Postal Regulatory Commission
Submitted 5/7/2007 4:01:55 pm
Filing ID: 56521
Accepted 5/7/2007

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001

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

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

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May 7, 2007

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Pursuant to Order No. 2, the Alliance of Nonprofit Mailers ("ANM") and Magazine Publishers of America, Inc. ("MPA") respectfully submit these joint comments in reply to the comments filed by other participants on April 6, 2007. These comments focus on several issues raised by the initial comments that are of particular concern to the publishers that belong to ANM and MPA.

SUMMARY

The initial comments of other parties demonstrate further that the index-based rate cap established by 39 U.S.C. § 3622(d) is binding, and may not be trumped by allegations that rates for an individual class of mail fail to cover attributable costs. This constraint may not be evaded by applying unused rate increase authority under 39 U.S.C. § 3622(d)(2)(C) across class boundaries, or by misusing the exigency provision of 39 U.S.C. § 3622(d)(1)(E) as a pretext for rate increases targeted to individual products, classes or subclasses.

Second, the other parties' initial comments also confirm that the issues that may be considered during the 45-day notice period for an index-based rate adjustment

should be limited to the question of whether the proposed rate changes comply with the index. A corollary of this principle is that the Postal Service and the Commission are entitled to apply index adjustments to the rates in effect at the outset of the 45-day period, even if one or more existing rates are under review pursuant to a complaint or the Commission's annual review authority.

Third, to the extent that attributable cost data play any role in oversight of individual rates, the Commission should reject the inflated measures of attributable costs proposed by several parties.

Fourth, the Commission should promulgate final rules as expeditiously as possible, to eliminate any need for another omnibus rate case under the pre-PAEA rules.

COMMENTS

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

A. The Section 3622(d) CPI-Based Rate Cap Supersedes The Attributable Cost Factor Of Section 3622(c)(2).

The initial comments demonstrate a consensus that Congress did not authorize the Commission or the Postal Service to breach the CPI "cap" established by Section 3622(d) for an individual class or subclass on the theory that revenue from the class or subclass would otherwise fail to cover attributable costs under Section 3622(c)(2). ANM/MPA at 2-12; *accord*, ABM at 3-4; NNA at 3-10; USPS at 22-23 ("to read [§ 3622(c)(2)] as 'requiring' that every class of mail cover its costs, regardless of the

ceiling imposed by the cap, would eviscerate the framework set forth by Congress"). As Senators Collins and Carpers have noted:

> The *primary requirement* . . . is the requirement that, for at least ten years, the system "include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers." We intended the objectives to supersede the factors in issues affecting the system's design.

Collins/Carper at 1 (emphasis added).

Two commenting parties, the Association of Priority Mail Users and Valpak, suggest that the attributable cost factor of § 3622(c)(2) may be invoked to justify above-CPI rate increases for individual classes. APMU at 2; Valpak at 11. Neither party, however, attempts to reconcile this position with the specific language and structure of PAEA (ANM/MPA at 2-7), the legislative history of PAEA (*id*. at 7-9), or the adverse effects that allowing the attributable cost floor to trump the CPI cap would have on the incentives for efficiency that Congress intended the CPI cap to create (*id*. at 10-11).

B. PAEA Does Not Authorize Cross-Class Banking.

The Commission should likewise reject APWU's proposal to allow "cross-class application of banked CPI savings"—i.e., to allow the Postal Service to apply unused rate increase authority from one class as a basis for above-CPI increases on another class. APWU at 8-9.

Cross-class banking would be at odds with the language and structure of Section 3622(d). Section 3622(d)(2)(C) explicitly states that the "annual limitations" imposed by the index under Section 3622(d)(1)(A) "shall apply to a class of mail." Moreover,

Section 3622(d)(2)(C)(i) defines "unused rate authority" as the difference between "the maximum amount of a rate adjustment that the Postal Service is authorized to make in any year" minus "the amount of the rate adjustment the Postal Service actually makes in that year." Each of these terms, which is stated in the singular, clearly refers to the "maximum amount" and the "amount . . . the Postal Service actually makes" *for an individual class of mail*. APWU's reading of the statute would require an elaborate volume-weighted calculation of the total unused rate increase authority (weighted by class), divided by the volume of the class(es) that would be the target of the cross-class bank "withdrawals." Nothing in the language of the statute suggests that Congress had this Rube Goldberg arrangement in mind. *Accord*, Pitney Bowes at 9.

Moreover, cross-class banking is also inconsistent with the legislative history of Section 3622(d). The legislative history reflects years of debate and deliberation over the breadth of the baskets of products to which the index adjustment should apply. In S. 2468, the postal reform bill passed by the Senate Homeland Security and Governmental Affairs Committee in the 108th Congress, the choice of groupings for application of the index was to be left to the regulator. The committee noted:

> The Committee expects that the Postal Regulatory Commission, in public proceedings and with the input of all interest parties, will fully and carefully evaluate the merits of a wide range of rate cap structures. This consideration should include, but should not be limited to . . . the definition of the product groupings to which the caps will be applied.

S. Report No. 318, 108th Cong., 2d. Sess. 10 (Aug. 25, 2004).

The predecessor of PAEA passed by the same Committee in the 109th Congress, however, abandoned this open-ended approach by specifying directly that the rate index must be applied at the class level:

> The annual limitation under paragraph (1)(A) shall apply to a class of mail, as defined in the Domestic Mail Classification Schedule as in effect on the date of enactment of the Postal Accountability and Enhancement Act.

S. 662, 109th Cong., 1st. Sess (reported June 22, 2005), § 201(a) (proposed 39 U.S.C. § 3622(d)(2)(A)). The Senate Committee adopted this provision notwithstanding a letter from the Board of Governors of the Postal Service expressing a preference that the index be applied at the level of the Postal Service's aggregate revenues. Letter of the Board of Governors of the U.S. Postal Service to Chairman Susan Collins (February 24, 2005).

The predecessor of PAEA passed by the House of Representatives would have disaggregated the relevant product baskets even further, applying the index as a separate constraint on each *subclass*:

> In the administration of this section, the Commission shall not permit the average rate in any *subclass* of mail to increase at an annual rate greater than the comparable increase in the Consumer Price index, unless it has, after notice and opportunity for a public hearing and comment, determined that such increase is reasonable and equitable and necessary to obtain the Postal Service, under best practices of honest, efficient and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

H.R. 22 (reported by the House Committee on Government Reform on April 28, 2005) at § 201(a) (proposing language to be codified at 39 U.S.C. § 3622(e)) (emphasis added). "To ensure fairness," the Committee explained, "the new system provides that rates from any one subclass should not increase faster than CPI." H. R. Rep. No. 66, 109th Cong., 1st Sess. 48 (April 28, 2005).

The version of the legislation ultimately enacted into law resolved the conflict between the Senate and House bills by defining the relevant baskets as classes rather than subclasses. 39 U.S.C. §§ 3622(d)(2)(A); *see also* USPS at 12-13 (discussing legislative history). The final version of the legislation did not, however, restore the earlier Senate version that would have allowed a single index basket consisting of market-dominant mail. Allowing unused rate increase authority to spill over into other baskets would effectively merge the multiple class-specific baskets into a single basket, accomplishing precisely what Congress rejected.

C. The Exigency Provision Of 39 U.S.C. § 3622(D)(1)(E) Applies Only To Cost Increases That Simultaneously Affect All Major Classes Of Mail.

The initial comments also confirm that the exigency clause, 39 U.S.C. § 3622(d)(1)(E), does not authorize rate adjustments that are limited to individual classes or subclasses of service—and certainly not for classes as small as Periodicals Mail. The "extraordinary or exceptional" circumstances contemplated by Congress are catastrophic and unforeseeable events with a impact comparable in system-wide impact to the 9/11 terrorist attacks and the subsequent anthrax mailings. ANM/MPA at 11-12; *accord*, Collins/Carper at 2; DMA at 8; Pitney Bowes at 10-11.

II. RATE REVIEW DURING THE 45-DAY REVIEW PERIOD.

A. Challenges To Proposed Rate Changes During The 45-Day Review Period Should Be Limited To Issues Involving Compliance With The Index Formula.

The initial comments also reveal a general consensus that the grounds for challenges to index-based rate increases during the 45-day review period should be

limited to alleged noncompliance with the Commission rules defining the index formula index. Parties wishing to raise other issues, including the lawfulness of below-cap rates, should be required to do so in the Commission's annual review of rates, or by initiating a complaint proceeding. ANM/MPA at 12; *accord*, Advo at 1-2, 4; Collins/Carper at 2; Pitney Bowes at 14; Time Warner at 16.

APWU, however, urges the Commission to rewrite Section 3622(d)(1)(C) by expanding the 45-day review to allow consideration of ratemaking factors of Section 3622 apart from compliance with the CPI index. APWU at 7-8. And Valpak proposes a review period of *four months* to allow an elaborate "multi-faceted" review of each set of proposed rate changes for compliance with all of the requirements, objectives and factors of PAEA. Valpak at 29-35.

These proposals are inconsistent with PAEA. Congress limited the potential remedies for a violation identified during the 45-day review period to (1) *notifying* the Postal Service that one or more rate increases exceeded the CPI-based limit (39 U.S.C. § 3622(d)(1)(C)(iii)), and (2) requiring the Postal Service to *respond to such a notice* from the Commission concerning a violation of the CPI-based limit (*id*., § 3622(d)(1)(C)(iv)). Review of postal rates on other grounds must occur under the after-the-fact review mechanisms of §§ 3653 and 3662.

It obviously would be desirable for the Postal Service to provide *notice* longer than 45 days when proposing rate changes that are complex, or involve complex changes in eligibility requirements or mail preparation rules. *See* ANM/MPA at 12-13. The Postal Service has stated that it intends to provide longer notice in such circumstances. USPS at 14-15. Doing so will allow mailers, third-party vendors, and

the Postal Service itself adequate time to reprogram their software and make other changes needed to implement the new rates. The statute, however, does not entitle the Commission to consume more than 45 days for *review* of proposed rate changes once the notice has been given.

B. Section 3622(d) Does Not Prescribe The Frequency Or Timing Of CPI-Based Rate Adjustments.

Several parties recommend that the Commission prescribe the maximum frequency or implementation date of CPI-based rate adjustments. *See*, *e.g.*, PostCom at 12 (once a year); DMA at 5; *cf*. Pitney Bowes at 30 (allowing multiple rate changes per year). Section 3622(d), however, imposes no such constraints on the Postal Service, but merely requires that CPI-based rate increases occur "at regular intervals by predictable amounts." 39 U.S.C. § 3622(d)(1(B). Beyond those restrictions, the statute leaves the frequency of CPI-based rate increases to the discretion of the Postal Service. Transaction costs—for both the Postal Service and its customers—obviously will serve as a practical check on the number of rate changes implemented in any given year.

A related issue is the relationship between the 45-day notice period and the pendency of annual review proceedings under Section 3653 and complaint proceedings under Sections 3662 and 3663. The pendency of either kind of proceeding should not be an obstacle to the filing of rate changes under 3622(d). The Postal Service should apply index adjustments to the rates in effect when it gives the requisite notice under Section 3622(d)(1)(C). If the Commission later prescribes changes to the underlying rates pursuant to 3653 or 3662, the Commission can simultaneously order changes the increased rates as well.

III. TO THE EXTENT THAT ATTRIBUTABLE COST DATA PLAY ANY FURTHER ROLE IN OVERSIGHT OF RATES, PRC SHOULD REJECT PROPOSALS TO ADOPT AN INFLATED MEASURE OF ATTRIBUTABLE COST.

UPS proposes that the Commission "improve cost attribution" for ratemaking by attributing "prior period retiree and health benefit costs" to the "products that have caused them." UPS at 5. The Commission should decline to adopt this simplistic rule. Prior period costs are sunk and thus properly treated as institutional costs.

The "prior period" costs to which UPS presumably refers are the annual "catch up" payments of $5.4 to $5.8 billion that Section 803 of the PAEA requires the Postal Service to pay into the Postal Service Retiree Health Benefits each of the next ten years. As MPA and ANM explained on pages 25-33 of their joint reply brief in Docket No. R2006-1, the obligations funded by these payments consist almost entirely of retiree health benefits that, although payable in future years, were earned by postal employees in *previous years*. Since there is no causal relationship between these costs and current or future volumes, these costs must be treated as institutional.

Cost attribution is a function of causation. *National Association of Greeting Card Publishers v. USPS*, 462 U.S. 810, 826 (1983); *accord*, 39 U.S.C. § 3631(b) (defining "costs attributable" to a product as "the direct and indirect postal costs attributable to such product through reliably identified causal relationships"). None of the services that the Postal Service expects to provide in the Test Year bears any causal responsibility whatsoever for the $5.0 billion amount. The payment will fund future health care obligations that the Postal Service has *already committed to paying* as compensation for service provided by Postal Service employees *in past years.* The Postal Service faces those obligations *regardless of* how much of any class of mail service is provided

in the Test Year (or, indeed, in any future year). Stated otherwise, the *cause* of the obligation that the $5.0 billion payment will cover was mail volume that the retirees serviced in *past* years in exchange for the future health care benefits promised by the Postal Service. The $5.0 billion payment therefore represents costs that are not only fixed but sunk. Without the requisite causal relationship between the $5.0 billion obligation and any class or classes of mail in the Test Year, the $5.0 billion cannot be attributed to any classes under 39 U.S.C. § 3622(b)(3).

IV. PRC SHOULD PROMULGATE RULES IMPLEMENTING SECTION 201 AS EXPEDITIOUSLY AS POSSIBLE.

The parties' initial comments display a wide range of views on the appropriate timetable for issuing final rules in this proceeding. There is a general consensus that the Commission should issue final rules expeditiously, in accordance with the desire expressed by Chairman Blair at the March 13 summit to have a new ratemaking system in place within 12 months after enactment of PAEA. *See* DMA at 2; MOAA at 4; PostCom comments at 3; Time Warner at 20-21; USPS at 4, 7-8; *cf*. Valpak at 2 (recommending that the Commission "take the full 18 months" allowed by PAEA).

ANM and MPA agree with other parties that the Commission should attempt to issue new rules sooner than required by the statute. Among other things, this would avoid giving the Postal Service an occasion to file another omnibus rate case under pre-PAEA law.[1] The Commission can minimize the time needed to issue new rules by

[1] Senators Collins and Carper, the co-authors of the final version of PAEA as enacted, have both urged the Commission to implement Section 201 as quickly as possible for this reason. ". . . I would strongly discourage the Postal Service from filing a 'final' rate case under the old rate setting rules before postal reform is fully implemented. Filing a new rate case would divert resources and effort from developing a modern system of rate regulations are required under the new postal reform law." Statement of Sen.

focusing on the standards and procedures needed to implement the CPI-based rate adjustment mechanism of Section 3622(d). To implement the remaining objectives, factors and provisions of the Act, the Commission might establish some more general guidelines such a safe harbor based on the Efficient Component Pricing Rule (as suggested by several parties), and reserve more detailed determinations for case-by-case adjudication.

Susan Collins, Hearings before the Subcom. on Federal Financial Management, Government Information, Federal Services, and International Security of the Sen. Comm. on Homeland Security and Government Affairs (Apr. 19, 2007). "I'd rather have the next rate increase occur under the new rules, not the old rules, so I look forward to hearing from you, Chairman Blair, about where we are in the rulemaking process and what help you might need from us and from the Postal Service in getting the new system up and running sooner rather than later." Statement of Sen. Thomas R. Carper, Hearings before the Subcom on Federal Financial Management, Government Information, Federal Services, and International Security of the Sen. Comm. on Homeland Security and Government Affairs (Apr. 19, 2007).

CONCLUSION

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

Respectfully submitted,

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