

Before The
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Regulations Establishing System of Ratemaking))))	Docket No. RM2007-1
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COMMENTS OF THE
NATIONAL POSTAL MAIL HANDLERS UNION
ON PROPOSED REGULATIONS

The National Postal Mail Handlers Union (“NPMHU”) respectfully submits the following comments on the Commission’s Order Proposing Regulations to Establish a System of Ratemaking, issued August 15, 2007, in implementation of the Postal Accountability and Enhancement Act of 2006 (“PAEA” or “Act”). The NPMHU will focus, in these comments, on a single topic – the Commission’s proposed rules, set out in Subpart E of Part 3001, with respect to the PAEA’s requirement that the Commission “establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances” 39 U.S.C. § 3622(d)(1)(E).

As a general matter, the NPMHU commends the Commission on its proposed rules, especially with respect to this issue. In particular, the NPMHU agrees with the Commission’s determination that it would be inappropriate to attempt in this rulemaking to define more precisely than does the statute when a proposed expedited rate adjustment will be justified by “either extraordinary

or exceptional circumstances.” Rather than addressing this issue in the abstract, the NPMHU agrees that it is preferable to allow the statutory terms to gather meaning through adjudication in the context of specific factual situations. By their requirement that the Postal Service provide detailed explanation for any proposed adjustment under this section, the Commission’s proposed regulations not only deter any temptation to overuse this authority, but also ensure that the Commission’s decisions implementing this provision will be made on the basis of a concrete factual record.

Having said that, however, the NPMHU is greatly concerned about certain language in the proposed regulations that suggests interpretations of the PAEA which are inconsistent with the Act’s statutory language, its legislative history, and indeed the Act’s purpose. This regulatory language could result in constraints upon the use of the § 3622(d)(1)(E) authority not intended by Congress, and therefore should be changed.

To provide a context for our comments on these specific points, we begin by briefly reviewing the history of § 3622(d)(1)(E).

As the Commission is aware, what became § 3622(d)(1)(E) was the result of a compromise reconciling the divergent language of the versions of the PAEA passed by the House and Senate. H.R. 22, as introduced and passed by the House, broadly allowed the Commission to permit rate adjustments exceeding the Consumer Price Index (“CPI”) if the Commission determined

that such increase is *reasonable and equitable and necessary* to enable 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, 109th Cong., 1st Sess. (Jan. 4, 2005) (emphasis added). The Senate's counterpart bill, on the other hand, provided much more narrowly for the Commission, notwithstanding the general CPI limitation, to "establish procedures whereby rates may be adjusted on an expedited basis due to *unexpected and extraordinary* circumstances." S. 662, 109th Cong., 1st Sess. (Mar. 17, 2005) (emphasis added).

After considerable discussion among groups of stakeholders favoring each of the two versions, a compromise between the House and Senate language ultimately was reached, as reflected in the bill introduced by Senator Susan Collins on October 11, 2006 and enacted into law in December of that year. That compromise requires the Commission to establish procedures

whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances, provided that the Commission determines, after notice and opportunity for a public hearing and comment, and within 90 days after any request by the Postal Service, that such adjustment is reasonable and equitable and necessary to enable 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.

39 U.S.C. § 3622(d)(1)(E); *see* S. 662, 109th Cong. 2d Sess. (Oct. 11, 2006).

This final language of the PAEA is significant in several respects that are relevant here:

It entirely omits the requirement of the Senate bill that circumstances justifying rate adjustments beyond the CPI must be “unexpected.” The compromise version replaces that word with “exceptional.”

The compromise language eliminates the Senate’s conjunctive requirement that circumstances be both “unexpected *and* extraordinary” (emphasis added), replacing it with explicitly disjunctive language, under which an above-CPI adjustment could be justified by circumstances that are “*either* extraordinary *or* exceptional” (emphasis added).

The compromise gave meaning to the phrase “either extraordinary or exceptional” by specifying – in adoption of the House language – what kind of findings would meet this requirement: the Commission could approve an above-CPI adjustment if it determines “that such adjustment is reasonable and equitable and necessary to enable 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.”

This consideration of the legislative history and ultimately adopted language of § 3622(d)(1)(E) leads to the following comments with respect to the Commission’s proposed regulations.

1. In Draft Regulation § 3100.61(7), the Commission proposes to require the Postal Service to justify an above-CPI adjustment request by explaining “why the circumstance giving rise to the request was neither foreseeable nor avoidable by reasonable prior action.” The Commission

explains this requirement by referring to what it describes as “the clear import of the PAEA’s overarching ratesetting philosophy that exigent requests are meant to be a safety net for dealing with *unforeseeable emergencies*.” Order No. 26, ¶ 2105 (emphasis added). This suggestion that the authority conferred by the statutory language in § 3622(d)(1)(E) is limited to circumstances involving “unforeseeable emergencies” is contrary to the PAEA’s language and legislative history in two respects.

First, Congress flatly rejected the notion that the availability of above-CPI rate adjustments was limited to circumstances that were “unforeseeable” or “unexpected.” As noted above, the original Senate bill introduced in 2005 did contain such a requirement, but in the compromise version that became law in December 2006 the word “unexpected” was specifically deleted. And, while in the original Senate bill the use of the conjunctive language “unexpected and extraordinary” made it a firm requirement that the circumstances be unforeseen, the use of the disjunctive “either . . . or” in the compromise bill made clear that circumstances had to be either “extraordinary” or “exceptional,” but not both, before the Commission should allow for an above-CPI adjustment. Thus, the Commission’s assumption that § 3622(d)(1)(E) applies only in the context of “unforeseeable emergencies,” and its proposal in Draft Regulation § 3100.61(7) to require the Postal Service to explain why the need for an above-CPI adjustment was not foreseeable, is clearly inconsistent with the intent and the enactment of Congress.

There is also a second, broader, reason why it would be misplaced to require that the circumstances giving rise to invocation of § 3622(d)(1)(E) be unforeseeable. We recognize the PAEA's reliance, as a general matter, on the CPI to limit postal rate adjustments. But the CPI is merely a statistical average of price trends, and as such it does not always accurately reflect conditions in a particular industry or sector of the economy. It is not at all unusual for businesses in a particular sector, for good and legitimate reasons, to raise their prices beyond the inflation rate that is reflected in the CPI, due to considerations specific to their industry. For example, a business that is heavily dependent on fuel costs – as is the Postal Service – must have the flexibility, at least as a last resort, to raise its prices beyond the increase in the CPI in a situation where, over a sustained period of time, fuel price increases consistently and substantially exceed the CPI increase. A rigidity that failed to allow for the necessary adjustments in such “exceptional” circumstances would doom the PAEA's approach to postal rate setting to failure.

It is for this reason that the drafters of the PAEA recognized the need for a “safety valve” for those extraordinary or exceptional circumstances in which – whether because of terrorist attack, runaway fuel prices, or for some other reason – an above-CPI rate adjustment was “necessary to enable 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.” 39 U.S.C. § 3622(d)(1)(E). Such extraordinary or exceptional circumstances might or might not be

unforeseeable. One can imagine, for example, a scenario under which entirely foreseeable, sustained increases in the cost of oil over a period of years would compel the Postal Service, in order to maintain the quality of its services, to raise its rates by a percentage greater than the increase in the CPI.

While we agree with the Commission that such above-CPI increases should be exceptional rather than routine, they may nonetheless be necessary in a variety of circumstances, foreseeable and not, and should not be implicitly or explicitly precluded by the Commission's regulations.

2. Also problematic is another requirement concerning information the Postal Service is to submit in support of a rate adjustment request under § 3622(d)(1)(E). Draft Regulation § 3100.61(6) instructs the Postal Service to explain "when, or under what circumstances, the Postal Service expects to be able to rescind the exigent increases in whole or in part." To the extent this provision may be read to imply that a rate adjustment under § 3622(d)(1)(E) can only be temporary, it is without support in the statute.

Nowhere in the PAEA is there any indication that a rate adjustment under § 3622(d)(1)(E) must be temporary. Nor is there any provision in the statute for "rescind[ing]" such rate adjustments. Rather, to the extent that the circumstances necessitating the § 3622(d)(1)(E) rate adjustment no longer exist, it is to be expected that the Postal Service would take account of these changed circumstances by foregoing, or reducing the magnitude of, subsequent rate adjustments it otherwise would have made.

Even if – contrary to what appears to be the case – it were to be assumed that the Commission had the statutory authority, where appropriate, to condition § 3622(d)(1)(E) adjustments on their rescission after a certain period of time or upon a change in the relevant circumstances, there still would be no warrant under the statute for any assumption that a § 3622(d)(1)(E) rate increase *necessarily* must be temporary.

In short, the implication from Draft Regulation § 3100.61(6) that all, or at least some, above-CPI rate adjustments will be temporary is without any foundation in the PAEA. To prevent the Commission’s regulations from giving rise to any such implication, we urge that Draft Regulation § 3100.61(6) be deleted from the final regulations to be adopted by the Commission. In the alternative, this paragraph should, at a minimum, be amended to request “[a]n explanation of *whether, and if so when, or under what circumstances, the Postal Service expects to be able to rescind the . . . increases in whole or in part*” (proposed new language italicized).

3. Finally, the NPMHU urges the Commission to reconsider its use throughout Subpart E of the word “exigent” as a shorthand for the above-CPI rate adjustments available under § 3622(d)(1)(E), as well as its frequent use of the terms “exigency” and “exigent circumstances” in its preamble discussing Subpart E.

The terms “exigent” and “exigency” appear nowhere in the statute. Nor did Congress use these terms in either H.R. 22 or in S. 662, the bills that ultimately became the PAEA.

To the extent the use of these words is intended merely as a shorthand reference, it might be thought harmless. But the frequent repetition readily leads the reader to assume – contrary to fact – that this is the relevant statutory term and the basis for determining whether rates can be adjusted under § 3622(d)(1)(E). Indeed, Subpart E is entitled, “Rules for Rate Adjustments in Exigent Circumstances.” And in its discussion of the Subpart E regulations, the Commission on multiple occasions speaks of “defin[ing] ‘exigent circumstances.’” *E.g.* Order No. 26, ¶¶ 2095, 2105.

While it may be expected that most, if not all, requests for rate adjustments under § 3622(d)(1)(E) will be “exigent” in the sense of “urgent” (and therefore will be “expedited,” as § 3622(d)(1)(E) requires), that term by no means defines the circumstances under which an above-CPI rate adjustment may be made. The test for whether such an adjustment request should be approved under § 3622(d)(1)(E) is not whether it is “exigent,” but rather whether there exist “either extraordinary or exceptional circumstances,” such that the adjustment is “necessary to enable 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.” 39 U.S.C. § 3622(d)(1)(E).

Although we appreciate the value of using shorthand terms on occasion, the Commission’s repeated use throughout its regulations of a term that Congress did not use in the statute – and that suggests a meaning not

necessarily intended by Congress – is highly misleading. It therefore should be avoided.

CONCLUSION

The NPMHU commends the Commission on its proposed regulations and on its general approach to the regulation of above-CPI rate adjustments under § 3622(d)(1)(E). In order to ensure that the regulations do not lead to inferences unwarranted by the statute’s text and history, however, the NPMHU urges the Commission (1) to delete the requirement in Draft Regulation § 3100.61(7) that the Postal Service explain why the circumstance necessitating the proposed adjustment was not “foreseeable”; (2) to delete Draft Regulation § 3100.61(6) in its entirety; and (3) to replace its use of the terms “exigent” and “exigency” throughout Subpart E and the preamble with terms that more accurately reflect the statutory language and congressional intent underlying § 3622(d)(1)(E) of the PAEA.

Respectfully submitted,

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