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

Rate and Service Changes To Implement Baseline Negotiated Service Agreement With Bank of America Corporation

Docket No. RM2007-1

COMMENTS OF THE AMERICAN POSTAL WORKERS UNION, AFL-CIO ON PROPOSED REGULATIONS TO ESTABLISH A SYSTEM OF RATEMAKING
(September 24, 2007)

On August 15, 2007, the Postal Regulatory Commission issued Order No. 26 Proposing Regulations to Establish a System of Ratemaking. The American Postal Workers Union, AFL-CIO (APWU) commends the Commission for proposing a cogent framework for ratemaking under the Postal Accountability and Enhancement Act ("PAEA" or "the Act") in such a timely fashion. The APWU hereby respectfully submits the following comments on the Commission's Proposed Regulations.

Discovery and Public Comment

Although we recognize the purpose and effect of the PAEA to streamline the process of rate adjustments, we also observe that in establishing postal rates, it is impossible to separate issues of postal cost determination and allocation from the issue of rate compliance. Given that a 45-day notice period will not permit adequate inquiry into these issues by the Commission or by other interested parties, we respectfully request that the Commission make a rule to establish public comment and discovery procedures that will permit interested parties to determine whether proposed rates comply with statutory requirements and polices of the Act beyond the

rate cap. We recognize and respect the need for the Commission to provide a means for the Postal Service to adjust rates under the PAEA, as an alternative to another omnibus rate case under the Postal Reorganization Act. However, the prospect of a rate adjustment under the PAEA in the near future emphasizes the necessity of making provision for inquiry and comment by interested parties.

Congress has restated and reconfirmed important policies that necessitate and justify the postal letter mail monopoly. In particular, the Postal Service must "provide prompt, reliable, and efficient services to all communities" (39 U.S.C. § 101(a)), and it may not "make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user." 39 U.S.C. § 403(c). Congress has specifically reconfirmed the requirements that the Postal Service "maintain one or more classes of letter mail for the transmission of letters sealed against inspection" and that "[t]he rate for each such class shall be uniform throughout the United States, its territories and possessions. …" 39 U.S.C. § 404(c). These and other policies of the Act are the responsibility and province of the Commission.

In the past, the participation of intervenors in rate proceedings has been instrumental in providing the Commission insight and information, through discovery from the Postal Service and otherwise, to permit the Commission to evaluate rates and effectuate the policies of the Act. Under the proposed regulations (§ 3100.13(2) public comments to be filed within 20 days from the date of the Postal Service filing are to address, among other things, "[w]hether the planned rate adjustments are consistent with the policies of 39 U.S.C. § 3622 and any subsequent amendments

thereto." As a basis for such comments, the Postal Service's notice of rate adjustment is required to include discussion of how it will "help achieve the objectives listed in 39 U.S.C. § 3622(b) and properly take into account the factors listed in § 3622(c); and to include [s]uch other information as the Postal Service believes will assist the Commission to issue a timely determination of whether the requested increases are consistent with applicable statutory policies." § 3100.14(b)(7), (8).

What is left unstated by this construct is the procedure to be followed when interested parties, based on the Postal Service filing, assert that the proposed rate increases do not, or may not, comply with the statute or the regulations. Commission comments accompanying its proposed rules, explain that public comment on rate adjustments will no longer be open ended and states that "[t]he Commission does not invite, and will not entertain, public comment during the 45-day review period on matters such as costing methods." Order No. 26 ¶ 2029. This restriction on public participation would make most substantive public responses to proposed rate increases difficult or impossible. Methodology often equates to substance and if the Postal Service's chosen methodologies can go unexamined a true determination of compliance with the Act cannot be made. The Postal Service submission stating how the Postal Service believes its proposals comply with the statute will provide no more than a basis for questions or challenges. The Commission should, as promptly as possible, make specific provision for interested parties to obtain additional information from the Postal Service and to make additional submissions to the Commission. These proceedings should be available

before, and in preference to, any procedure for formal complaints that may be filed with the Commission.

It would not be appropriate or necessary for the Commission, in the name of expedition, to omit provision for this type of participation by interested parties under the amended procedures. Necessarily, any searching analysis of changed postal rates will be post hoc. But that does not mean that it should not be thorough, or that it should be relegated to a complaint process. To avoid unnecessary, and probably numerous, complaints, the Commission needs to provide a means for interested parties to obtain information and insight and to provide their views to the Commission outside the complaint process.

Workshare Discounts

Sections 3100.14(b) and (c) of the proposed regulations detail the information required to be filed by the Postal Service in support of its proposed workshare discounts. Omitted from these regulations is a process for determining whether the proposed discounts comply with the policies of the PAEA. Unlike Section 3100.13 detailing the process for rate adjustments under the annual rate limitation which make it clear that the Commission will issue a finding regarding the proposed rate adjustment's compliance with the rate cap, the workshare discount regulations do not specify that there will be a finding of compliance or non compliance, nor do these regulations make it clear when such a determination would be made, if at all. Also missing from the Commission's proposed regulations is a method for amending workshare discounts that violate the PAEA.

Section 3622(e) of the PAEA delineates requirements for the implementation of workshare discounts. Included among them is the requirement that workshare discounts "not exceed the cost that the Postal Service avoids as a result of workshare activity." 39 U.S.C. § 3622(e)(2). The Act also requires that the system of ratemaking designed "establish and maintain a just and reasonable schedule of rates and classifications." Id. at § 3622(b)(8). In addition, the PAEA re-codified the fundamental policy requiring postal rates to "apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." 39 U.S.C. § 101(d).

To give effect to the policies and other requirements of the Act, the Commission must include in its final regulations a process for determining whether the proposed workshare discounts comply with the Act and a method for correcting non-compliant workshare discounts similar to the process established for determining compliance with the annual rate increase limitation. Given the 45 day time limit it is unlikely that workshare discount compliance will be determined in advance of implementation. However, this does not mean that review of workshare discounts cannot be accomplished prior to the annual compliance review. Instead, we respectfully recommend that the Commission establish a process to evaluate workshare discounts early in the process to allow the Postal Service to make any necessary changes to noncompliant rates as soon as possible, thereby mitigating any damage caused by workshare discounts that violate the Act.

The PAEA also mandates that workshare discounts not exceed the cost the Postal Service avoids as a result of the workshare activity. Excessive discounts are permitted in some limited circumstances, but it is clear that Congress contemplated

that these excess discounts would be eliminated over time. See 39 U.S.C. §§ 3622(e)(2)(A)-(B). Thus, compliance with the PAEA requires a procedure to ensure that workshare discounts that are excessive are justified by an exception or are eventually eliminated,. The Commission's proposed regulations require justification of any proposed discount in excess of the costs avoided. We respectfully submit that the regulations must also require that the Postal Service state how it will eliminate the excess portion of any excessive discount.

Negotiated Service Agreements

In Subpart D of the proposed Regulations, the Commission would establish reasonable and appropriate requirements for the contents of the required Postal Service submission concerning a proposed Negotiated Service Agreement ("NSA"). We respectfully submit, however, that the proposed requirements do not go far enough to ensure that proposed NSAs satisfy the statutory requirements of 39 U.S.C. § 3622(c)(10).[1]

Proposed § 3100.42(b)(4) refers to "requests for clarification from the Commission." This provision permits the inference that the Commission does not provide, and may not intend to provide, a means for other interested parties to request information or clarification of information about proposed NSAs. We respectfully request that the Commission permit inquiries by other interested parties during the 45-day notice period. In addition, the Commission should spell out in its regulations what will occur if either the Commission or another interested party concludes that the proposed NSA is not in compliance with the statute or the

[1] We observe that § 3100.42(g) should make reference to "requested changes" not "requested increases."

Commission's regulations – or may not be in compliance with the statute or the Commission's regulations.

By way of background for this point, we respectfully refer the Commission to the record in MC2007-1, the Bank of America Corporation ("BAC") NSA. The APWU, as an intervenor in that case, had a great deal of difficulty in comprehending the Postal Service's use of aggregate baseline data that seemed to be out of date, instead of available current aggregate data or mailer specific data. Because of its knowledge of Postal Service equipment and operations, APWU had good reason to believe that there was better, more current data that should be used as a baseline to measure BAC's performance under the NSA. The APWU ultimately concluded that the NSA should not be approved by the Commission because the Postal Service had failed to provide information that would justify its proposal. We recognize that the 45-day notice period will not permit a similarly in-depth analysis of proposed NSAs. But that fact emphasizes the necessity of providing an additional process that permits discovery by other interested parties.

In our view, it would be inefficient and ineffective to require that other interested parties use a complaint process to engage in discovery about proposed NSAs. The APWU had not opposed any proposed NSA prior to the BAC NSA; and we did not intervene in that NSA for the purpose of opposing it. We simply could not accept at face value the submissions of the Postal Service in support of that NSA. After discovery, we are convinced that our misgivings about that NSA were well-founded. It is very troubling that the inadequate and unrevealing submissions of the Postal Service in that case might be deemed to satisfy proposed § 3100.42. If that

were the case, and if discovery by other interested parties were not permitted, the Postal Service submissions could obscure rather than reveal the effect of proposed NSAs.

We are in doubt about the intended operation of the proposed "Data Collection Plan" requirement in § 3100.43. We do not understand the phrase "annualized information on a yearly basis within 60 days of implementation of a proposed agreement," and respectfully request that it be clarified. More fundamentally, however, we observe that the required "analysis of the effects of the negotiated service agreement" (§ 3100.43(a)(2)) will only be as valid and effective as the data revealed by the Postal Service in support of the NSA. Again, the proposed BAC NSA in MC2007-1 illustrates this point. A Postal Service analysis and report using the 1999 aggregate data the Postal Service proposed to use in that case would show, incorrectly, that the NSA had been successful in incenting cost-saving actions on the part of BAC. Only discovery in that case revealed the flaws in that proposed NSA.

Exigent Requests

Section 3622(d)(1)(E) of the PAEA provides an exception to the annual rate increase limitation and allows in certain exigent circumstances a rate adjustment that exceeds the annual limitation. Subpart E of the Commission's proposed regulations delineates rules for rate adjustments in exigent circumstances. The rules specify what is required to support an exigent request and describe the procedure to be used to evaluate such a request. With a few exceptions, these regulations are comprehensive and are appropriate to implement the exigent circumstances provision of the Act.

One exception pertains to the issue of whether the Postal Service must rescind the exigent increase. Section 3100.61(a)(6) of the proposed regulations requires the Postal Service to provide "an explanation of when, or under what circumstances, the Postal Service expects to be able to rescind the exigent increase in whole or in part." But these regulations do not make it clear whether the Postal Service *must* rescind the exigent increase. There may be circumstances where the exigency need not be rescinded. For example, in a situation where the rate of inflation has caught up with exigency increase, it would be unnecessary to rescind the exigency. The regulations also do not detail the process the Postal Service must use when it does rescind an exigent increase. We respectfully suggest that the Commission establish regulations that clarify when and how an exigency increase should be rescinded.

In addition, the PAEA does not permit the implementation of exigent increases without 90 days notice and an opportunity for a public hearing and comments. 39 U.S.C. § 3622(d)(1)(E). Thus, the Act contemplates a meaningful role for the public. However, the Commission's proposed regulations severely limit the amount and degree of public participation during exigency request proceedings. The proposed regulations do not permit the public to conduct discovery, instead Section 3100.65(c) allows the public merely to submit to the Commission "suggested relevant questions that might be posed during the public hearing.". We respectfully suggest that questions submitted by interested parties should be answered by the Postal Service unless they are so irrelevant as to be unduly burdensome or are otherwise objectionable. Moreover, while the regulations do permit public comment, the issues the public is permitted to comment on are limited. We also submit that the scope of

public comments should not be restricted in the manner contemplated by the Commission's proposed rules. Inevitably, there would be circumstances where an important issue would be outside the scope of the topics permitted by the rules.

These are important issues that must be addressed in the Commission's final regulations. Without clarity and guidance from the Commission and meaningful public participation, parties subject to an exigent increase in the future may be forced to rely on Complaint proceedings to undo exigent increases.

Conclusion

For the foregoing reasons, the APWU respectfully requests that the Commission modify its proposed regulations regarding public comments and discovery, workshare discounts, negotiated service agreements and exigency requests to provide further clarification and to ensure compliance with the PAEA.

Respectfully submitted,

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