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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268

REGULATIONS ESTABLISHING SYSTEM OF RATEMAKING	:	DOCKET NO. RM2007-1

REPLY COMMENTS OF THE ASSOCIATION FOR POSTAL COMMERCE

INTRODUCTION

In its Initial Comments, the Association for Postal Commerce ("PostCom") has shown that the fundamental purposes of the Postal Accountability and Enhancement Act ("PAEA") are to afford the Postal Service flexibility in designing products and setting rate levels within the price cap regime established by the new Act and to vest in the Postal Regulatory Commission the responsibility for preventing monopoly abuse and predatory conduct. These purposes emerge clearly from an examination of the language of the Act itself. Some of the commenters, however, misapprehend the purpose and operation of a price cap system of rate regulation. Several seem determined to read a "fair and equitable" standard back into the criteria for setting rates despite Congress's clear intent to eliminate this qualification.[1] These incorrect readings of the PAEA, in turn, lead to misguided attempts to recouple rates to costs and provide unwarranted review of rate increases that do not exceed the price cap. PostCom submits these reply

[1] *See, e.g.*, Comments of the Newspaper Association of America at 10 (noting that the fifth objective of the PAEA involves ensuring adequate revenues for the Postal Service and casting this objective as "the paramount objective of the new rate setting system"). Of course, this characterization conveniently ignores the additional objectives of maximizing "incentives to reduce costs and increase efficiency," "[t]o allow the Postal Service pricing flexibility," and "[t]o reduce the administrative burden and increase the transparency of the ratemaking process." PAEA § 201(a) (new § 3622(b)).

comments to clarify the benefits of the price cap system enacted by Congress, emphasize that the "fair and equitable" standard does not exist under the PAEA, and to address various other misreadings of the Act.

PURPOSE OF PAEA AND IMPLICATIONS FOR POSTAL RATE SETTING

The PAEA's primary and fundamental innovation consists of a move from cost of service ratemaking with prospective review to a price cap regime with extremely limited prospective review of rates. This point cannot be overemphasized. The PAEA creates a fundamentally different regulatory regime than that created by the Postal Reorganization Act of 1970. The price cap system is an incentive-based regulatory system designed to encourage increased efficiency on the part of the Postal Service.

The Federal Communications Commission explained the purpose of a price cap regime when it moved to such a system for regulating local exchange carriers in 1990: "our objective . . . is to harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates." *Policy and Rules Concerning Rates for Dominant Carriers*, 55 Fed. Reg. 42,375 (1990). The rates produced by such a system should "produce rates within a zone of reasonableness." *Id.* A price cap system operates by decoupling rates from costs and holding all rates presumptively reasonable if they fall within the cap. Thus, the more efficient the regulated entity, the greater profitability they will achieve. The price cap ensures that rates will be reasonable and predictable, and the elimination of guaranteed cost recovery provides an incentive for the regulated entity to reduce its costs and increase profits.

This is the system that Congress enacted to govern the Postal Service. It is emphatically *not* cost-based. It no longer requires that rates for market-dominant products be reviewed under the "fair and equitable" standard. Congress has given the Postal Service increased flexibility to set rates as long as it complies on a class-by-class basis with the price cap. Under the PAEA, Congress has given the Postal Service a "profit-making incentive" by removing the old, unworkable, break even constraint and by defining the caps on rate increases that must be applied by both the Postal Service and the Commission. That is, Congress has itself established the "zone of reasonableness" and has done so at the class level. *See* Postal Service Comments at 19; PostCom comments at 4.

In developing rules to implement the PAEA, the Commission must keep this fundamental change in mind. Thus, there is no merit to the arguments that have been put forth in this proceeding demanding intense Commission scrutiny of proposed rate increases that do not exceed the price cap. In establishing a price cap regime, Congress decoupled prices from costs and intended to simplify the rate setting process. The Commission should honor this intent.

SCOPE OF REVIEW OF PRICE CAP ADJUSTMENTS AND PUBLIC NOTICE

If the incentives the price cap regime created by the PAEA are to be effective, the Postal Service must have primary authority to set rates within the price cap. Because the PAEA was implemented to increase flexibility in rate setting and provide incentives for the Postal Service to become more efficient to gain profits within the cap, review of adjustments within the cap must be limited. There is, therefore, no need for public comment during the period between when notice of a proposed rate increase is published and the effective date of those rates.

The PAEA makes this principle explicit. While it states that the Commission's regulations must require the Postal Service to provide public *notice* of proposed rate adjustments at least 45 days before the changes take effect, it does not provide for public *comment*. § 3622(d)(1)(c)(i). It provides only for Commission review of the proposed rates. § 3622(d)(1)(c)(ii). Furthermore, the Commission's review is only concerned with whether the adjustment complies with the annual limitation of the price cap. § 3622(d)(1)(c)(iii). There is no provision for, and in fact there is no need for, public comment at this stage.

Congress's intent in structuring the periodic rate adjustments in this way becomes even clearer when one contrasts these provisions with the PAEA's provisions regarding the annual compliance review. There, Congress directed the Commission to "promptly provide an opportunity for comment" on the Postal Service's annual report "by users of the mail, affected parties, and an officer of the Commission who shall be required to represent the interests of the public." § 3653(a). This language is the sort Congress uses when it intends to provide for an opportunity for public comment. It is absurd to believe that Congress would use the language in § 3622 to provide for public comment instead of the language used in § 3653(a). When Congress wants to provide an opportunity for public comment, it uses language that demands such an opportunity. The PAEA contains such language with respect to the annual compliance review. It does not permit public comment with respect to periodic price adjustments. The attempt by commenters to read an opportunity for comment into Section 3622 does violence to basic rules of statutory construction and the purposes of the PAEA.

Consequently, the Commission's rules should not create a public comment process with respect to periodic rate adjustments. As directed by the PAEA, the Commission alone should review these adjustments, and it should do so solely to determine whether the adjustments comply with the annual limitation set forth in § 3622(d)(1)(A). Any additional review would defeat the purpose of providing the Postal Service with increased flexibility in setting rates and undermine the effectiveness of the price cap regime.

RETROSPECTIVE REVIEW IS LIMITED TO ABUSE OF MONOPOLY POWER

As PostCom explained in its Initial Comments, the Commission's limited authority to review periodic rate adjustments that fall within the price cap does not mean that the Commission is powerless. *See* PostCom Initial Comments at 9. In fact, the PAEA grants the Commission enhanced authority to ensure that the Postal Service complies with the law in setting rates. The PAEA provides for an annual compliance review, allows the Commission to entertain complaints against the Postal Service, and authorizes the Commission to order the Postal Service to remedy non-compliance with the PAEA. Several commenters, however, misunderstand this heightened power, and attempt to use this authority to read back a "fair and equitable" standard into the PAEA. In truth, the Commission is empowered only to guard against the Postal Service's abuse of its monopoly power—defined principally as undue or unreasonable discrimination—and the Commission's rules regarding complaints and compliance reviews should reflect this principle.

As we have pointed out in our Initial Comments, Congress carefully preserved § 403(c) of the 1970 act. This provision affords the Commission all the authority the it needs to prevent

the Postal Service from unlawfully abusing its flexibility. Discrimination involves a rate and the application of that rate to a particular user or group of users. The classic case of discrimination involves a utility charging different rates to similarly situated customers for the same service. Discrimination can also involve cross-subsidization between competitive and market dominant products. The PAEA empowers the Commission to remedy such discrimination through its requirement that rates be "just and reasonable." 3622(b)(8).

The power to remedy unreasonable discrimination is fundamentally distinct from a requirement that rates for and classifications of market dominant products be "fair and equitable" to all users of the mail, a requirement that was eliminated by the PAEA. Nevertheless, several commenters have attempted to read this standard back into the PAEA. The Greeting Card Association ("GCA"), for example, states that "[t]he substitution of 'just and reasonable' for 'fair and equitable' should not be interpreted as changing" the requirement in former § 3622(b)(1) that the Commission seek "the establishment and maintenance of a fair and equitable rate schedule." Initial Comments of the Greeting Card Association at 6. Exactly why or on what authority GCA thinks that the Commission is empowered to re-write the PAEA is not explained. Nor can it be explained. Where, as here, Congress has clearly spoken – and Congress has plainly eliminated the "fair and equitable" language – the Commission's task is to apply the new standard, not to ignore it.

GCA nevertheless continues in this vein, urging the Commission to craft its complaint and review rules in such a way as to ensure that rates will not be considered in isolation, and that the interrelationship between rates will become paramount. Such a process bears no resemblance to the "just and reasonable" review and protection against

discrimination contemplated in the PAEA and customarily applied in other industries regulated under a just and reasonable standard.

Furthermore, this "fair and equitable" standard is incompatible with the broader objectives of the PAEA and the operation of the price cap regime. The PAEA grants the Postal Service rate setting flexibility as long as it complies with the price cap limitation and does not abuse its monopoly power. The fairness and equity standard was used – some would say overused – under the 1970 act as a standard for judging the apportionment of institutional costs among subclasses of mail. But institutional cost assignment is irrelevant in the context of a price cap regime. Thus, the old repealed standard has no meaning. To impose a "fair and equitable" standard on top of price caps would artificially constrain the Postal Service's decision-making and prevent it from adjusting to market realities. The opportunity to realize profits under the price cap structure (and, therefore, the incentive to increase efficiency) would be compromised, and the benefits of the move to a price cap regime would not be realized. The attempt to read a "fair and equitable" standard back into the PAEA is nothing more than an attempt to reintroduce cost-of-service ratemaking, a condition clearly contrary to Congress's intent in enacting a price cap regulatory regime.

CONCLUSION

The PAEA abolishes the cost of service, break-even regime of the 1970 Act and replaces it with a price cap regulatory regime designed to increase flexibility and encourage efficiency. The Commission's rules must recognize that Congress intended to fundamentally alter the way the Postal Service operates and the way the Commission oversees that operation. Several commenters in this proceeding seem intent on

reestablishing the prior system despite Congress's undeniable intent to streamline the process of setting rates. The Commission should ignore these suggestions and proceed as the PAEA directs, establishing a simplified system of regulation that focuses on compliance with the price cap and the establishment of just and reasonable rates.

As a final note, before commencing the next round of comments, the Commission must issue proposed rules that interested parties can analyze and evaluate before submitting comments. While PostCom welcomes the opportunity to provide feedback to the Commission at this early stage in the rulemaking process. The Administrative Procedure Act demands that the Commission provide the public with sufficient notice of the scope and application of the rules it intends to adopt, and this notice will be adequate only if the Commission issues proposed rules and affords the opportunity to comment on the specifics of those rules.

Respectfully submitted,

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