

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

Regulations Establishing System
Of Ratemaking

Docket No. RM2007-1

**REPLY COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA
ON SECOND ADVANCE NOTICE OF PROPOSED RULEMAKING
(July 3, 2007)**

The Newspaper Association of America (“NAA”) hereby respectfully submits its reply comments on the Second Advance Notice of Proposed Rulemaking (“*2d ANPRM*”)¹ in this proceeding. In these comments, NAA will address only issues raised by certain other commenters relating to the worksharing discount rate provision at issue in Question 3.

I. WORKSHARE DISCOUNTS

Question 3 invited comment regarding the mandate in Section 3622(e) that the Commission “ensure that workshare discounts do not exceed the cost that the Postal Service avoids as a result of the workshare activity” except in certain situations. The Commission sought comment on the data that the Postal Service must provide to allow enforcement of this provision and on when such data should be filed.

NAA’s opening comments on the *2d ANPRM* showed that the Commission is to review all discount rates at the time the Postal Service provides notification

¹ Order No. 15 (May 17, 2007).

of rate changes and review the actual performance afterwards as well in the annual compliance review. However, some commenters believe that Section 3622(e)(4) does not apply to “existing” discounts in effect at the time that the Postal Service provides notification of rate adjustment pursuant to Section 3622(d)(1)(C). That view is not well based on the statute and would give rise to perverse outcomes.

Finally, the comments reflect widespread recognition that the data upon which the Postal Service has traditionally relied are not fully satisfactory. The Commission has, and should exercise, authority to insist on improvements.

A. The Statute Requires The Commission To Review All Discount Rates At The Time Of The Notification Of Rate Changes

Section 3622(e)(4) requires that “whenever” the Postal Service “establishes a workshare discount rate,” at the time it publishes notification of that rate it also must submit a detailed report to the Commission:

- Explaining the reasons for establishing the rate;
- Setting forth the cost data and other analysis in support of the discount rates to be established; and
- Certifying that the discount will not adversely affect “rates or services provided to users of postal services who do not take advantage of the discount rate.”

39 U.S.C. § 3622(e)(4). Although this provision applies “whenever” the Postal Service “establishes” a “workshare discount rate,” some commenters attempt to create a dichotomy between “new” and “existing” discounts.² They concede that

² See USPS Comments at 10-11; ADVO Comments at 7; Pitney-Bowes Comments at 6; PostCom Comments at 6; NAPM Comments at 3.

the Postal Service must supply the detailed information required by Section 3622(e)(4) at the time that a workshare discount is first created. But they would limit Section 3622(e)(4) to only newly created workshare discounts, arguing that data regarding “existing” discounts need be supplied only in the annual compliance report required by Section 3652. This distinction is not supported by the statute.

First, nothing in the text of Section 3622(e)(4) limits its applicability to a discount rate associated with a “new work share initiative.” Instead, by its plain language Section 3622(e)(4) applies “whenever” the Postal Service establishes a workshare discount rate. The statute does not say “first” establishes; the statutory text applies “whenever” a “workshare discount rate” is established. A rate is “established” under the PAEA when the Postal Service publishes what a rate will be.

Second, that Congress understood the difference between new and existing discounts is clear from Section 3622(e)(2)(A)(i), which excepts (from the general rule that discount rates should not exceed costs avoided) discounts that are associated with “a new work share initiative.” This is how Congress referred to a “new” type of discount. But nothing in the text of Section 3622(e)(4) indicates that Congress intended to limit its applicability to discounts associated with “new” worksharing initiatives. Section 3622(e)(4) exists to vindicate Congressional interest in *rates*, not the workshare discount *classifications*.

Third, commenters that would limit Section 3622(e)(4) only to discount rates associated with “new work share initiatives” rest their argument on the existence of Section 3652(b). That reliance is misplaced.

Section 3652(b) directs the Postal Service to include in its annual compliance report to the Commission, for each market-dominant product for which a workshare discount was in effect during the relevant period: (1) the per-unit cost avoided by the Postal Service; (2) the percentage of the cost avoided represented by the discount rate; and (3) the per-item contribution to institutional costs. 39 U.S.C. §3652(b). Section 3652 demonstrates Congress’s desire to monitor and focus on possibly excessive workshare discounts. It does not mean, however, that the Postal Service need not provide the support required by Section 3622(e)(4) when it adjusts discount rates. The information required by the two sections serve different purposes.

In particular, Section 3622(e)(4) requires the Postal Service to address, in addition to cost avoidance and economic analyses, both the policy reasons for offering the discount and the effect of the discount on other mailers. In contrast, Section 3652(b) more narrowly requires only that the Postal Service report actual costs avoided, passthroughs, and unit contributions. It checks only on the “profitability” of the discount; it does not concern itself with the policy for continuing to offer the discount or require a certification of no harm.

Fourth, applying Section 3622(e)(4) only to “new” workshare discounts, but not to “existing” discounts, would result in a perverse interpretation. Discounts associated with new worksharing initiatives are one of the exceptions

to the general rule that discounts should not exceed avoided costs. 39 U.S.C. § 3622(e)(A)(i). It would be illogical to require the Postal Service to file a detailed report addressing policy, cost data, and certifying the absence of harm to other mailers only in conjunction with introducing a discount that is specifically allowed to exceed costs avoided (which inherently can adversely affect other mailers). On the contrary, the Section 3622(e)(4) report has particular pertinence to existing discounts because it directs the Postal Service to reassess its discounts regularly and periodically, not just at their introduction.

Fifth, the commenters' theory would render statutory protections meaningless. Under their approach, the Postal Service would need, for example, to certify that a discount rate would not adversely affect rates or services for other mailers only when first introducing a discount. No such assurance would ever subsequently thereafter be needed. Thus, after introducing a new worksharing initiative in year 1, the Postal Service would be free as early as year 2 to adjust the discount rate in ways that deliberately adversely affect other mailers. Such is not a reasonable interpretation of the PAEA.

As stated in NAA's opening comments, the Postal Service should both file the required cost support at the time of providing notice of rate changes and submit an assessment of the actual results and cost savings in its annual compliance report. This showing applies for all changes in worksharing discounts. When a discount rate is unchanged, the Postal Service must show that labor rates and operations have not changed or, if they have, that the unchanged discount continues to comply with the statutory test.

In its comments, the Postal Service states that it intends to base changes to existing discounts on the Section 3652(b) data filed in the immediately preceding annual compliance report. Consistent with the above, those data alone are insufficient, as the Postal Service must also explain its rationale for continuing the discount and certify to the absence of harm. However, it is reasonable to expect that the Section 3652(b) data may in many cases be sufficient to comply with Section 3622(e)(4)(B), so long as the data are current.

B. There Is Widespread Consensus That Section 3622(e) And Section 3652 Require Improved Data In Many Instances

Many commenters recognize that both Section 3622(e) and Section 3652 require accurate information about the Postal Service's costs avoided by worksharing. A consensus exists that the data traditionally relied upon by the Postal Service in omnibus rate cases are a good starting point. But there is also widespread consensus that such data, and the costing methodologies by which they are analyzed, need substantial improvement.³

The Commission should reject ADVO's contention, in connection with the annual compliance review, that the Postal Service should have "leeway" in its estimates because of "differences in opinions regarding how those avoided costs should be estimated." ADVO Comments at 8. Congress assigned to this Commission the authority to prescribe the methodologies to be used by the Postal Service when annually reporting its "costs, revenues, rates, and quality of

³ See APWU Comments at 5 (data similar to that used in previous rate filings, but "should not be so closely tied to the old methods that better sources of data can not be introduced"); NPPC Comments at 8 (PRC should "rule out any presumption that cost pools not modeled by the Postal Service do not vary with worksharing").

service.” 39 U.S.C. § 3652(a)(1). The Commission can best promote clarity and meet its duty under Section 3622(e) and Section 3653 by avoiding the problems (and resulting complaints) that “leeway” would inevitably create by prescribing the costing methodologies to be used in evaluating whether worksharing discounts comply with the statute.

II. CONCLUSION

For the foregoing reasons and for the reasons set forth in its initial comments on the *Second ANPRM*, the Newspaper Association of America respectfully urges the Commission to adopt regulations that implement Section 3622(e) in a manner that meets the statutory mandate of “ensuring” that workshare discounts do not exceed the Postal Service’s costs avoided except as specifically provided by statute.

Respectfully submitted,

NEWSPAPER ASSOCIATION OF AMERICA

Paul J. Boyle
Senior Vice President/Public Policy
Newspaper Association of America
529 14th Street NW
Suite 440
Washington DC 20045-1402
202.638.4784

By: /s/ William B. Baker
William B. Baker
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006-2304
(202) 719-7255

Certificate of Service

I hereby certify that I have this 3d day of July, 2007, caused to be served the foregoing document upon the United States Postal Service and the Office of the Consumer Advocate in accordance with the rules of practice.

William B. Baker
William B. Baker

1. Contrary to ADVO, it is the choice of the Commission, not the Postal Service, as to what methodology to use in measuring cost avoidance.