

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001**

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**Regulations Establishing System  
Of Ratemaking**

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**Docket No. RM2007-1**

**REPLY COMMENTS OF THE  
AMERICAN POSTAL WORKERS UNION, AFL-CIO  
(May 7, 2007)**

The American Postal Workers Union, AFL-CIO (APWU), pursuant to Commission Order No. 2, respectfully submits these reply comments on the Commission's Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking.

On April 6, 2007, the APWU filed initial comments pursuant to the Postal Regulatory Commission Advance Notice of Proposed Rulemaking. The APWU and 30 other parties submitted initial comments covering a broad range of issues. The Initial Comments show that in certain areas there is some consensus among the parties. For example, a number of parties address the inadequacy of the 45 day notice period accompanying a rate adjustment to market dominant products.<sup>1</sup> But the Initial Comments also demonstrate a wide variance across critical issues. Below

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<sup>1</sup> See for example, Initial Comments of American Business Media, p. 4-5; Initial Comments of Alliance of Nonprofit Mailers and Magazine Publishers of America, p. 12; Initial Comments of Direct Marketing Association, p. 6; Initial Comments of Mail Order Association of America, p 1; Initial Comments of Time Warner, p. 15; Initial Comments of Valpak Marketing Systems and Valpak Dealers Association, p 10.

the APWU submits further comment on six issues of particular import lacking a general consensus.

**I. The Commission should avoid predetermining any hierarchical ordering of the provisions of the PAEA.**

In the Initial Comments, several parties, including the Postal Service, posit that Section 3622, as amended by the Postal Accountability and Enhancement Act (PAEA), is structured in a hierarchical manner. Specifically, these parties argue that some parts of this section of the Act are more important than or take precedence over other parts.<sup>2</sup> However, on its face, the Act does not provide any structure or ranking. It would be more logical to infer that Congress intended that all provisions of the PAEA would be given effect. Until the Commission and the parties have some experience in the application of the revised Section 3622 it would be a mistake to create an abstract hierarchical structure that might not meet the needs of the Postal Service or the parties. Thus, in its regulations implementing Section 3622 of the Act the Commission should not endorse the presumption that one portion of the Act should take precedence over another. The regulations should instead reflect the presumption that all provisions of the PAEA work in harmony and that all can be given proper consideration and weight when creating and evaluating a market dominant rate adjustment. Only if and when a clear conflict between different aspects of the Act emerges should it be determined how different provisions will be reconciled.

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<sup>2</sup> Initial Comments of United States Postal Service, p. 7-8; *See also*, Initial Comments of American Business Media, p. 4 (price cap “trumps” the cost coverage provision of the Act); Initial Comments of Alliance of Nonprofit Mailers and Magazine Publishers of America, p. 3 (the factors of the Act cannot “trump” the CPI-U rate requirement)

The determination of how the different requirements, objectives and factors of the Act should be weighed in case of a conflict cannot be made in advance and in the abstract. Instead, the Commission should make a case-by-case evaluation taking into account the facts and circumstances surrounding a specific adjustment request. In such circumstances it would be appropriate and worthwhile for the Commission to allow discovery and public comment to aid in determining the proper weight to be given to each requirement, objective and factor.

**II. The Commission's regulations should reflect the hybrid system of pricing under the PAEA.**

In the Initial Comments some parties asserted that the PAEA established a rate cap regime that basically eliminates the importance of cost data by requiring review of compliance with the CPI-Ucap only <sup>3</sup>, while others argued, in effect, that the PAEA did not alter the cost based regime of the Postal Reorganization Act (RA ).<sup>4</sup> Neither of these positions seems completely accurate.

Rather the PAEA created a hybrid system, incorporating portions of both approaches. This hybrid system does provide the Postal Service increased flexibility but it also has cost-based elements that must be satisfied. Data must be collected by the Postal Service and publicly provided to demonstrate that the cost-based requirements of the PAEA have been met. For example, Section 3622(c)(2) requires “that each class of mail or type of mail service bear the direct and indirect postal costs attributable to each class or type of mail service...plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.” In order to

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<sup>3</sup> Initial Comments of USPS, p. 23; Initial Comments of Time Warner, p. 15-16

<sup>4</sup> Initial Comments of Valpak, p. 5, 23, 29-32.

give full consideration to this provision the Postal Service must create costing data and produce it before the PRC. Similarly, Section 3622(e) provides for workshare discounts that do not exceed the costs avoided by the Postal Service as a result of worksharing activity, and requires that “whenever the Postal Service establishes a workshare discount rate, the Postal Service shall ... submit to the Postal Regulatory Commission a detailed report that ... (B) sets forth the data, economic analyses, and other information relied on to justify the rate.” Thus, costing data is required in evaluating worksharing.

Although the PAEA was enacted in part to simplify the postal ratemaking process, the cost based requirements of the Act cannot be ignored for the sake of simplicity. The Commission must set up rules to require that an appropriate amount of information is provided and to ensure that the Postal Service is complying with the provisions of the Act that require cost based analyses. APWU believes that with the recent and planned improvements in collecting operational data the Postal Service can provide far less data than required by the current rules but nonetheless provide more relevant and therefore, more helpful information about costs.

### **III. The Commission must pre-approve all Negotiated Service Agreements.**

Many of the Initial Comments addressed Negotiated Service Agreements (NSAs) under the PAEA. Under the PAEA, some commentators argue, NSAs do not have to be reviewed by the Commission in advance and that only minimal reporting requirements should apply.<sup>5</sup> However, this outcome would be contrary to the clear language of the PAEA. Under the PAEA, the Commission has the authority and

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<sup>5</sup> See *for example* Initial Comments of Parcel Shippers Association, p. 21; Initial Comments of Pitney Bowes, p. 31-32.

responsibility to promulgate rules governing NSAs, including rules for determining whether or not NSAs are desirable.<sup>6</sup> Section 3622(d) further requires that the Commission review all market dominant rate adjustments, including adjustments under Section 3622(c)(10) pertaining to NSAs.<sup>7</sup> At the very least then, the Commission will be required to determine in advance that the NSAs meet the requirement of “improving the net financial position of the Postal Service,” or that the NSAs “enhance performance” of Postal Service functions and do not cause “unreasonable harm to the market place.”<sup>8</sup> In order to allow the Commission to fulfill this oversight function mandated by law, the Postal Service must be required to submit data to the PRC in advance of the implementation date of the proposed NSA.

**IV. The radical changes in the system of rate relationships and worksharing discounts proposed by the OCA and Pitney Bowes must be rejected.**

In their Initial Comments, both Pitney Bowes and the OCA have proposed radical changes to the system of rate relationships and worksharing discounts. Specifically, the OCA seems to advocate regulations that would enable the Postal Service to price products and services to reflect the absolute cost of such products or services.<sup>9</sup> This is a completely different methodology to be used in determining rates. The PAEA was created in part to provide the Postal Service with additional flexibility regarding rate setting. OCA’s proposal would constrain the Postal Service and limits its flexibility. Therefore, the Commission should reject the OCA’s proposal to adopt regulations that presuppose appropriate rate setting methodologies.

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<sup>6</sup> 39 U.S.C. § 3622(c)(10).

<sup>7</sup> 39 U.S.C. § 3622(d)(1)(C).

<sup>8</sup> 39 U.S.C. § 3622(c)(10).

<sup>9</sup> Initial Comments of OCA, p. 8-10.

Pitney Bowes argues for a regulatory system that extends the principles of Efficient Component Pricing (ECP) to apply to “all cost causative characteristics of mail including shape, weight, distance, payment evidencing, address hygiene and others.”<sup>10</sup> This proposal flies in the face of the Commission’s recent decision in R2006-1 refusing to do just that, and would violate Section 3622(e) regulating workshare discounts. There is no warrant for this proposal in the decisions and definitions of the PRC.

In Docket No. R2006-1 the Commission rejected the Postal Service’s call to de-link rates of First Class Single Piece mail from those of First Class Presort Mail.<sup>11</sup> In doing so, the Commission noted that the de-linking proposal would unfairly allow “many costs that are not worksharing related to be avoided by worksharing mailers.”<sup>12</sup> The decision continued to limit the application of workshare discounts to those activities like presorting and prebarcoding mail pieces; activities that the Postal Service would otherwise have to do.<sup>13</sup> It also reconfirmed the principle that workshare discounts cannot exceed the costs saved by the Postal Service and reconfirmed the use of a benchmark to determine the cost avoided as critical to prevent the shifting of costs.<sup>14</sup> The PAEA did not alter the effect or reasoning of the

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<sup>10</sup> Initial Comments of Pitney Bowes, p. 19

<sup>11</sup> PRC Opinion and Recommended Decision in Docket R2006-1 at ¶ 5079.

<sup>12</sup> *Id.* at ¶ 5086.

<sup>13</sup> *Id.* at ¶ 4037.

<sup>14</sup> *Id.* at ¶ 5109; See also PRC Opinion and Recommended Decision in Docket MC9501 at ¶ 4302.

Commission's past decisions. In fact, in enacting the PAEA Congress ratified the Commission's previous holdings on workshare discounts.<sup>15</sup>

Accordingly, the PAEA provides no basis for the radical revisions suggested by the OCA and Pitney Bowes. While the Postal Service can certainly propose new discounts or pricing as it moves into the new ratemaking paradigm under the PAEA, it is not appropriate or necessary to expand the definition of workshare discounts to presume new worksharing or force the Postal Service to implement new discount pricing through this initial rulemaking.

**V. The Commission should promptly enact regulations implementing its new subpoena power.**

Section 602 of the PAEA grants the Commission the power to issue subpoenas "requiring the attendance and presentation of testimony by, or the production of documentary or other evidence in the possession of, any covered person; and order the taking of depositions and responses to written interrogatories by a covered person." This power may be used in any proceeding conducted by the Commission under the PAEA.<sup>16</sup> This power did not exist under the Postal Reorganization Act, thus the Commission's current regulations promulgated under the PRA do not provide any further guidance on when a subpoena will be issued under Section 602. The current regulations only govern the taking of depositions and are too limited given the Commission's new subpoena power. Under the current rules of practice, depositions are permitted only when

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<sup>15</sup> 39 U.S.C. § 3622(e): "'workshare discounts' refers to rate discounts provided to mailers for the presorting, prebarcoding, handling, or transportation of mail....the Postal Regulatory Commission shall ensure that such discounts do not exceed the cost that the Postal Service avoids as a result of workshare activity...."

<sup>16</sup> 39 U.S.C. § 602(f) (2).

(1) the person whose deposition to be taken would be unavailable at the hearing, or (2) the deposition is necessary to perpetuate the testimony of the witness, or (3) the taking of the deposition is necessary to prevent undue and excessive expense to the participant and will not result in undue delay or undue burden to other participants.<sup>17</sup>

Thus in MC2007-1, the Commission reasoned that the limited circumstances permitting depositions were not present and denied the APWU's request for a subpoena.<sup>18</sup> With all due respect to the Commission's current regulations and rulings on the matter, the Commission's new regulations should implement the Commission's subpoena power to allow for discovery via depositions under less restrictive circumstances. Only if these recommendations have been expanded will the Commission's new subpoena power be given meaning, especially since there will likely be fewer formal hearings on the record under the PAEA. The need for information when there is a live matter before the Commission is still important and it would be wasteful of the Commission's and interested parties' time and resources to require discovery through testimony before the full Commission in a hearing on the record. A more efficient and fair process would be to allow parties to conduct discovery with respect to any Commission proceeding, including any rate adjustment pursuant to Section 3622 of the Act or compliance review under Section 3652, through depositions, with the approval of the Presiding Officer of the Commission.

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<sup>17</sup> Rule 33

<sup>18</sup> See Presiding Officer's Ruling MC2007-1/5.

**VI. Ex Parte Communication Rules must be broadened to apply to all proceedings requiring Commission review.**

In its Initial Comments the Association for Postal Commerce (Postcom) submits that the Commission's current rules regarding ex parte communications must be changed.<sup>19</sup> We agree with the assessment that the rules will require overhaul. The ex parte rules must be revised to reflect the Commission's altered responsibilities under the PAEA. The Commission's current Rules of Practice and Procedure prohibit ex parte communications "in any agency proceeding that is required to be conducted in accordance with § 556 of Title 5 [the Administrative Procedures Act] or a proceeding conducted pursuant to Subpart H of this part [Appeals of Postal Service Determinations to Close or Consolidate Post Offices]."<sup>20</sup> Given that the PAEA eliminated the mandate that certain Commission proceedings be conducted pursuant to the Administrative Procedures Act, with that prohibition alone it is possible that the current rules may never be applied.

Although the PAEA alters postal regulating by, for example, eliminating the requirement of a hearing on the record for rate adjustment, the Commission's responsibility as the Postal Service regulator has not diminished and the risk posed by ex parte communications has not disappeared. The revised ex parte rules, therefore, should as a minimum, provide for public notice of any meetings with Commission decision makers pertaining to a matter that is before the Commission. This notice should include the name of the parties in attendance along with a short description of the subject and a brief summary of what was said. This would be

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<sup>19</sup> Postcom Initial Comments at p.15-16.

<sup>20</sup> Rule 7(b).

similar to the methods employed by the President's Commission on the United States Postal Service.<sup>21</sup> In establishing these regulations the Commission should not only look to the ex parte rules of the Federal Communications Commission, as recommended by Postcom,<sup>22</sup> but also to the rules employed by the Federal Trade Commission<sup>23</sup>, the Federal Energy Regulatory Commission<sup>24</sup> and other similar agencies.

**VII. The Commission should avoid predetermining the proper application of the exigency clause.**

The breadth of the Section 3622(d)(1)(E) of the PAEA, which provides for an increase above the CPI cap during "extraordinary or exceptional circumstances," has been addressed by many parties in the initial round of comments. For example, in their Initial Comments the Alliance of Nonprofit Mailers and Magazine Publishers of America suggest that regulations promulgated by the Commission should authorize rate adjustments only in severe circumstances, like those present during September 11<sup>th</sup> and during the anthrax scare.<sup>25</sup> However, the Commission should avoid enacting rules governing the proper application of the exigency clause in a vacuum. The PAEA provides for Commission approval of any rate adjustments above the cap after notice and an opportunity for a public hearing and comment, thus implying a case by case analysis.<sup>26</sup> Therefore, the Commission should resist the calls for immediate regulations governing the exigency provision. The Commission should

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<sup>21</sup> Executive Order 13278 of December 11, 2002.

<sup>22</sup> Postcom Initial Comments at p. 16.

<sup>23</sup> 16 C.F.R. § 4.7

<sup>24</sup> 18 C.F.R. §385.2201.

<sup>25</sup> Initial Comments, p. 11.

<sup>26</sup> 39 U.S.C. § 3622(d)(1)(E).

wait for the benefit of experience and determine on a case by case basis whether “extraordinary or exceptional circumstances” are present in order to permit the Postal Service to exceed the statutory rate cap.

Respectfully submitted,

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