

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001**

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**REPLY COMMENTS OF THE  
ASSOCIATION FOR POSTAL COMMERCE**

Although some issues were raised in the initial round of comments on the proposed rules, at least one major consensus emerged: the Commission has generally outlined a streamlined ratemaking process consistent with the PAEA and its purposes. In these Reply comments, the Association for Postal Commerce ("PostCom") addresses several matters that threaten to overly burden the rate review process or complicate the Commission's rules. We address these matters in three sections below, which concern the proposed rules applicable to each of the three types of rate adjustments the Commission identified.

**I. Rules for Rate Adjustments of General Applicability (Type 1 Rate Adjustments)**

Despite the general consensus supporting the PAEA's streamlined process, a few parties seek to return the PAEA to the same burdensome ratemaking regime that existed under the Postal Reorganization Act ("PRA").<sup>1</sup> Plainly, such arguments cannot be

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<sup>1</sup> See, e.g., *Comments of American Postal Workers Union, AFL-CIO* (September 24, 2007) (seeking an extra-statutory comment and discovery period to consider whether the proposed rates comply with the requirements and policies of the Act beyond the rate period); *Office of the Consumer Advocate Comments*

countenanced. As PostCom explained more fully in its initial comments, the Commission should limit its review procedure for Type 1 rate changes to considering whether the proposed increase complies with the CPI cap. This approach is mandated by statute and should be followed whenever a rate change is proposed, including changes in product offerings that affect rates. To effectuate the modern process that Congress intended, the Commission must carefully tailor its Type 1 review procedure, *exclusively* using the simple pattern laid out by statute.

The proposed rules appear to authorize public comment on whether the Postal Service's request complies with other provisions of the PAEA. *See* Proposed Rule § 3010.13(b)(2) ("Public comments should address . . . Whether the planned rate adjustments are consistent with the policies of 39 U.S.C. § 3622"). Perhaps emboldened by the Commission's opening the door to public comments on compliance matters, some participants urge the Commission to provide expanded procedures that would allow for discovery – procedures that echo the procedures in place under the PRA. *See* note 1 *supra*. The Commission should not succumb to the temptation to return to the old process, a process which Congress repealed for good reason. Full pre-implementation compliance review – including such matters as whether rates fully recover attributable costs, or whether worksharing discounts exceed avoided costs – is *not* prescribed by statute. Congress did that quite intentionally: There would be no need for an annual compliance review – or a complaint procedure – if the Commission were to review any and all statutory compliance issues (other than the price cap limitation) during the pre-implementation review period afforded by § 3622(d). Thus the Commission should limit

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(September 24, 2007) (suggesting, *inter alia*, discovery procedures applicable to participants in connection with pre-implementation review).

public comment during the pre-implementation review of Type 1 Rate Adjustments to matters that bear on the Postal Service's compliance with the price cap and nothing more. For the same reason, it should not allow complaints to be filed during that period and certainly cannot reach the merits of any complaint during that period. *See Initial Comments of the Association for Postal Commerce* at 2. Section 3622(d) does not require, much less warrant, discovery and other trial type proceedings under the APA.

A number of parties ask the Commission to spell out in its rules the earliest date the Postal Service may implement a rate increase pursuant to Section 3622 of the PAEA. Based on PostCom's sense of the history of postal rate changes, it is our expectation that the Postal Service makes every effort to *not* implement more than one general rate increase in any given twelve month period. Moreover, PostCom believes that the Postal Service recognizes the burden that rate changes impose on the private sector and the need for sufficient notice prior to the effectiveness of new rates.<sup>2</sup> The experience of the Postal Service and industry in implementing the rates following the decision in R2006-1 is fresh in the minds of the industry and the Postal Service. PostCom is certainly sensitive to the concerns of mailers concerned about the risk of back-to-back increases and has every interest in working with the Postal Service to avoid a last omnibus rate case (and these problems) under the PRA. However, the issues of double counting and/or back to back increases are at this point hypothetical; if such an issue arises, the Commission can address it at that time, on a case-by-case basis, and determine whether such an increase complies with the PAEA's price cap limitation. PostCom respectfully suggests that the Commission should focus on prescribing rules that maintain their relevance for an

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<sup>2</sup> *Initial Comments of the Association for Postal Commerce* at 3, footnote 1 (September 24, 2007).

extended period of time and should not concern itself with specific situations that may or may not materialize.

One party questions whether the proposed rules implementing new rate and classification adjustments for market dominant products comply with the Administrative Procedure Act ("APA"). MedCo Health Solutions argues that a rate adjustment is a rulemaking process that is required to comply with APA procedures allowing for public participation before an agency issues rules. The short answer to this argument is that, to the extent Section 553 of the APA applies (and in a ratemaking context that is not a given), the Commission's pre-implementation rules do provide for notice and comment. The fact that the pleading cycle is expedited – to meet the statutory 45 day mandate for review specified in Section 3622(d)(1)(C) of the PAEA – does not result in a violation of the APA. *See, Asiana Airlines v. FAA*, 134 F.3d 393, 397-98 (D.C. Cir., 1998).

## **II. Rules for Negotiated Service Agreements (Type 2 Rate Adjustments)**

The Commission's proposed rules suggest that the Commission intends to conduct pre-implementation review of Negotiated Service Agreements for compliance with § 3622(c)(10). The PAEA requires no such process. Rather, § 3622(c)(10) instructs the Commission to design its ratemaking system to take into account the "*desirability* of special classifications...". Thus, if anything, the statute implies a presumption in favor of the desirability of such classifications. The proposed procedures codify what is essentially the same NSA filing requirements that exist under the PRA – and the Commission apparently intends to evaluate the NSA for compliance with § 3622(c)(10) prior to authorizing implementation of the rates. Order No. 26 ¶ 2087. As more fully explained in its initial comments, PostCom is deeply concerned that the regulatory

burdens under the PRA – burdens which prevent all but the largest customers from seeking NSAs with the Postal Service – are retained under the proposed rules. We do not believe that the Commission intends this result, but to avoid confusion and protracted litigation, the Commission must make clear that its rules specifying the information to be filed with an NSA for a Type 2 Rate change are intended solely to streamline the complaint processes specified in Section 3662 and do not trigger an automatic stay of an NSA pending the Commission's review under either (or, worse yet, both) of Part 3100 or Part 3200 of the proposed rules.

This clarification is necessary because some participants demand extensive pre-implementation review procedures for NSAs.<sup>3</sup> This demand finds no basis in the Act. The statute plainly does not authorize a public hearing for pre-implementation review of NSAs in the market-dominant category any more than it authorizes a full APA public hearing upon notice and prior to implementation of other proposed rate changes under § 3622. Indeed, the *only* opportunity for pre-implementation public hearing that the PAEA provides under section 3622(d) is for purposes of reviewing any Postal Service proposal to adjust the rates on an expedited basis in excess of the price cap due to either extraordinary or exigent circumstances. All of these claims for pre-implementation hearings on NSAs must be firmly and explicitly rejected.

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<sup>3</sup> See, e.g., *Office of the Consumer Advocate Comments* (September 24, 2007) (urging the review of NSAs according to the Bank One "Suggested Framework" established by the Commission under the PRA); *Comments of the Newspaper Association of America on Notice of Proposed Rulemaking* (September 24, 2007) (arguing that public comment on a notice of NSA should be authorized, and outlining an extensive pre-implementation review process).

### **III. Rules for Rate Adjustments in Exigent Circumstances (Type 3 Rate Adjustments)**

Some parties have requested that the Commission establish rules to prevent the Postal Service from double-recovery in its rates of cost increases resulting from extraordinary or exigent circumstances when those same circumstances have caused an increase in the CPI index. While PostCom certainly agrees that the problem of double-counting should be addressed, PostCom maintains that the Commission's rules governing extraordinary or exigent circumstances should be kept to the minimum procedures necessary to provide procedural instructions for addressing such a circumstance. Substantive matters such as potential double-counting can and should be addressed on a case-by-case basis.

Respectfully submitted,

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