

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

REGULATIONS ESTABLISHING SYSTEM)
OF RATEMAKING)

Docket No. RM2007-1

**REPLY COMMENTS OF
ALLIANCE OF NONPROFIT MAILERS AND
MAGAZINE PUBLISHERS OF AMERICA, INC.
ON ORDER NO. 26**

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The Alliance of Nonprofit Mailers (“ANM”) and Magazine Publishers of America, Inc. (“MPA”) respectfully submit these reply comments pursuant to Order No. 26, “Order Proposing Regulations To Establish A System Of Ratemaking,” issued by the Commission on August 15, 2007, and published in the Federal Register at 72 Fed. Reg. 50744 (September 4, 2007). These reply comments discuss the following:

(1) Proposals by various parties to make pre-implementation review of rate and classification proposals under PAEA more like the traditional cost-of-service ratemaking that prevailed under the Postal Reorganization Act—by adopting more burdensome filing requirements, establishing broader grounds for challenges to rate proposals, allowing discovery, and extending the period for pre-implementation review.

(2) Proposals to create an exception to the CPI cap for classes that assertedly fail to cover their attributable costs.

(3) The proper implementation of 39 U.S.C. § 3622(d)(1)(E), which authorizes above-CPI rate increases in “extraordinary or exceptional” (i.e., exigent) circumstances.

(4) Matters that, although raised by other parties, are beyond the scope of this proceeding.

I. RATE ADJUSTMENTS OF GENERAL APPLICABILITY (RULES 3010.10 THROUGH 3010.14)

A. The Commission Should Decline To Expand The Filing Requirements Or The Scope Of Pre-Implementation Review.

The rules proposed by the Commission in Order No. 26 authorize only limited review of proposed rate changes during the brief pre-implementation review period authorized by 39 U.S.C. § 3622(d)(1)(C). See Order No. 26 at ¶¶ 2026-2047 (discussing proposed rules 3010.13 and 3010.14). Several commenting parties, however, urge the Commission to expand the information that the Postal Service must submit in support of proposed rate changes, and the scope of Commission review of those rate changes:

- ***More burdensome filing requirements.*** Several parties argue that the Commission should impose more burdensome filing requirements on the Postal Service for any rate increases under § 3622(d). See NNA at 7-9 (contending that the Commission should require the Postal Service to provide cost justification for “subclass increases dramatically in excess of the price cap” even though “PAEA’s intent limits the Commission’s ability to correct disproportionate rate increases,” and “imposition of standards not explicitly found in PAEA might exceed the Commission’s authority”); Valpak at 10 (USPS should be required to provide a “complete explanation” of how its rate changes comply with “**each** of the objectives listed in 39 U.S.C. § 3622(b)

and properly take into account **each** of the **factors** listed in § 3622(c)” (emphasis in original).

- **Broader scope of challenges to proposed rate and classification changes.** Several parties ask the Commission to allow pre-implementation challenges to rate changes proposed by the Postal Service not only on grounds of non-compliance with the § 3622(d) index cap, but also on any other ground relating to “any other policy of 39 U.S.C. § 3622.” McGraw-Hill comments at 6-8; *accord*, Valpak comments at 2-7. McGraw-Hill and Valpak also ask the Commission to authorize pre-implementation review of “major classification changes for market-dominant” mail. McGraw Hill at 2-5; Valpak at 12-16. McGraw-Hill also asks the Commission to extend the 45-day notice period upon a showing of “good cause” that more time is needed to adjudicate any challenges asserted in opposition to the classification changes. McGraw Hill at 2-5. NAA contends that pre-implementation review should encompass discrimination claims under 39 U.S.C. § 403(c). And Medco Health Solutions contends that any limitation on the scope of issues that parties may raise in pre-implementation challenges to proposed rate or classification changes would violate the Administrative Procedure Act. Medco comments at 6-10; *see also* Valpak comments at 2-7.
- **Discovery.** APWU and OCA argue that the Commission should authorize interested parties to obtain discovery from the Postal Service and “make additional submissions to the Commission” during the pre-implementation review period. APWU comments at 1-4; OCA comments at 10-11.

- **Extended period for pre-implementation review.** McGraw-Hill and several other parties ask the Commission to extend the 45-day period to the extent necessary to adjudicate such other challenges “for good cause shown.” McGraw-Hill at 7 n. 4.
- **Special review of worksharing discounts.** APWU also asks the Commission to modify proposed rule 3010.14 to allow pre-implementation review of whether “proposed workshare discounts comply with the Act.” APWU Comments at 4-6. While acknowledging that the Commission could not complete the contemplated review before the rates take effect, *id.* at 5, APWU advocates adoption of an unspecified “process” that would result in the implementation of “any necessary changes to noncompliant rates as soon as possible,” and before the “annual compliance review.” *id.*

The Commission should reject these additional constraints. Their adoption would effectively write out of PAEA the streamlined system of ratemaking contemplated by Congress and return to the litigate-everything-but-the-kitchen-sink approach of the Postal Reorganization Act.

As many of the commenting parties have noted, the purpose of the Section 3622(d) rate index mechanism is to replace “the current lengthy and litigious rate-setting process” for market dominant products “with a rate cap-based structure” and thereby to achieve “10 years of predictable, affordable rates” and a “decade of rate stability.” Cong. Rec. S11675 (Dec. 8, 2006) (Sen. Collins); *accord, id.* at S11676 (Sen. Carper); *id.* at S11676-77 (Sen. Frist). As Senators Collins and Carpers have noted:

The *primary requirement* . . . is the requirement that, for at least ten years, the system “include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers.” We intended the objectives to supersede the factors in issues affecting the system’s design.

Comments of Senators Collins and Carper (filed April 10, 2007) at 1 (emphasis added).

Superimposing traditional cost-of-service rate regulation on the new index-based regulatory system would frustrate this intent. “The 45-day period that the Act gives the Commission to review rate filing[s] is largely intended to be used to determine whether or not a rate filing is within the rate cap.” *Id.* at 2. As the Commission has found, the reliance of PAEA on a CPI-based index mechanism “represent[s] a marked shift away from PRA-style in-depth examination” and “PAEA ushers in a fundamentally different approach to rate regulation for market dominant products.” Order No. 26 ¶¶ 2026, 2029.

Hence, the Commission was entirely correct in finding that PAEA “casts [the] ratemaking apparatus [of the Postal Reorganization Act] aside and replaces it with a simpler process”; that “formal discovery, Notices of Inquiry, Presiding Officer’s Information Requests, testimony, and hearings” will no longer be authorized; and that the “proposed scope of public comment is no longer open-ended.” Order No. 26 ¶¶ 2026, 2029.¹

¹ *Accord*, PostCom (Sept. 24, 2007) at 2-5; Time-Warner (Sept. 24, 2007) at 2, 4-5. See also Advo (Apr. 6, 2007) at 2-3, 6-9; ANM-NAPM-NPPC (Apr. 6, 2007) at 6; MOAA (Apr. 6, 2007) at 2-3; PostCom (Apr. 6, 2007) at 2-3, 4-10; Time Warner (Apr. 6, 2007) at 7-9, 18-20; *accord*, ANM-MPA (May 7, 2007) at 6-7; ANM-NAPM-NPPC (May 7, 2007) at 2-6.

Finally, Medco and Valpak gain nothing by asserting that “due process” under the Administrative Procedure Act entitles interested parties to assert the same procedural and substantive challenges to proposed rate changes that were available under the Postal Reorganization Act. *Cf.* Medco at 6-10; Valpak at 2-7. PAEA entitles “any interested person” who believes that an existing rate violates a ratemaking standard of Title 39 to seek relief by filing a complaint under 39 U.S.C. § 3662. If the Commission finds that the complaint is justified, the Commission

shall order that the Postal Service take such action as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance (such as ordering unlawful rates to be adjusted to lawful levels, ordering the cancellation of market tests, ordering the Postal Service to discontinue providing loss-making products, or requiring the Postal Service to make up for revenue shortfalls in competitive products).

39 U.S.C. § 3662(c). The availability of the complaint remedy fully satisfies due process; and the Commission has no obligation to establish a duplicate set of procedural remedies before rate or classification changes take effect.

B. The Index-Based Rate Cap Imposed By 39 U.S.C. § 3622(d) Trumps The Attributable Cost Floor Of 39 U.S.C. § 3622(c)(2).

OCA and Valpak renew their proposals to allow (or require) greater-than-CPI rate increases for mail classes that fail to cover their attributable costs, either directly or through the “exigent” rate increase mechanism. OCA 18-22; Valpak 19-20. The Commission should decline these parties’ invitation to create non-statutory exceptions to the CPI-based rate cap.

(1) As ANM and MPA have previously explained in detail, the language, legislative history, and economic policies of Section 3622(d) preclude the Commission from allowing the attributable cost floor to trump the rate cap for individual classes of mail. ANM-MPA (April 6, 2007) at 2-10; ANM-MPA (May 7, 2007) at 2-3; *accord*, ABM (April 6, 2007) at 3-4; NNA (April 6, 2007) at 3-10; USPS (April 6, 2007) at 22-23. Neither OCA nor Valpak attempts to reconcile their proposals to give greater weight to the attributable cost floor with the actual language or legislative history of PAEA, or explain how allowing the attributable cost floor to trump the CPI cap would preserve the incentives for efficiency that Congress intended the CPI cap to create.

(2) By contrast, OCA's suggestion that, a class of mail that fails to recover attributable cost should be required to take the full amount of its CPI-based and banked increase authority (OCA at 21-22) is quite reasonable. As ANM and MPA noted in their April 6 comments, the Postal Service (or, under procedures authorized by the Act, the Commission) may continue to increase the rates for a class that fails to cover attributable costs by the full amount of the CPI until full coverage of attribute costs is attained. This interpretation of the statute harmonizes the rate cap provisions of § 3622(d)(1) and the attributable cost factor of § 3622(c)(2) by giving effect to both, and without frustrating the intent of Congress.

II. EXIGENT CIRCUMSTANCES (RULES 3010.60 THROUGH 3010.66)

A. The Commission Should Decline To Find That Reasonably Foreseeable Cost Increases Constitute Exigent Circumstances.

National Postal Mail Handlers Union (“NPMHU”) asserts in its comments that the Commission should find that exigent circumstances may arise from events that are entirely *foreseeable*. NPMHU at 1-7. The Commission should decline to make such a finding at this time.

The premise of NPMHU’s argument is that some cost increases may be “extraordinary or exceptional” within the meaning of 39 U.S.C. § 3622(d)(1)(E) despite being entirely foreseeable. The legislative history of this provision, however, demonstrates that the circumstances contemplated by Congress as sufficiently extraordinary to warrant above-cap rate increases were national emergencies comparable in scale and severity to the “terrorist attacks of September 11, 2001, and the subsequent use of the mail to transmit anthrax . . .” H. R. Rep. No. 108-31, 108th Cong., 2d Sess. 11, 43 (2004). Moreover, Congress, when finalizing the language that became Section 3622(d)(1)(E) by changing the phraseology from “unexpected and extraordinary” to “extraordinary or exceptional,” added the further requirement that the resulting revenue shortfall must be large enough to threaten the ability of the Postal Service “to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” *Id.*; Cong. Rec. H9160, H9162 (December 8, 2006). This language, which was added to the Senate bill during the final deliberations over its wording, makes clear their expectation that the exigency exception would be available only in rare circumstances. Moreover, the further requirement that an exigent rate increase must be “necessary” under “honest, efficient, and economical

management,” 39 U.S.C. § 3622(d)(1)(E), clearly rules out application of the exigency clause when the cost increase at issue could have been avoided by reasonable exercise of foresight and prudence (e.g., through insurance or hedging).

Perhaps there exists circumstances in which cost increases might be “extraordinary or exceptional” and foreseeable yet incapable of prevention or mitigation through “honest, efficient, and economical management.” If so, however, NPMHU has failed to identify any plausible example. The two specific examples offered by NPMHU are a “terrorist attack” and “runaway fuel prices.” NPMHU at 6. A terrorist attack on a scale large enough to threaten the Postal Service’s ability to provide adequate mail service, however, is unlikely to be foreseeable. And changes in fuel prices should never be an exigent circumstance. Fuel is a major component of the CPI; and the weighting of fuel costs in the CPI is roughly comparable to the percentage impact of fuel costs on the Postal Service’s overall budget.

Under the circumstances, the Commission should decline to rule in the abstract that exigent rate increases may be justified by cost increases that are foreseeable. If and when the Postal Service contends that such a circumstance has arisen, the Commission can resolve the issue in the context of actual facts rather than theoretical scenarios.

B. The Exigent Increase Mechanism May Not Be Applied Selectively To Circumvent The CPI Cap For Individual Classes Of Mail.

OCA and Valpak propose in the alternative to circumvent the CPI cap by allowing (or requiring) the Postal Service to single out supposedly noncompensatory classes of mail with disproportionate increases under the exigency provision of 39 U.S.C.

§ 3622(d)(1)(E). Cf. OCA at 21; Valpak at 19-20, 23-26. This proposal would be unlawful for the reasons discussed above. First, as previously explained by ANM, MPA and others, revenue shortfalls within an individual class as small as Periodicals Mail are too small to constitute “extraordinary or exceptional” circumstances under Section 3622(d)(1)(E).

Second, allowing the Postal Service to implement even a true exigent increase in a non-uniform fashion to cure what the Postal Service perceives as existing defects in the rate structure would be a misuse of Section 3622(d)(1)(E). The exigency clause is a pass-through mechanism for certain exogenous cost increases. It is not a mechanism for changing the *rate structure* without satisfying the statutory constraints imposed by Section 3622 for rate changes of general applicability.

Third, allowing the Postal Service to apply exigent rate increases non-uniformly to cure the alleged failure of individual classes, subclasses, categories or products to cover attributable costs would effectively restore the traditional link between rates and the Postal Service’s actual attributable costs, thereby attenuating or eliminating the incentive for efficiency that Congress sought to create by severing this link. ANM-MPA (April 6, 2006) at 11-12; ANM-MPA (May 7, 2007) at 6; *accord*, Collins/Carper (April 6, 2006) at 2; DMA (April 6, 2006) at 8; Pitney Bowes (April 6, 2006) at 10-11.

C. The Commission Should Adopt A Sunset Rule Requiring The Rollback Of Exigent Rate Increases.

In their September 24 comments, ANM and MPA explained that the logic of exigent rate increases requires the rescission of such increases when the cost increases that justified them (1) recede or (2) are reflected in the CPI itself. ANM-MPA

at 6-8; *accord* DMA at 9. APWU and NPMHU contend, however, that circumstances may warrant maintaining the increases in effect even when the circumstances that justified them have dissipated. APWU at 9; NPMHU at 7-8. NPMHU asserts that the Postal Service could make shippers whole by foregoing further rate increases until the CPI caught up with the cumulative rate increases; APWU hypothesizes “a situation where the rate of inflation has caught up with [the] exigency increase.” *Id.* Neither party considers, however, the scenario in which “inflation” fails to “catch up” with the previously increased rates for an extended period. In that scenario, overrecovery of costs could likewise persist for an extended period.²

III. THE COMMISSION SHOULD DECLINE TO RESOLVE MATTERS THAT ARE BEYOND THE SCOPE OF THIS PROCEEDING.

Several of the comments filed on September 24 seek relief that is beyond the proper scope of this proceeding, and should not be considered by the Commission now. For example, the Greeting Card Association advocates the adoption of various standards and procedural guidelines for complaint proceedings. GCA Comments at 1-4. To the extent that GCA is simply asking the Commission here to move expeditiously to initiate a docket to establish standards and procedures for complaints, we concur. The establishment of such standards and procedures has not been noticed in the present docket, however, and thus is beyond its scope.

² The above criticism assumes that the APWU position is identical to that of NPMHU: i.e., that rates will remain unchanged until the cumulative increases in the CPI catch up with the cumulative increases in overall rates, including the exigent increase. It is possible, however, that APWU seeks to allow the Postal Service to take *further* CPI-based increases until the cumulative changes in the CPI catch up with the cumulative rate changes. This proposal would be even worse: it would allow the cost overrecovery cost persist indefinitely, or even permanently.

CONCLUSION

ANM and MPA respectfully request that the Commission adopt final rules in accordance with these comments and the previous comments of the two parties.

Respectfully submitted,

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