” 39 C.F.R. § 3001.20(c) (emphasis added). Even when such intervention is allowed, the Commission normally requires the “delinquent” intervenor to abide by the existing procedural schedule, and disallows the filing of “additional rebuttal.” Order No. 359, Docket No. R80-1 (Nov. 14, 1980) at 2.

CCM contends that the requisite extraordinary circumstances are present here because the Commission failed to provide “meaningful notice of the *magnitude* of the recommended rate increases.” Motion to Reopen at 4 (emphasis added). Hence, CCM states, “most catalog companies were unaware of the possibility that their rates would be increased significantly above the Postal Service’s proposed levels.” *Id.* at 9. Until the Commission disclosed its actual rate recommendations, CCM’s members lacked the sense of “clear and present danger” needed to “motivate mailers to underwrite the costs of lawyers and expert witnesses.” *Id.* “Neither CCM, nor any other cataloger, can be expected to have introduced testimony on difficulties in transitioning to rate levels that were unannounced and unanticipated.” Motion to Reopen at 9. With all respect, none of these justifications is well founded.

A. CCM's Members Had Notice Before This Case That Flat-Shaped Mail Was Overdue For Large Rate Increases.

Continued subsidies of catalog mail by letter mail cannot be upheld on the theory that the rate adjustments recommended by the Commission are too sudden or too “steep.” *Cf.* Decision of the Governors at 9. To the contrary, the Commission’s action is overdue. Mailers have been on notice for years that postal rates need realignment to reflect the cost differential between letters and flats.² Yet today, the existing rate structure still recognizes far less than 100 percent of recognized shape-related cost differences. If the movement toward the recognition of shape-related costs had proceeded with reasonable dispatch, full cost recognition would have occurred years ago.

The Postal Service announced its intention to begin such a realignment in the early 1990s, as the flats mailers acknowledge.³ The Postal Service began deaveraging third-class mail for shape in Docket No. R90-1, and gradually deepened letter-flat rate differentials in subsequent cases. Progress was slow, however, and a substantial degree of shape-related averaging remained in the rate structure fifteen years later. R90-1 PRC Op. & Rec. Decis. (Jan. 4, 1991) at ¶¶ 5930-5944; R94-1 PRC Op. & Rec. Decis. ¶ 5235; R2000-1 PRC Op. & Rec. Decis. ¶ 5407 & n. 92; R2001-1 PRC Op. & Rec. Decis. ¶ 3133.

² See Miller and Sherman, *supra*, at 67 (emphasis added) (noting as a “problem” the failure of 1979-vintage postal costing methods to analyze costs in terms of “principal components” such as “speed of delivery, distance, size, weight, handling, and so on.”).

³ See “DMA Calls on Members to Protest Exorbitant, Unexpected Postage Rate Recommendations; Fax Postal Governors By Mar. 8,” available on <http://www.the-dma.org/cgi/dispanouncements?article=688> (downloaded March 5, 2007).

In Docket No. R2005-1, the Commission, while recommending the across-the-board rate increase proposed by the Postal Service in that docket, put mailers on notice that the deviations from cost-based pricing in the existing rate structure were likely targets for correction in the next omnibus rate case, and that above-average rate increases were likely to result:

After careful consideration, the Commission agrees that under these unique circumstances, small equal increases now, to be followed by a proceeding to “true-up” rates after a thorough examination of postal costs, is consistent with sound public policy. The Commission’s preference is to develop rates that accurately reward mailers’ worksharing. It is concerned that *the delay in recognizing the impact of recent innovations and improvements in postal operations, coupled with the passage of time, will probably result in unusually disproportionate increases and decreases in different rates in the next case. The Postal Service and mailers seem prepared for that possibility as they too recognize that proper cost-based rates foster efficiency and promote a healthy postal system.*

R2005-1 PRC Op. & Rec. Decis. (Nov. 1, 2005) at ii (emphasis added). The Commission also warned mailers that, while they were free to offer “rate shock arguments,” the Commission would seek in the next case to develop “economically efficient cost-based rates”:

Rate shock arguments are often raised in rate proceedings. They are likely to be raised in the next proceeding as well, in which case the Commission will assess their merits based on the record developed in that proceeding. *Parties should be aware that the Commission will seek to obtain economically efficient cost-based rates and appropriate allocation of institutional cost burdens.*

Id., ¶ 5032 (emphasis added). Rate shock in the next rate case, the Commission added, is “a risk that settling parties run, one presumably considered and deemed acceptable,” by agreeing to an across-the-board rate increase in R2005-1. *Id.* ¶ 5030.

B. CCM's Members Were On Notice Before May 31, 2006, The Deadline For Intervention In This Docket, That Standard Mail Rates Were At Issue In This Case.

As noted above, CCM's members, along with the entire world, received specific notice on May 5, 2006, through the issuance of Order No. 1464, that (1) the Postal Service was proposing changes in Standard Mail rates generally and "shape-related changes" specifically, and (2) the deadline for intervening in the case was May 31, 2006. 71 Fed. Reg. at 27436, 27438, 27439. The latter point appeared repeatedly in the Order:

- "May 31, 2006: deadline for interventions" *Id.* at 27436, col. 2.
- "Those electing full or limited status *shall file* notices of intervention conforming to the Commission rules *no later than May 31, 2006.*" *Id.* at 27439, col. 2 (emphasis added).
- "Notice of intervention shall be filed no later than May 31, 2006." *Id.* at 27439, col. 3, ¶ 10.

Order No. 1464 also urged interested parties to "carefully review the filing to determine its impact on aspects of postal rates, fees and classifications that may be of interest to them." *Id.* at 27436 (col. 3). The notice also warned that, in "the course of consideration, participants may propose alternatives to the Service's proposals," and the "Commission's review of the Request . . . may result in recommendations that differ from proposed rates, fees and classification changes." *Id.* at 27436 (col. 3).

Publication of Order No. 1464 on the Commission's website and again in the Federal Register constituted legally sufficient notice of the contents of the Order to all the world, including CCM and its members. "Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual

knowledge or hardship resulting from ignorance.” *Jones v. U.S.*, 121 F.3d 1327, 1329 (9th Cir. 1997) (quoting *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667-68 (9th Cir. 1989)).⁴

CCM's assertion that its members' failure to intervene in a timely fashion should be overlooked because they could not know the magnitude of the Standard Mail rate changes until the Commission actually issued its Recommended Decision (Motion to Reopen at 4 and 9) is without merit. The deadline for intervention falls near the beginning of the case. Rule 17(d)(4), 39 C.F.R. § 3001.17(d)(4). *No one* participating in an omnibus rate case can know, or be expected to know, the outcome of the case before the intervention period expires. Hence, orderly administrative process requires that interested persons act to protect their rights by intervening *before* knowing what other intervenors will propose, let alone what relief the final decision will order.

CCM's “clear and present danger” standard of intervention—i.e., that potential intervenors may sleep on their rights until the record has closed and the agency has issued its decision—would mean litigation without end. The “final” agency decision

⁴ See also *International Trading Co. v. U.S.*, 412 F.3d 1303, 1309-1310 (Fed. Cir. 2005) (publication in Federal Register of final results of administrative review in the application of an anti-dumping statute which removed a suspension over a specific shipment of imported goods held to be “sufficient to give notice” to Customs Service that the suspension had been removed, requiring the Customs Service to pay the importer the rate that applied on the date the suspension was removed); *LaBaron v. U.S.*, 989 F.2d 425, 428 (10th Cir. 1993) (recipients of services from a health service clinic were held to have sufficient notice that such services would be terminated because of publication of the termination in the Federal Register); *Ed Taylor Construction Co. v. OSHA*, 938 F.2d 1265, 1272 (11th Cir. 1991) (employers are charged with the knowledge OSHA safety requirements regardless of whether they are actually aware of them through the publication of such requirements in the Federal Register).

would become merely the starting gun for belated interventions and proffers of additional testimony by dissatisfied mailers in the guise of *ad hoc* coalitions like CCM.

C. CCM's Members Had Notice, Ten Weeks Before The November 20, 2006, Deadline For Filing Rebuttal Testimony, That Valpak Witness Mitchell Was Proposing To Increase The Passthrough Of Shape-Related Cost Differences To Nearly 100 Percent.

Even if the notice discussed above could somehow be deemed insufficient, any claim of unfair surprise to CCM's members collapsed on September 6, 2006, when Valpak filed the testimony of its witness Robert Mitchell proposing to modify the Postal Service's rate design to incorporate virtually full passthrough of shape-related cost differences. As Valpak notes in its April 13, 2007 Opposition To Late Intervention By CCM, Mr. Mitchell's testimony and subsequent interrogatory responses were sufficient to "put any mailer on notice that the Commission had before it large changes in Standard Regular flats rates." *Id.* at 6-7 (reproducing table of Mr. Mitchell's rate proposals). See *also* Kiefer Reb. (USPS-RT-11) at 20-22 (objecting to Mr. Mitchell's proposal on the ground, *inter alia*, that the resulting rate increases for flats would be too large).

Mr. Mitchell's testimony, like all testimony in this docket, was posted promptly on the Commission's public website. At that point, two and one-half months remained until November 20, 2006, the deadline for filing rebuttal testimony. If CCM or its members had sought leave to intervene out of time and file rebuttal testimony by the latter date, they would have had ample time to enter into the record the testimony that CCM now proffers, without delaying the final resolution of the case.

II. THE EVIDENCE PROFFERED BY CCM, EVEN IF CONSTRUED IN ITS MOST FAVORABLE LIGHT, IS INSUFFICIENT TO SUPPORT THE RATE REDUCTIONS SOUGHT BY CCM.

The testimony proffered by CCM is merely an elaboration of claims previously advanced, explicitly or implicitly, in the rebuttal testimony of USPS witness Kiefer: (1) full recognition of letter/flat cost differentials will mean large percentage rate increases for flat-shaped mail in some worksharing/weight cells; (2) at least some catalog mailers will not be able to avoid these rate increases by changing their mailing practices; (3) competition will prevent at least some catalog mailers from passing the rate increases through to their customers; (4) the volume of catalog mail could diminish as a result; and (5) this could in turn decrease the “vitality of the catalog industry.” Motion to Reopen at 7-8; *cf.* Kiefer Reb. (USPS-RT-11) at 20-22. These claims, even if accepted as true, are insufficient to warrant the rate relief sought by CCM.

As a threshold matter, the precise nature of what CCM seeks is unclear. First, CCM does not explain what it means by “transitional rate relief”—in particular, whether CCM is asking the Commission to recommend a new set of rates for flat-shaped letter mail under former 39 U.S.C. § 3624, or just to postpone the effective date of the rate changes previously recommended by the Commission and now scheduled to take effect on May 14. Second, CCM is silent about how the relief is to be funded—e.g., through offsetting increases in letter-shaped mail, increases in the volume of and contribution from flat-shaped Standard Mail as a result of the rate reductions, or a reduction in the Postal Service’s overall After Rates revenue. Regardless of which version of relief CCM in fact seeks, however, its proffered testimony is insufficient to justify it.

A. The Commission Has No Authority To Delay The Effective Date Of The Rate Changes Scheduled To Take Effect On May 14, 2007.

The undersigned parties are not unsympathetic to the concerns of catalog houses and other mailers of flats. Indeed, we have urged the Postal Service to work out an accommodation with these mailers by delaying the effective date of the rate changes for Standard Mail by a few months.⁵ If CCM is asking the *Commission* to impose such a delay, however, CCM is seeking relief from the wrong entity. The authority to decide the timing of rate changes is vested solely in the Board of Governors, not the Commission. *Governors of the USPS v. PRC*, 654 F.2d 108, 115-116 (D.C. Cir. 1981).

B. The Additional Evidence Proffered By CCM, Even If Assumed To Be True And Correct, Is Insufficient To Support The “Rebalancing” Of Rates For Flats At The Expense Of Rates For Letters.

Perhaps CCM is in fact asking the Commission to recommend a new and different schedule of Standard Mail rates to replace the ones previously recommended by the Commission in February. This remedy, however, would be considerably more far-reaching and permanent than “transitional rate relief.” A different set of recommended rates, if implemented by the Governors, would remain in effect as long as the Postal Service chose.

This more far-reaching relief would probably also entail rate increases for letter-shaped Standard Mail—increases that would also remain in effect as long as the Postal Service chose. The Postal Service has been insistent that, “in order to mitigate rates for flats, it would be necessary to make upward adjustments in other rates, namely, the

⁵ See, e.g., Financial Services Roundtable Comments (Apr. 12, 2007); NAPM Comments (April 16, 2007).

rates for letters.”⁶ While this position is regrettable—and the undersigned parties renew their request that the Postal Service reconsider it—as a practical matter the Commission can do little to provide relief for flats without offsetting increases in letter rates unless the Postal Service shows some flexibility concerning the revenue requirement. The Governors’ power under former 39 U.S.C. § 3625(d) to modify rates recommended by the Commission means that, in a tug of war over a proposed reduction in aggregate After Rates revenues, the Governors will have the last word.⁷ Accordingly, absent some change of heart by the Postal Service, the Commission cannot recommend lower rates for flats without ultimately forcing letter mailers to pay higher rates.

For this reason, CCM, if it seeks to have the Commission recommend lower rates for flat-shaped mail than the rates now scheduled to take effect on May 14, necessarily assumes the burden of showing that the benefits of lower rates for flats outweigh the offsetting costs resulting from higher rates for letter-shaped Standard Mail. These costs include the economic injury to letter mailers and their customers from higher rates, plus

⁶ Initial Statement of the USPS on Reconsideration (Mar. 28, 2007) at 9 (citing Governors’ Decision at 10).

⁷ See R2000-1 PRC Op. & Rec. Decis. (Nov. 13, 2000) (reducing requested After Rates revenue by approximately \$1 billion, including a \$668 million reduction in the contingency); *id.*, Decision of Governors issued Dec. 5, 2000 (implementing rates under protest and requesting reconsideration of revenue requirement); *id.*, PRC Op. and Further Rec. Decis. (Feb. 9, 2001) (declining to restore most of disputed amount); *id.*, Decision of Governors on Further Recommended Decision (Mar. 5, 2001) (rejecting Further Recommended Decision and requesting further reconsideration); *id.*, PRC Op. & Rec. Decis. on Further Reconsideration (Apr. 10, 2001) (reaffirming previous decision); *id.*, Decision of the Governors on the Recommended Decision on Further Reconsideration (issued May 7, 2001) (modifying Recommended Decision by restoring disputed contingency amounts and an additional \$200 million “to ensure the financial integrity of the Postal Service and the postal system”).

the deadweight loss to society as a whole from a rate structure that violates the Efficient Component Pricing Rule (“ECPR”), plus the transaction costs to mailers and their vendors from back-to-back changes in Standard Mail rate schedules within a relatively short interval.

Satisfying this burden of proof would require a *comparative* analysis of these discrete impacts. The evidence proffered by CCM, however, does not begin to make such a showing. For example:

(1) CCM does not dispute that flat-shaped mail costs more to process than letters, and does not challenge the accuracy of the data relied on by the Commission to quantify this disparity. See Motion to Reopen at 7 n. 6 (“CCM does not seek to reopen the record on issues relating to the underlying costs of Standard Mail Regular flats”).

(2) CCM does not dispute that setting shape-related rate differentials below 100 percent of shape-related cost differences violates ECPR, and is therefore inefficient. See R2006-1 PRC Op. & Rec. Decis. ¶¶ 4001-4020 (explaining why postal rate relationships should satisfy the Efficient Component Pricing Rule); *id.* at ¶¶ 4023-4038 (explaining why ECPR requires that rates reflect cost differences caused by shape).⁸

⁸ CCM alludes several times to the “wasteful costs” or “economic waste” that supposedly would result from allowing the recommended rates to take effect on May 14. See Motion to Reopen at 4 & n. 3 (defining “economic waste” as “any unproductive allocation or misuse of resources” that is “economically inefficient”); *id.* at 6 and 10. CCM never explains, however, what is inefficient about allowing rates for flat-shaped mail to rise to ECPR-compliant levels. When rates for flat-shaped mail rise to ECPR-compliant levels, mailers presumably will respond to the newly-efficient price signals by (1) substituting more efficient flat-shaped mail, letter mail or non-postal marketing channels; (2) reducing the volume of flat-shaped mail sent; or (3) a combination of (1) and (2). While the adjustment may be painful for some mailers, CCM never explains why it is “wasteful” or “inefficient,” and does not challenge the Commission’s analysis

(3) CCM also does not deny that the existing rate structure has forced users of letter-shaped Standard Mail to subsidize a portion of the costs of flat-shaped mail, and that “rate balancing” would perpetuate this unfair relationship. *Cf.* R2006-1 PRC Op. & Rec. Decis. ¶ 4032 (“it seems to be fundamentally fair that mailers pay the costs they impose upon the Postal Service plus the same contribution per piece that all the mailers make within the same subclass.”).

(4) CCM does not contend that a narrowing of the letter/flat rate differentials would be warranted by differences in the elasticities of demand for the two shapes. Indeed, CCM proffers no econometric or other evidence on elasticities at all. See Motion to Reopen at 7 n. 7 (disclaiming any intention to submit econometric testimony).

(5) CCM’s explanations for why postal rate increases hurt businesses that rely on flat-shaped Standard Mail to advertise their products and services apply to users of letter-shaped mail as well. Virtually all of the bullet points on pp. 7-8 of CCM’s Motion to Reopen may be restated in terms of letter mailers:

- Users of letter-shaped Standard Mail “include many small entrepreneurs offering niche products and services.”
- Businesses that rely on letter-shaped Standard Mail for marketing “have greater dependency on a continuous stream of mailings to generate future sales volume.”
- Businesses that rely on letter-shaped Standard Mail for marketing “use extensive sample testing to drive mailing decisions.”

showing that shape-based pricing is necessary for economic efficiency. *Cf.* R2006-1 PRC Op. & Rec. Decis. ¶¶ 4001-4020, 4023-4038. “Just as ECPR should produce the least cost mail by incentivizing a mailer or third part to workshare if it can perform mail processing or transportation more cheaply than the Postal Service, so too sit should provide appropriate incentives to minimize costs in the case of shape and other mail characteristics.” *Id.* at ¶ 4024.

- Businesses that rely heavily on letter-shaped Standard Mail for marketing have “an elongated planning cycle.”
- Mail “is a key component of” the “business plans” of users of letter-shaped Standard Mail “and drives revenue.”
- “Postage already constitutes a substantial portion of” the costs of users of letter-shaped Standard Mail, “which magnifies the impact on the bottom line of additional large rate increases.”
- “Difficulty in quickly changing cost structure (due to, e.g., restraints imposed by existing contractual commitments with vendors).”⁹
- Impracticality of converting solicitations from a letter format to a less expensive format.
- “Difficulty in quickly adjusting mailings to decrease postage costs (e.g., by decreasing the size or number of pages of the” letter-shaped solicitation).
- “Limitations on passing through an increase in costs to customers.”
- “Long-term effect of” further rate increases on the volume of letter-shaped Standard Mail solicitations “resulting from the migration of” marketing budgets from Standard Mail to “other forms of advertising and the decreased vitality of the . . . industry.”

It is certainly possible, in theory, that the some of these impacts weigh more heavily on flat-shaped mail than on letter-shaped mail, or *vice versa*. Whether this is actually so, however, is a question of fact that cannot be resolved without a comparative analysis of the users and uses of the two mail shapes. The analysis of economic impacts proffered by CCM, however, is limited to flat-shaped mail alone.

⁹ In this regard, users of letter-shaped mail are clearly worse off. As noted above, users of flat-shaped Standard Mail have been on notice for some time that a major rate realignment for this category was overdue. Accordingly, catalog mailers could have inserted *force majeure* or other clauses into contracts with vendors to provide greater flexibility to reformat their mail if the anticipated rate realignment occurred during the life of the supply contracts.

(7) The rate changes recommended by the Commission for flat-shaped Standard Mail are not uniform, and do not result from the new letter/flat rate differentials alone. Deaveraging by shape is only one of several new dimensions of cost deaveraging recommended by the Commission: others are deeper presort passthroughs, deeper dropship passthroughs, and a greater recognition of the primacy of pieces rather than weight in driving costs. The Standard Mail pieces that receive the biggest percentage rate increases from the Standard Mail rates recommended by the Commission are not only flat-shaped, but also less presorted, less drop-shipped, and lighter in weight—in other words, more costly to process per pound of content. Thus, for example, while a Mixed ADC nonautomation flat weighing less than four ounces and entered at the origin SCF faces a rate increase of 50.9 percent, pieces that are more finely presorted, destination entered or heavier faces increases that are much smaller. Indeed, heavy weight flats presorted to 5 digits and entered at the destination SCF will actually receive rate *decreases*. See Library Reference PRC-LR-15, *Standard Regular and Nonprofit Rate Design*, “Flats” worksheet, columns U through AB.

If (contrary to fact) the threat of rate shock for flats in fact justified significant departures from the Efficient Component Pricing Rule, the obvious place to look first for funding would be elsewhere within flat-shaped mail itself. Increasing the 5-digit rate for flats and using the revenue to temper the 3-digit rate, reducing dropship discounts for flats, and increasing the pound rate for flats would greatly reduce the maximum increases facing flat-shaped Standard Mail—*without any additional subsidy from letter-shaped mail*. Before flats mailers start collecting handouts from other mailers, shouldn't the charity begin at home?

III. IF THE COMMISSION REOPENS THE RECORD FOR ANY OF THE ADDITIONAL EVIDENCE PROFFERED BY CCM, DUE PROCESS ENTITLES LETTER MAILERS TO SUBMIT REBUTTAL EVIDENCE.

The solipsism of CCM's proposed testimony is mirrored by the one-sided procedural schedule that CCM also offers: a "single witness" with "limited discovery" and no rebuttal testimony "unless other parties seek to expand this proceeding." Motion to Reopen at 9. If the Commission finds that additional evidence proffered by CCM is sufficiently material, probative and non-cumulative to warrant reopening the record, however, due process will entitle adverse parties to have an adequate opportunity for discovery and cross-examination of the factual underpinnings of that testimony, followed by the right to submit rebuttal testimony. The hearing requirements of 39 U.S.C. § 3624(a), and the provisions of the Administrative Procedure Act incorporated by that section, entitle participants in Commission rate cases to discovery, cross-examination *and rebuttal* of testimony that raises material disputed issues of fact. *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 428-430 (D.C. Cir. 1993) ("MOAA"); *accord*, Order No. 1482 at 4-5.¹⁰

¹⁰ *Accord*, Valpak Opposition to Late Intervention By CCM (filed Apr. 13, 2007) at 1 n. 1 (stating that, if the Commission reopens the record for CCM, Valpak will seek to participate "actively to defend the interests of letter mailers, including filing interrogatories, conducting oral cross-examination, rebuttal testimony, and complete briefing.").

CONCLUSION

For the foregoing reasons, CCM's motion to reopen the record should be denied. If the Commission grants it any respect, however, the undersigned parties request a full opportunity for discovery, cross-examination, rebuttal and briefing.

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