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APPENDIX A

- a “comprehensive statement under section 2401(e);”
- a “performance plan under section 2803; and”
- “program performance reports under section 2804.” 39 U.S.C. § 3652(g).

Within 90 days of the filing of the Postal Service’s ACR, and after providing opportunity for public comment, the Commission is to make a determination as to whether the Postal Service’s rates, fees, and service performance are in compliance with the relevant statutes and regulations. 39 U.S.C. § 3653. Additional financial reporting is required by 39 U.S.C. section 3654, and the Commission is required to provide an annual report to Congress under 39 U.S.C. section 3651.

The ACR to be filed by the Postal Service each year replaces the extensive pre-implementation filing formerly required of the Postal Service when it requested a recommended decision for a change in rates or mail classification pursuant to former 39 U.S.C. sections 3622-24 established by the Postal Reorganization Act of 1970 (“PRA”). In Order No. 104, the Commission accurately described the ACR reporting and review provisions as “[p]erhaps the most important tools provided by the PAEA for achieving the transparency on which the new statutory scheme relies....” Order No. 104, p. 2.

Indeed, the goal of PAEA, particularly the goal of the ACR requirements, is not just transparency but to “increase” transparency. *See* 39 U.S.C. § 3622(b)(6). Therefore, the proposed regulations in this docket need to achieve the high statutory objective of “increasing” the transparency that existed under the system in place under PRA.

Section I of these comments seeks to identify lessons learned from litigation of the only Annual Compliance Review under PAEA — Docket No. ACR2007. Section II addresses ways

to protect the due process rights of mailers with respect to the Commission's Annual Compliance Determination as well as in the procedures for changing accepted analytical principles. Section III seeks to develop a standard for the Postal Service when it is required to provide textual analysis to the Commission. Section IV contains comments on specific rules, presented in the same order as the Commission's proposal. Lastly, Appendix A sets out the Commission's rules developed under PRA, and compares them to PAEA's statutory requirements and the Commission's proposed rules in this docket.

COMMENTS

I. The Commission's Rulemaking Should Be Informed by Lessons Learned from Docket No. ACR2007.

In its effort to write rules governing PAEA's requirement of an annual compliance report and review process, the Commission approaches this rulemaking with the advantage of having had actual experience in a compliance docket under PAEA (albeit one which was conducted before it was possible for the Commission to promulgate rules). In Docket No. ACR2007, the Postal Service filed an ACR based purely on its understanding of PAEA,¹ and the Commission conducted its required review using procedures developed ad hoc that it

¹ It is interesting that the Postal Service took the position in its FY 2007 Annual Compliance Report "that the inclusion of information in this transitional Report does not necessarily mean that the Postal Service believes that such information should be included in future reports under PAEA." Docket No. ACR2007, Postal Service FY 2007 Annual Compliance Report, Dec. 28, 2007, p. 2.

believed appropriate for a transitional case.² Chairman Blair explained his view that the Commission's:

[2007 annual compliance] determination and future reports will serve as action-forcing mechanisms in shedding light on postal operations and finances. These reports will provide customers, stakeholders, and the Postal Service with valuable information on which to assess annual performance.

Future ACDs will benefit from formal Commission rules that will govern Postal Service compliance submissions. Those rules will be forthcoming and the content will reflect the experiences of this first compliance proceeding. [*Id.*, cover letter.]

Certainly this is what has happened, as PAEA is being implemented through various dockets and rulemakings. The current rulemaking provides the Commission with the opportunity to transform those “action-forcing mechanisms” into rules, which will ensure that mailers and others have necessary information about Postal Service operations.

Quality Information. In Docket No. ACR2007, parties commented on the need for the Commission to require that the Postal Service provide quality information in its Annual Compliance Report. For example, the Commission observed that:

Some comments express concern about information and explanations the Postal Service has not included in its ACR. Valpak requests that the Commission's future rules require **sufficient information** to be filed with the ACR to reduce the amount of information the Commission will need to seek from the Postal Service during review. Valpak Comments at 7. It points out that the ACR is **devoid of any testimony or discussion of the costing results presented, with no comparisons with previous costs, no explanations of costs that appear out of**

² “The Postal Service's FY 2007 ACR is the first ACR filed with this Commission and represents a period of transition.” Annual Compliance Determination, FY 2007, Docket No. ACR2007, p. 6.

line, and no information on changes in operations. *Id.* at 36. Valpak expresses concern about future rate increases if the Commission does not provide mailers with an **opportunity to inquire** into anomalies in reported Postal Service costs. *Id.* at 34-35. **These comments will be considered in formulating proposed rules to govern the subsequent Postal Service reports.** [Annual Compliance Determination, Docket No. ACR2007, p. 17 (emphasis added).]

The Commission’s principal findings referenced two changes for future Postal Service presentations:

- In future reports the Postal Service must provide **additional information to explain anomalies** in data, and how its operations and rate designs are intended to advance statutory policies.
- Future presentations must be timely, accurate, self-explanatory, and not rely on undocumented calculations. [*Id.*, Principal Findings, p. 3 (emphasis added).]

The instant docket presents the Commission with the opportunity to obtain the quality information and narrative from the Postal Service that it believed necessary in Docket No. ACR2007.

Discovery Rights. The Commission also discussed Major Mailers Association’s perceived need to have greater opportunity to explore controversial issues with the Postal Service, and then referenced Valpak’s suggestion that parties be allowed “a period of discovery during the annual review.... Valpak at 7.” *Id.*, p. 18. The Commission stated that the “90-day time constraint of 39 U.S.C. section 3653 leaves little opportunity for discovery during the annual compliance review, although the Commission stands ready to moderate its current process if this proves to be necessary....” *Id.*, p. 18. Although the Commission

hinted that it may want to take a “wait and see” attitude toward discovery, Valpak would urge that the matter be considered in this docket. *See* discussion in Section II, *infra*.

Vetting Changes in Analytical Methods. The Commission agreed with Valpak and several other parties that changes in input data and analytical methods should be reviewed **before** the Postal Service uses them in an ACR (as was done in Docket Nos. RM2008-2 and RM2008-6):

Several parties have argued that there needs to be an opportunity to **vet nonperfunctory changes to input data and to analytical methods in a more thorough and deliberate procedure** than has been available here before they are relied upon in the Postal Service’s standard financial reporting to the Commission. NAPM Comments at 3-4, MMA Comments at 6, APWU Comments at 1, Valpak Comments at 36. **The Commission is in complete agreement.** In conjunction with future regulations articulating the Postal Service’s periodic reporting duties, the Commission is preparing proposals for regulations that require changes to analytical methods that the Postal Service uses to produce its periodic reports to be publicly proposed and evaluated in informal rulemaking proceedings, well in advance of the filing of its annual compliance report. [Annual Compliance Determination, Docket No. ACR2007, p. 10 (emphasis added).]

This Commission statement appears to underlie the rationale for proposed Rule 3050.11.

Need for Postal Service Narrative. Simple numerical data without corresponding analysis and discussion by the Postal Service would not serve the purposes of the ACR or assist the Commission in its determination. The Commission pointed out:

The Postal Service’s December 28, 2007 ACR filing consists of a **34-page narrative.... A significant proportion** of the ACR narrative **is comprised of a list** of market dominant products and an indication of where and how the categories of mail under the PRA “match” the products in order to decompose the costs for FY 2007 into the new product list. [*Id.*, pp. 10-11 (emphasis added).]

See discussion in Section III, *infra*.

Under-Water Products. Additionally, Valpak expressed concern about postal products which did not cover their attributable costs. Specifically, Valpak discussed “the requirement that each class must cover its attributable cost [as] not being met, and [that] the Commission must find the Periodicals class in violation of this requirement.” *Id.*, p. 68. Although the Commission decided at that time to “allow the recently adopted strategy for overcoming the Periodicals revenue-cost relationship a reasonable interval of time to succeed...” (*id.*, p. 70), the problem is likely to come up in the next review. Accordingly, Valpak urges that the Commission address the type of information it would require from the Postal Service in such a circumstance. See discussion in section IV, § 3050.20, *infra*.

Costing Anomalies. Finally, in Docket No. ACR2007, Valpak raised questions about a number of costing anomalies within Standard Mail. The Commission incorporated some of the questions about detached address labels (“DALs”) of concern to Valpak in its Information Request No. 2, and the Postal Service responded to the Commission. The issue here is not whether the Postal Service response was satisfactory in that docket, but the lessons that can be learned from that experience, which were described by the Commission as follows:

While the explanations offered ... may be legitimate, Valpak raises an important issue. The Postal Service should support its annual report with more **complete explanations**, and **discuss data which may be perceived as anomalous**, such as large variations in unit costs. With only 90 days available for the Commission to make its findings and even less time for interested parties to analyze the data and submit comments, **it is crucial to the process** that the data filed by the Postal Service is accompanied by **accurate descriptions and a thorough analysis**. [*Id.*, p. 91 (emphasis added).]

Valpak agrees completely with the Commission (*see* discussion in Section III, *infra*), and would add one further thought. In future annual compliance determinations, the Commission may not always identify and pose questions about all of the areas where additional information would be important to the review process. Mailers, admittedly with economic motivations to focus on particular issues of concern to them, are in the best position to raise these questions and present them to the Postal Service. It is best if the Postal Service files “accurate descriptions and a thorough analysis” (using the Commission’s words), but if the Postal Service fails to meet that high standard, mailers should have the right to pose discovery questions to the Postal Service to clarify matters and improve the quality of the Commission’s review process. *See* discussion *supra*.

II. The Commission Should Establish Certain Procedural Rules for the Annual Compliance Determination Concurrently with the ACR Rules as well as Rule 3050.11.

A. The Commission Should Establish Procedures for the Annual Compliance Determination.

1. Significance of the Commission’s Determination of Compliance

Under PRA, accountability and transparency of the Postal Service were achieved to some degree by a comprehensive and effective (albeit sometimes said to be “cumbersome”) pre-implementation rate case process. Mailers had due process rights to participate in those dockets, including discovery, and were able to provide expert testimony, as well as briefs, to the Commission. *See* former 39 U.S.C. §§ 3622-3625, 3628.

From the perspective of the mailing public, the system under PRA has been replaced under PAEA by the three-pronged scheme of:

- (i) brief pre-implementation **rate and classification change** review (39 U.S.C. §§ 3622 and 3633);
- (ii) extensive **annual reporting** by the Postal Service and comprehensive **compliance determination** by the Commission (39 U.S.C. §§ 3652-3654); and
- (iii) strengthened Commission **complaint** jurisdiction and power (39 U.S.C. §§ 3662-3664).

Under PAEA, the required pre-implementation rate and classification change filing is limited, with most compliance review focused on the CPI-index rate cap. The Commission has described this new pre-implementation system as “far more spare” than the ratemaking system under PRA. Order No. 104, p. 6. The brief and quick ratemaking procedure does not, and was not intended to, provide for extensive mailer input.

A corresponding rulemaking is pending in Docket No. RM2008-3 to establish procedures to exercise the Commission’s enhanced **complaint** power under PAEA, with the goal of ensuring “**due process** for all participants.” Order No. 101, p. 1 (emphasis added). Hopefully, complaints will not be a regular method of enforcement.

Under PAEA, much of the routine protection for, and protection of the due process rights of, mailers is designed to be achieved in the annual compliance reporting and determination process. This makes periodic reporting and the associated annual compliance determination central to protecting the interests of mailers. If the ratemaking and annual compliance systems are functioning effectively, the Commission should not expect to see a rash of complaints.

The Commission has compared the proposed periodic reporting rules with the previous periodic reporting rules under 3001.102-103. *See* Order No. 104, pp. 6-14. As proposed,

however, the reporting requirements correlate more closely to what was filed with a request for a recommended decision under PRA. *See* Valpak Initial Comments, Appendix A, Docket No. ACR2007, which sets out a comparison of the rate case filing requirements under PRA with the proposed requirements for the ACR. Moreover, PAEA demands an “increase” in transparency, and the particular requirements specified by section 3652 for the ACR vary from what was required in a rate case. *See also* Appendix A to these comments setting out a comparison between the content of (i) a formal request by the Postal Service for proposed changes or adjustments in rates or fees under the Commission’s Rule 3001.54, with (ii) PAEA requirements for an ACR, and (iii) the Commission’s rules for an ACR proposed in Order No. 104.

2. Developing Rules for an Annual Compliance Determination

PAEA requires opportunity for mailer input with the Commission’s review of the Postal Service’s Annual Report:

After receiving the reports required under section 3652 for any year, the Postal Regulatory Commission **shall promptly provide an opportunity for comment** on such reports by users of the mails, affected parties, and an officer of the Commission who shall be required to represent the interests of the general public. [Section 3653(a) (emphasis added).]

The following subsection of the statute requires that, within 90 days from the filing of the ACR, the Commission must make a determination of compliance or noncompliance. 39 U.S.C. § 3653(b).

The interplay between 39 U.S.C. section 3652 (Postal Service annual reporting to the Commission) and section 3653 (annual determination of compliance by the Commission) is

obvious and significant. The Commission's annual compliance determination ("ACD") (defined in proposed Rule 3050.1(d)) could not be made without the information filed with the ACR, and the ACR would not have as much significance without the Commission's ACD.

Order No. 104 acknowledges the interplay, referencing 39 U.S.C. section 3653 in several places. The Commission lists three statutory provisions which it has said are "[p]erhaps the most important tools provided by the PAEA for achieving the transparency on which the new statutory scheme relies": 39 U.S.C. section 3652 (the ACR), section 3651 (the Commission's annual report to Congress), and section 3653 (the ACD). Order No. 104, p. 2.

The Commission recognizes its responsibility under section 3653 in proposing certain Postal Service reports to be submitted more frequent than annually: "Due to the short time 39 U.S.C. 3653 allows the Commission to produce its compliance determination, it is necessary for the Commission to stay as current as possible on the financial and operating performance of the Postal Service as the reporting year unfolds." *Id.*, p. 22. Also, the Commission used the criteria for its determination of compliance from section 3653 in proposed Rule 3050.20, requiring Postal Service analysis of whether the Postal Service has maintained compliance with those criteria.

It is important that the Commission move expeditiously to adopt procedural rules to implement 39 U.S.C. section 3653 — to provide for participation of interested persons in the procedures culminating in issuance of the ACD, including discovery and comment — along with its proposed regulations to implement section 3652 and its periodic reporting rules. Similar to proposed Rule 3030.1(a) relating to complaint procedures (*see* Docket No. RM2008-

3, Order No. 101), Valpak suggests the following be incorporated at the beginning of Rule 3050.11: “Part 3001, subpart A, applies to the annual compliance review.”

The public has virtually no role in development of the Postal Service’s ACR, except for the right to petition for a change in accepted analytical principles used in preparing the ACR (and presumably to participate in rulemakings initiated by other parties, *see* section IV, *infra*). Preparation and submission of the ACR are wholly the responsibility of the Postal Service. On the other hand, the public, *i.e.*, “users of the mail” and “affected parties,” are statutorily allowed to participate in the review procedure established by section 3653.

For guidance in establishing procedures, one can look to the single annual compliance review docket thus far. In Docket No. ACR2007, the Commission provided periods of 30 days to submit initial comments and 14 days thereafter for reply comments. *See* Notice of Filing of Annual Compliance Report by the Postal Service and Solicitation of Public Comments (Dec. 31, 2007). The Commission did not expressly provide for formal discovery, and with the exception of questions presented to the Postal Service by the public representative (filed Jan. 29, 2008), no discovery by parties was filed with the Commission.

It is submitted that the protections in Docket No. ACR2007 constitute the bare minimum that appears to be required by the statute, and the Commission should provide for more to get the benefit of mailer input. Valpak requests that the Commission implement regulations establishing³:

³ Although it may be that these procedural rules could be implemented before the upcoming annual compliance review for FY 2008, the Commission could, if it chose to do so, implement such procedures without final rules on an ad hoc basis, as it did in Docket No. ACR2007.

- Allowance of written discovery to the Postal Service for the purpose of clarification of issues that were presented in the ACR under consideration, in addition to any informal technical conferences. Such clarification of issues would enhance mailer and Commission understanding of the ACR and make mailer input more accurate and useful to the Commission.
- The provision of 60 days for initial comments and reply comments. The Commission could provide for 45 days from its notice as a deadline for initial comments, with another 15 days for reply comments. This would provide interested parties a reasonable period of time to review the Postal Service's voluminous information, and the Commission still would have enough time to take such comments into consideration.

Finally, under PAEA, any determination of noncompliance proceeds as a complaint under 39 U.S.C. section 3662 and, thus, would be subject to the Commission's complaint procedures. *See* 39 U.S.C. § 3653(c). A significant portion of the procedural rules that would implement section 3653 are already in the process of being formulated in Docket No. RM2008-3. Therefore, it does not appear that implementing procedures under section 3653 would be particularly burdensome for the Commission at this point.

B. The Commission Should Clarify Procedures for Changes under Rule 3050.11.

Proposed Rule 3050.11 sets forth procedures governing Commission review of a petition to change an accepted analytical principle. Some of the procedures specifically address such petitions, and some of the procedures refer to discovery. Subsection (c)(1) states that if the Commission issues a notice of proposed rulemaking, it will be evaluated under 5

U.S.C. section 553.⁴ However, the proposed rules do not explicitly incorporate the general rules of practice of Part 3001, Subpart A of the Commission's Rules.

The first question that comes to mind upon reading Rule 11 has to do with the procedures when the Commission initiates a change, *i.e.*, without a petition by the Postal Service or any other party. Will the Commission publish a notice of proposed rulemaking, as in subsection (c), or will there be some form of discovery or other public fact-finding before such a notice is filed? One would have to assume that, at a minimum, the Commission would make an evaluation under 5 U.S.C. section 553, although this is not expressly stated in Rule 11. In other words, subsections (a)-(c) ("Form and content of petition"; "Procedures for processing petition"; and "Action on the petition") all appear to be designed to address a "petition," which is not what the Commission has labeled its own initiation in the first sentence of Rule 11. If subsections (a)-(c) are to apply to the Commission's institution of a proceeding under this rule, this could be made clearer.

Secondly, in the time between the filing of a petition by an interested person and the Commission's determination to issue a notice of proposed rulemaking (subsection (c)), proposed Rule 11 provides for the possibility of discovery, if the Commission so orders. However, the rule does not express what procedures will be in place, or what rules will govern any discovery that may be available. Just as the Commission has proposed with respect to

⁴ "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose...." 5 U.S.C. § 553(c).

proposed Rule 3030.1(a) relating to complaint procedures (*see* Docket No. RM2008-3, Order No. 101), Valpak suggests the following be incorporated at the beginning of Rule 3050.11:

“Part 3001, subpart A, applies to petitions filed under this section that meet the form and content requirements of this section unless otherwise ordered by the Commission.”

III. Certain of the Commission’s Rules Should Require the Postal Service to Provide a Narrative Setting Forth a Full and Detailed Explanation of the Matters and Data Being Reported.

A. Proposed General Rule for All Postal Service Reports/Explanations under Part 3050

Several of the Commission’s proposed rules would require the Postal Service, in complying with various reporting obligations, to provide an explanation by narrative information, but they express that requirement differently — such as by “analysis” (*e.g.*, proposed Rule 3050.20), by “brief narrative explanation” (*e.g.*, proposed Rules 3050.2(a) and 3050.13(a)), and by “report” (*e.g.*, proposed Rules 3050.21, 3050.22, and 3050.23).

In part, this difference in nomenclature may be intended. For example, proposed Rule 3050.13(a)’s requirement for “a **brief narrative explanation** of any changes to accepted analytical principles that have been made since the most recent [ACD] was issued, and the reasons that those changes were accepted” (emphasis added) might be different in nature and scope from the “list and **summary description** of any transportation contracts whose unit rates vary according to the level of postal volume carried” (emphasis added) required by proposed Rule 3050.22(i).

Nevertheless, insofar as the reporting process contemplated by the proposed rules demands a narrative explanation by the Postal Service, that requirement, if submitted, should be as uniform and as precise as possible. Valpak would recommend the phrase “**a narrative setting forth a full and detailed explanation**” as the standard language to be used in the rules to spell out the Postal Service’s duty to analyze, report, list, or explain an item under the Part 3050 periodic-reporting rules.⁵

In the absence of such a standard, the Postal Service might not feel compelled to provide the kind of detailed explanation that would benefit not only the Commission, but interested mailers as well. For anyone who is under the compulsion to provide “a narrative setting forth a full and detailed explanation” of a particular item, it should be difficult to avoid submitting an understandable and informative report.

Such a standard would neither offset nor diminish any of the existing reporting requirements in the proposed rules. Instead, it would impose an interpretative addition to such existing reporting requirements, to confirm the nature of the Postal Service’s reporting obligation. It could be adopted, for example, as Rule 3050.1a, as follows:

Rule 3050.1a. Full and detailed explanation. Where the rules in this Part require the Postal Service to file or otherwise submit an explanation, including the explanatory reports, analyses, lists, estimates, and other such items required by the various rules in Part 3050, the Postal Service shall provide a narrative setting forth a full and detailed explanation, providing the information requested, such as how the items in question were

⁵ It may be that the Postal Service is already under an obligation to provide a sufficient explanation of the items it is required to report or analyze under the proposed rules. Nevertheless, standardized language would provide useful uniformity and substance with respect to the Postal Service’s reporting obligation.

calculated and/or determined, how they differ from such items in the immediately preceding report of the same type, and how they comply with the requirements of the law and/or those imposed by the Commission.

B. Specific Rule for Postal Service Compliance Analysis.

One of the most important responsibilities imposed on the Commission by PAEA is the annual compliance determination:

(b) Determination of Compliance or Noncompliance. — Not later than 90 days after receiving the submissions required under section 3652 with respect to a year, the **Postal Regulatory Commission** shall make a **written determination** as to —

(1) whether any **rates or fees** in effect during such year (for products individually or collectively) were not in **compliance** with applicable provisions of this chapter (or regulations promulgated thereunder); or

(2) whether any **service standards** in effect during such year were not met.

If, with respect to a year, no instance of noncompliance is found under this subsection to have occurred in such year, the written determination shall be to that effect. [39 U.S.C. § 3653(b) (emphasis added).]

To assist the **Commission** in making that determination, proposed Rule 3050.20 requires the **Postal Service** to “include an analysis of the information [in the ACR] in sufficient detail to demonstrate that ... all of its products ... comply with all of the applicable provisions of chapter 36 of title 39 and the regulations promulgated thereunder, meet the goals established under 39 U.S.C. 2803 and 2804, and promote the public policy objectives set out in title 39.” The way in which proposed Rule 20 is currently written may invite a boilerplate response that all rates comply with all aspects of the law. Such conclusory statements are not helpful to anyone.

This proposed Rule should be made more explicit with respect to the Postal Service's required analysis, and the analysis could be subject expressly to the standard set forth above — that is, that the Postal Service's analysis include **a narrative setting forth a full and detailed explanation** with respect to the required issues.⁶ Indeed, this reporting obligation is fundamental vis-a-vis the Postal Service's performance under PAEA, and due care should be taken in writing proposed Rule 3050.20 to encourage the Postal Service to provide sufficient narrative to facilitate comprehension of the mass of data being provided.⁷

Recommendations. Certain matters should require additional explanation. For instance, whenever Postal Service reports for a cost segment or a rate category indicate a change in unit costs that is, relative to the prior Annual Compliance Review, outside the bounds of the CPI plus or minus 5 percentage points, the Postal Service should be required to identify and explain, to the best of its ability, the reason for the change.⁸

Further, whenever Postal Service cost studies generate costing anomalies — such as where the street cost of handling saturation flats is less than DPS'd letters — the Postal Service should be required to identify each anomaly of which it is aware and explain, to the best of its ability, the reason for the anomalous result. The language proposed herein would do much to

⁶ It is recommended that such a standard be expressed in the regulation even if the suggested regulation proposed in part A, above, is adopted by the Commission.

⁷ The Postal Service's compliance analysis in its FY 2007 ACR was abbreviated, at best. The "narrative explication" requirement recommended herein might do much to improve Postal Service performance in subsequent ACRs.

⁸ To illustrate, if the CPI has increased by 4.0 percent, then the Postal Service should explain changes in unit cost that decrease by more than 1 percent, or increase by more than 9 percent, which is the 4 percent change in the CPI \pm 5 percent.

ensure that the Commission and the public receive a meaningful explanation from the Postal Service.

In Docket No. RM2007-1, in response to Order No. 26, Valpak filed comments on proposed regulations governing ratemaking (Sept. 24, 2007). In Order No. 26, the Commission had referred to the burden of proof imposed on the Postal Service to explain how its rates meet the objectives and factors of the PAEA. Order No. 26, p. 23, ¶ 2043. In discussing a proposed rule with respect to the Postal Service's reporting burden, Valpak suggested, *inter alia*, that the regulations could require the Postal Service to provide, in addition to a representation that its rates comply with PAEA, "a complete explanation' rather than only 'a discussion' of how its rates for 'each product' 'will help achieve' 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).'" Docket No. RM2007-1, Valpak Comments (Sept. 24, 2007), p. 10. Noting the requirement in the proposed regulations that an "explanation must be provided if new unused rate authority will be generated for a class of mail that is not expected to cover its attributable costs (Order No. 26, p. 19, ¶ 2031), Valpak pointed out that this was "the only statement in the proposed regulations that explicitly discusses the requisite Postal Service response in the event that revenues from a class of mail did not cover the attributable costs of that class to effect compliance with section 3622(b)(8) and section 3622(c)(2) of PAEA." As Valpak stated, requiring the Postal Service to identify and explain major changes in unit costs and costing anomalies at the time the Annual Report is filed would, at a minimum, greatly improve transparency and accountability. Valpak Comments, pp. 19-20. And, pointing out the need for an explanation from the Postal Service in proposing certain rates, Valpak stated:

Notwithstanding the Commission's reluctance to require written justification for individual rates, at least under the circumstance where an entire class (or product) of mail has been the recipient of a cross-subsidy because revenues from that class (or product) failed to cover its attributable costs (either in the last fiscal year or the latest fiscal year for which data are available), it is necessary to enhance transparency and accountability by requiring the Postal Service provide a detailed justification supporting its proposed rates and explaining how far those rates will go towards elimination of the cross-subsidy to effect compliance with section 3622(b)(8) and section 3622(c)(2) of PAEA. [Valpak Comments, p. 20.]

For these reasons, having the Postal Service identify and explain major changes in unit costs and costing anomalies at the time the Annual Report is filed, at a minimum, would improve transparency and accountability greatly. In the absence of such an explanation, mailers would need to search for such peculiarities on their own and, even if found, mailers would be left wondering about the relevant facts and their significance, because they would have received no explanation from the Postal Service. As the time frame for mailer review is strictly limited, imposing such a specific requirement on the Postal Service, resulting in the sharing of significant information with the Commission and interested parties, would be a constructive step toward accomplishing the statutory goals envisioned in 39 U.S.C. section 3653.

IV. Section-By-Section Comments.

The following comments track the Commission's proposed rules in Order No. 104, offering Valpak's views on the proposals, as well as several suggestions with respect to revisions to the language proposed by the Commission.

§ 3050.1 Definitions.

“Analytical principle” is defined as “a particular economic, mathematical, or statistical **theory, precept, or assumption** applied by the Postal Service in producing a periodic report to the Commission.” Section 3050.1(c) (italics original, emphasis added).

The proposed definition appears to be too narrow. For example, the Commission intends for a change in a regression model to be viewed as a change in an analytical principle. *See* Order No. 104, p. 28. Regression analysis (or any other statistical analysis) may be viewed as a tool or a technique, or even a method, but it is not commonly understood to be a “theory,” or a “precept,” or an “assumption.” Accordingly, the proposed definition of “analytical principle” should be broadened appropriately. This minor problem could be remedied by replacing the proposed phrase “theory, precept, or assumption” with the new phrase “theory, precept, assumption, method, or technique.”

§ 3050.2 Documentation of periodic reports.

Section 3050.2(a) — Making Error Correction Transparent. Section 3050.2(a) requires, *inter alia*, that when periodic reports are submitted to the Commission, the Postal Service must identify:

- i. changes in input data;
- ii. changes in quantification techniques; and
- iii. corrections of any errors.

Although the first and third factors would change substantively the results in the periodic report, the second factor should not. As to the third factor, to allow the causes of corrections to be understood and the effects of corrections to be traced, corrections should be presented by the Postal Service in such a way that the program can be run with and without the correction.

Otherwise, the effect of the correction could be masked by other factors. A more transparent presentation could be achieved by adding the following sentence at the end of the section —

Corrections should be presented in a manner that permits replication of the calculation both before, and after, correction of the error.

Section 3050.2(d) — Delayed Filing of Documentation. In certain circumstances, subsection (d) authorizes delayed “[f]iling of portions of the documentation required by this section that are not time critical...” The “documentation” that can be deferred is somewhat ambiguous — it probably refers to section (b) “workpapers” and section (c) “spreadsheets,” but not section (a) identification of changed input data, changed quantification techniques, corrected errors, and the associated narrative explanation of each. To clarify that this is the meaning intended, Valpak suggests that section (d) be modified by inserting after the word “documentation” the following limiting language: “required by subsections (b) and (c)....”

§ 3050.3 Access to information supporting Commission reports or evaluations.

Section (a) states that “[t]he Commission shall have access to the following material...”⁹ It is hoped that describing “access” with reference only to the “Commission” does not leave the mis-impression that only the Commission would have access to such material. Indeed, such an interpretation would be inconsistent with section (b), which

⁹ It could be argued that this provision is unnecessary, as proposed section 3007.2 (in Docket No. RM2008-1) states generally: “The Commission or its authorized representative may require the Postal Service to provide any information, documents, and things in its possession or control, or any information, documents, and things that it can obtain through reasonable effort and expense, that are likely to materially assist the Commission in its conduct of proceedings, in its preparation of reports, or in performance of its functions under title 39.” Nevertheless, we can identify no reason not to include this provision in Rule 3050.3.

anticipates that all such information would be publicly disclosed unless the Commission determines to withhold it under proposed Part 3007 (“Treatment of Non-public Information Provided by the Postal Service”) now being considered in Docket No. RM2008-1 (“Regulations to Establish Procedure for According Appropriate Confidentiality”). There should be no tension between subsections (a) and (b) since it is generally understood that — apart from documents protected under proposed Part 3007 — the Commission would make available to the public on its website all other information received from the Postal Service.

§ 3050.11 Proposals to change an accepted analytical principle applied in the Postal Service’s Annual Report.

The “preamble” to this section states that “any interested person, including the Postal Service or a Public Representative, may submit a petition to the Commission to initiate such a proceeding.” Order No. 104, p. 42 (emphasis added). After the preamble, the following subsections detail: (1) the form and content of any petition submitted under this rule; (2) the procedure for processing petitions; and (3) action on the petition.

Preamble — Public Representative. The Commission’s reference to “a Public Representative” initiating a proposal to “change an accepted analytical principle” raises a problem like that presented by a similar reference in the Commission’s proposed complaint regulations (Docket No. RM2008-3, “Rules for Complaints”). At present, the Commission has the practice of appointing Public Representatives in different dockets, but only **after** the docket is initiated by formal order, rather than there being one head of the Office of the Consumer Advocate/Public Representative in place at all times. In such a situation, it is unclear whether anyone among the Commission’s rotating Public Representatives could initiate

a change in an “accepted analytical principle.” *See* Valpak Initial Comments in Docket No. RM2008-3 (Oct. 6, 2008), pp. 7-15.

However, the reference in the instant section to “a” Public Representative is a bit more permissive than the language used in proposed Part 3007, as it could be interpreted to allow any appointed Public Representative to exercise such authority.¹⁰ Alternatively, it could be interpreted to allow the Public Representative in the Annual Compliance Determination docket to make such a proposal, but that could work only during the brief time that docket is pending. Under this view, the proposed regulatory language would be rendered meaningless during the rest of the year when the Annual Compliance Determination docket is not pending. Such an interpretation should not be made. *See id.*

It is submitted that the only effective way to remedy this and other related problems is for the Commission to return to the practice of appointing one head of the Office of the Consumer Advocate who would serve as Public Representative generally and in all dockets. *Id.*, pp. 7-15.

Subsections (a)(2) and (c)(1) — Oral Proceedings. Proposed Rule 3050.11 twice refers to the possibility of parties addressing an issue to the Commission **orally** in lieu of writing, with respect to changes in analytical principles.

- “To expedite its evaluation of the data request, the Commission may, after reasonable public notice, order that answers or objections be presented **orally** or in writing.” Rule 3050.11(a)(2) (emphasis added).

¹⁰ According to the Commission’s website, there have been eight different Public Representatives appointed in 15 different proceedings under the current practice. *See* http://www.prc.gov/PRC-DOCS/home/info_for_mail_comm/Public%20Representatives.pdf

- Interested parties will be afforded an opportunity to present comments and reply comments, either **orally** or in writing, at the Commission’s discretion.” Rule 3050.11(c)(1) (emphasis added).

Further, in discussing what it terms “expedited rulemakings” for “improvements in the data and methods that the Postal Service uses,” Order No. 104 explains that “[w]here expedition requires it, discovery may take the form primarily of **oral** questions answered in real time, such as **informal technical conferences**.” Order No. 104, p. 34 (emphasis added).

Such proposed use of oral procedures raises concerns. Certainly, the reference in the explanatory information in Order No. 104 makes great sense, as “informal technical conferences” could be helpful in understanding certain issues in a timely manner. However, focusing on the text of the proposed rules, it is difficult to understand how oral “answers,” “objections,” “comments,” and “reply comments” would be helpful in dealing with some of the most complex, sometimes arcane, and significant matters that come before the Commission.¹¹ Of course, both provisions reference Commission discretion, but the rules should not preserve Commission discretion to use an approach which almost certainly would add confusion to a proceeding and, possibly, would restrict the due process rights of interested parties.

Accordingly, Valpak urges the Commission to modify proposed Rule 3050.11, as follows:

¹¹ Oral commentary presented before a regulatory commission by lawyers (who may lack an in-depth understanding of technical details pertaining to changes in analytical principles), would rarely be as useful as thoughtful, written commentary. A modern ratemaking system, when dealing with technical matters, should obtain views and opinions from the most informed experts available in the most useful manner available — in written form.

- (i) incorporate a reference authorizing oral informal technical conferences as discussed in the Commission’s commentary; and
- (ii) eliminate the two other references to oral proceedings.

However, if the Commission chooses to preserve the right to have oral proceedings, it would be better if these proceedings are not be presented as **alternatives** to written proceedings, but **supplementary** to them. The language “orally or in writing” is presented in the disjunctive, but it does not appear intentional or desirable that addressing an issue orally should necessarily preclude addressing the matter in writing. Valpak suggests that this section be amended to reflect that an issue always would be able to be addressed in writing, but in certain important cases **also** might be addressed orally.

Subsection (b) — Missing Role of Other Parties. The proposed rules authorize the Commission to “order” the “petitioner” and/or the “Postal Service” to provide experts on the subject matter “to participate in technical conferences, prepare statements ... or be deposed.” Although the Commission may not have the authority to “order” someone other than the “petitioner” or the “Postal Service,” there is no express authority in this rule for expert testimony to be filed by other parties. However, this type of administrative proceeding is not a private two-party dispute between the petitioner and the Postal Service. Whenever a mailer or other petitioner seeks a change in an analytical principle, it is almost inevitable that the effect of the change would be imposed on all other affected mailers. Therefore, it is to be anticipated that other parties will want to offer expert testimony, participate in technical conferences, etc.,

and the rules should permit this.¹² The role of other parties can be made express by replacing “the Commission may order that the petitioner and/or the Postal Service” with “the Commission may order that the petitioner, any interested persons, and/or the Postal Service.”

The due process rights of mailers are not protected by the provision in subsection (c)(1) that after discovery interested parties may file comments and reply comments. Such a right to participate only at the end of the proceeding is analogous to trying to argue that a citizen’s right to vote is vindicated by being able to vote for one of the two major party candidates in the general election, even though the voter was barred from voting, working and giving during the earlier conventions, primaries, and caucuses where the party’s candidates are selected. The rule should provide for full participation by interested persons at a stage in the proceedings earlier than when the final rules are presented.

If the rule were not changed to allow early mailer participation, then one could reasonably anticipate that, once any mailer files a petition under proposed Rule 3050.11, every other mailer who has an interest in the area would respond by filing a separate petition to initiate a similar proceeding on the same issue, and then seek consolidation of those proceedings. Mailers should not be required to jump through such hoops, which are cumbersome for everyone, including the Commission, to preserve their right to procedural due process.

¹² A recent example would be the “Recommendations for Improving the Periodicals Class,” appended to the Initial Comments of Time Warner, Inc. in Response to Order No. 99, filed in Docket No. RM2008-2. Were that document filed as a petition, it is almost certain that other parties would want to participate fully from the outset.

Further, proposed Rule 3050.11(b) is unclear with respect to the provision that experts may “be deposed by officers of the Commission.” It is unclear if “officers of the Commission” are the same as the “Public Representative” referenced in the preamble to this section. If the rule anticipates the Public Representative having a right to depose a witness not enjoyed by the petitioner, this would not be sensible or fair. And if the rule anticipates that staff of the Commission would be able to depose a witness, it would put the Commission in the untenable role of both litigating and deciding the case. The intention of this provision should be clarified and the matter resubmitted for comment.

General — Experience from Prior Dockets. The rules under consideration in this docket can benefit from the Commission’s experience with proposals to change analytical principles — in the form of proposed changes to costing methodology — in prior dockets. Specifically, this experience illustrates the need for (i) transparent procedures, open to all interested parties, (ii) a full vetting of proposed changes, including the possibility of discovery as well as comments, and (iii) deliberate consideration by the Commission.

In Docket No. RM2008-2, for instance, the Postal Service proposed a number of what it described as “relatively minor changes in costing methodology” with “hopes that most of these proposals ... will not be controversial.” Request of the United States Postal Service for Commission Order Amending the Established Costing Methodologies for Purposes of Preparing the FY 2008 Annual Compliance Report (Aug. 11, 2008), pp. 1-2. It requested an expedited decision so that any approved changes could be implemented in the FY 2008 ACR.

As it turned out, Proposal No. 1 represented a first step towards developing a methodology to estimate incremental costs. To consider this change “relatively minor” is

more than a stretch, as comments in response to this proposal made clear. Moreover, the lack of clarity about the Postal Service's intent with respect to how it planned to incorporate incremental costs into the Cost and Revenue Analysis ("CRA") Report could have been enlightened by discovery. For further discussion on this topic, see the discussion of section 3050.23, *infra*.

Another proposal, No. 7, would change the distribution key used to attribute the costs of Vehicle Service Drivers ("VSDs") (cost segment 8), on the theory that no mail entered at destination delivery units ("DDUs") would ever utilize transportation costs between SCFs and DDUs. Five parties responded, and all opposed the Postal Service's proposed change. The Commission nevertheless gave Proposal No. 7 tentative approval, but wisely said that it plans to revisit this issue within one year. Subsequent events already have shown the wisdom of the Commission's decision. On September 26, 2008, the Postal Service received comments in response to its notice requesting comments regarding "New Automation Requirements for Detached Address Labels." *See* 73 Fed. Reg. 50,584 (Aug. 27, 2008). The Postal Service's proposed rule would require that detached address labels accompanying saturation mailings of Periodicals or Standard mail flats be automation-compatible and have a correct delivery point POSTNET barcode or Intelligent Mail barcode with an 11-digit routing code. The stated rationale for the proposed rules is to eliminate carrier casing of DALs in favor of processing on DPS equipment.

Valpak's comments submitted in response to the Postal Service notice reveal new reasons to be concerned as to whether the Postal Service is correct in its assumption that DDU-entered mail would never be transported to SCFs. If flats and parcels with DALs are DDU-

entered, processing of DALs on DPS equipment would require them to be shipped both to and from SCFs. If the host piece is kept with the DALs, this DDU-entered volume too would be given round-trip transportation by VSDs. Therefore, the Postal Service DAL rulemaking could affect substantially the amount of DDU-entered mail shipped back and forth between the DDU and SCFs. These considerations bear directly on the merits of the Postal Service's proposed change in costing methodology.

General — Need for Greater Transparency. The proposed rule governs situations in which the Postal Service (among others) could institute a proceeding before the Commission to change an accepted analytical principle. This provision needs to be modified, as it would permit, under PAEA, the Postal Service to continue (in many circumstances) to keep changes in an “analytical principle” completely internal, without any public awareness, until the last minute that it is actually proposed, as has been done under PRA. The problems associated with not ensuring transparency under the existing and proposed practices can be illustrated in a variety of ways.

First, take the situation where the Postal Service, on its own initiative, wants to conduct a study that is designed to change an accepted analytical principle that would have major changes for mailers. Neither the current nor the proposed rules require the Postal Service to notify the mailing public, or the Commission, about such a contemplated change until it is virtually a *fait accompli*.

Under PRA, the Postal Service routinely undertook a variety of special studies between rate cases. Some of those studies were in response to suggestions by the Commission in prior *Opinion and Recommended Decisions*, while some were initiatives of the Postal Service.

(Rarely, if ever, were all studies suggested in the *Opinion and Recommended Decision* acted upon.) However, until the next rate case was filed, intervenors rarely knew what studies were completed (or underway) and what studies would require study and a response. Such surprises, coming as they did in the context of a complex rate filing, gave the Postal Service an enormous tactical advantage in overcoming opposition, and “transparency” was lacking until the case was filed.

Under PAEA, circumstances are improved somewhat, as changes in “analytical principles” are separated from rate increases and focused on separately, avoiding the difficulty for mailers of, for example, simultaneously analyzing costing changes and rate proposals. Yet, while this separation promotes the goal of transparency under PAEA, nowhere does proposed Rule 3050.11, as currently drafted, **require** the Postal Service to reveal the existence of important studies beforehand. Thus, important studies designed to change accepted analytical principles seemingly could be initiated, executed, and then reviewed and vetted within the Postal Service without anyone outside the Postal Service having any idea that a change is even in the works.

Second, suppose the Postal Service, on its own initiative and without telling anyone (*i.e.*, as under PRA), (1) executes its own study designed to change an accepted analytical principle, and (2) then presents it to the Commission along with a petition to change the accepted analytical principle — in other words, the completed study is presented essentially as a *fait accompli*.¹³ Only in its finished form does the study become “transparent.” This *fait*

¹³ In rate cases under PRA, the vast majority of special studies were done by the Postal Service. To the extent that intervenors did any kind of study, those studies almost

accompli scenario is not consistent with the “ultimate responsibility” role which the Commission believes that it has. *See, e.g.*, Order No. 104, pp. 26, 30-31. If the intent of this rule is to permit the Postal Service to conduct studies in secret, and unveil them publicly as a finished product with limited procedural due process protections for mailers to challenge the results, then in order to have some minimum guarantee of accountability, the rule must provide for an early notice, well before Commission action is required.

Third, assuming, *arguendo*, that the Postal Service proceeds in the manner just described, what next? The proposed rule says that “[t]o better evaluate a petition to change an accepted analytical principle, the Commission **may** order that it be made the subject of **discovery.**” Order No. 104, p. 43 (emphasis added). This appears to mean that affected

always were done as a direct response to a study presented by the Postal Service.

The Commission apparently found having competing studies before it unsatisfactory. “[It] was required to resolve an analytical issue by accepting or rejecting competing analyses submitted by opposing witnesses.... In almost all cases, analyses were presented as *faits accomplis*, with no opportunity for input or feedback from either the Commission or interested third parties. The process was cumbersome and the results were often less than satisfactory.” Order No. 104, p. 30 (italics original).

However, the adversarial process is generally relied on by all common law countries and is the foundational principle of the civil and criminal judicial system at both the federal and state levels. With adversaries motivated to marshal their best facts and law, the Commission is in the position to decide which arguments most closely meet the standard sought to be achieved.

Why the Commission should prefer a procedure that eliminates all counter-proposals is not altogether clear. Nor is it clear that the proposed process will result in more satisfactory results. The new process is likely to be more satisfactory only if various parties (i) are allowed to, and (ii) do, participate vigorously in the proposed process, from the outset. Otherwise, Postal Service studies will go largely unchallenged, and the Commission will be unaided by input from the parties.

Although under PAEA the Commission grants maximum deference to Postal Service rate setting, there is no statutory support for a similar policy of maximum deference to the Postal Service underlying the Commission’s most important single responsibility — the Annual Compliance Determination.

parties either may, **or may not**, have an opportunity for discovery. This provision implicitly assumes that the Commission will be able to decide on its own, from the face of a petition to change, whether mailers should have the due process right to investigate the proposed change. But such an assumption is unlikely to be accurate. Mailers often focus on changes which appear significant to them, giving greater attention to details than the Commission staff can devote to the issues and consequences presented by such changes. Moreover, not all weaknesses are apparent on the face of each proposal. Mailers need the opportunity to challenge the Postal Service, or transparency will be lost and, more importantly, the benefits of transparency — better decision making — will be lost. Optional discovery provides neither protection nor due process. And even if the Commission were to grant a period of discovery, how long any discovery period might be expected to last is not indicated. The rule also states that “[b]y request of any interested person, ... the Commission **may order** that ... the Postal Service ... participate in technical conferences.” (*Id.*, p. 43, emphasis added.) It does not lay down any ground rules, or even expectations, for such technical conferences; hence, they could be as sterile as many of those conducted under the PRA.¹⁴ If the Postal Service is to be allowed to spring completed studies “from out of nowhere,” this part of the proposed rule

¹⁴ In the past, under PRA, technical conferences usually were conducted in the context of litigating rate cases. Almost inevitably, the Postal Service presided and took the position that the sole purpose of a technical conference was to explain **what** was done, but no expert (or other technical person) from the Postal Service was allowed by its lawyers (who were always present) to answer any question about **why** something was done the way it was. As a result, most technical conferences had a certain sterility attached to them. If one already understood **what** was done, but had little insight into **why** it was done, or why some alternative was not pursued, then such technical conferences were not particularly useful. Under the more recent procedure, where the Commission chairs the conference, and actively permits a wider range of questions directed to the Postal Service, technical conferences may be more fruitful.

needs considerable strengthening. Otherwise, interested parties could be “steam-rolled” by the proposed process.

Fourth, after the petition has been processed, and “[a]fter the conclusion of any discovery procedures, the Commission shall determine whether to issue a notice of proposed rulemaking based on the petition **and the supporting material received.**” (*Id.*, p. 43, emphasis added.) In the instance postulated here, where the Postal Service submits a completed study, previously unknown to anyone outside the Postal Service, that study would be the “supporting material” referred to in the proposed rule. Assuming the Commission then issues a notice of proposed rulemaking, “[s]uch notice shall be evaluated by procedures that are consistent with 5 U.S.C. 553. Interested parties will be afforded an opportunity to present comments and reply comments, either orally or in writing, at the Commission’s discretion.” (*Id.*, p. 43.) Affected parties may not have much opportunity in the way of permitted discovery or time to prepare views opposed to the Postal Service’s special study. This is true for any study, but especially so for one that is detailed and complex. Furthermore, oral comments (usually presented by a lawyer) on a complex, technical study inevitably would be much weaker than written comments.

Recommendations. The preceding discussion is not intended simply to rehearse past practices that often were shrouded in secrecy. These comments are intended to lay the groundwork for what the rules should require with respect to special studies aimed at changing analytical principles. To that end, for all studies that might result in proposed changes to analytical principles, the Postal Service should be **required** to publish a list, updated at regular intervals (*e.g.*, quarterly) of **all** studies underway, regardless of whether such studies (as well

as proposals for such studies) would be submitted in accordance with Rule 3050.11. Further, each regular update should provide, **at a minimum**, a short status report indicating the following information:

- What unit within the Postal Service is responsible for conduct of the study (if internal), or what consultant firm is responsible (if external).
- Date when the study commenced, current status of the study, and expected completion date.
- Analytical principles that the study may affect.

Changing the proposed rules to incorporate minimal requirements, such as those suggested above, should help eliminate surprises. It also would help improve transparency and accountability with respect to analytical studies performed by the Postal Service.

It is possible, of course, to go beyond the requirements listed above, which are considered minimal, and require, for example, that the Postal Service provide copies of interim reports (*e.g.*, deliverables, if from outside consultants) associated with various tasks/milestones in its studies.¹⁵

Still another step forward would be to have the rule provide that, upon request by any interested party, the Commission will grant a reasonable discovery period for completed studies under review. *See* discussion in Section II, *supra*.

¹⁵ To achieve greater transparency, it is also recommended the Commission itself also adhere to such a procedure, *e.g.*, by releasing task reports in its universal service obligation study currently underway.

§ 3050.12 Obsolescence of special studies relied on to produce the Postal Service’s Annual Report.

Proposed Rule 3050.12 (a) states:

If the Postal Service cannot certify that a study reasonably reflects current operating conditions or procedures, it must provide a timetable for updating the study.

As written, this rule would be very helpful to ensuring that studies used in the annual report are meaningful and relevant. However, for all obsolete studies for which a timetable must be provided, it could be strengthened if it would require that the timetable not just reference when the Postal Service would update the study, but also reflect a target date to file a **proposal** with the Commission to update obsolete studies in accordance with Rule 3050.11 (“Proposals to change an accepted analytical principle....”), unless, of course, updating would not constitute a change in “an accepted analytical principle” (such as merely gathering more recent data, and plugging such data into the existing study). If filed at the outset of the project, the proposal could project a target date for completion and publication of the new study. Moreover, this information would give the Commission and mailers a benchmark against which to its measure progress. *See* discussion, *supra*, regarding proposed Rule 3050.11.

§ 3050.13 Additional documentation required in the Postal Service’s Annual Report.

The proposed Rule states:

At the time the Postal Service files its Annual Report, it shall include a **brief narrative explanation** of any **changes** to **accepted analytical principles** that have been made since the most recent Annual Compliance Determination was issued, and the reasons that those **changes** were accepted. [Proposed Rule 3050.13(a) (emphasis added).]

The proposed rule seems reasonable on its face. It is understood that proposed Rule 3050.10 requires that “the Postal Service shall use only accepted analytical principles as defined in rule 3050.1.” It also is understood that proposed Rule 3050.11 requires the Postal Service to obtain Commission approval of any change in “accepted analytical principles.” Assuming that the Postal Service has obtained prior Commission approval under Rule 3050.11, then, in order for the Postal Service to provide “the reasons that those changes were accepted,” all it would have to do is quote or paraphrase a few sentences from the Commission’s ruling(s) during the year. Including such on-the-record information from previous ruling would make the free-standing Annual Report more complete.

In addition to the required narrative, it would be helpful if Rule 3050.13 also required the Postal Service to provide a sort of “roadmap,” in the form of a table, that (i) lists each recent change in accepted analytical principles incorporated in the Annual Report, (ii) specifies the docket in which each change was approved,¹⁶ and (iii) using current year data, summarizes the effects of each such change. Since the prior rulemaking in which the change was approved necessarily will have been based on earlier data, this information could be particularly useful.

§ 3050.20 Compliance analysis in the Postal Service’s Annual Report.

Proposed Rule 3050.20 states:

The Postal Service’s Annual Report shall include an **analysis** of the information that it contains in sufficient detail to demonstrate that, in the fiscal year covered by its report, all of its products (market dominant and competitive) **comply** with all of the

¹⁶ A handy table summarizing such information would be especially helpful in any year when the Postal Service has initiated multiple dockets requesting approval of numerous changes in analytical principles.

applicable provisions of **chapter 36 of title 39** and the **regulations** promulgated thereunder, meet the goals established under 39 U.S.C. **2803** [Performance plans] and **2804** [Program performance reports], and promote the **public policy objectives** set out in title 39. [Proposed Rule 3050.20 (emphasis added).]

As written, the proposed rule appears to expect the analysis in the Postal Service's Annual Report to demonstrate that every Postal Service product has complied with all applicable provisions of PAEA. No provision is made for any deviation. Experience with the Annual Report for FY 2007 convincingly demonstrates, however, that the presumed outcome may not always materialize. For instance, in the first Annual Compliance Determination for FY 2007, the Commission's *Principal Findings* note (at 1) that:

- Five market dominant postal services did not cover their attributable costs.
 - Periodicals;
 - Single-Piece Parcel Post;
 - Media/Library Mail;
 - Registered Mail; and
 - First-Class Mail International (inbound).

The Commission's *Principal Findings* went on to state that “[r]ate increases and rate design improvements were implemented during the second half of the year to eliminate such deficiencies in the future.” *Id.* It remains to be seen, however, whether this optimism was justified. The *Principal Findings* further noted (at 2) that

- Two competitive postal services did not cover their attributable costs.
 - Parcel Return Service; and
 - International Surface Parcel Post at non-UPU rates (inbound).

Proposed Rule 3050.20 should be revised to distinguish between products that **do** and products that **do not** comply with all applicable provisions of PAEA. Specifically, the rule should:

Allow for the possibility that one or more of the Postal Service's products did not comply with all applicable provisions of PAEA and, if that occurs, then:

- i. require the Postal Service to explain the most important circumstances underlying the failure to meet the applicable provisions of PAEA;
- ii. explain what steps the Postal Service plans to take to bring the products into full compliance with PAEA; and
- iii. indicate the time frame within which the Postal Service contemplates that those products not in compliance will be brought into full compliance.¹⁷

This last provision would seem critical to the Commission's evaluation responsibilities. Order No. 104 states that its Annual Compliance Determination:

is to include an evaluation of "the extent to which regulations are achieving the objectives under sections 3622 and 3633, respectively." ... The Commission notes that section 3651 asks the Commission to evaluate the extent to which its regulations "are achieving" their statutory objectives, rather than the extent to which they "have achieved" them. [p. 3.]

Similarly, under the discussion of its longer-term responsibilities, and taking note of the longer-term reports that the Commission is required to provide to the President and Congress under sections 701 and 702 of PAEA, Order No. 104 states:

¹⁷ For instance, if revenues from a particular product failed to cover its attributable costs during the fiscal year in question, the Postal Service should be **required** to (1) explain the most important reasons underlying the failure of revenues from the product in question to cover its attributable costs, (2) explain what steps (or plans) it has for eliminating the product's deficit, and (3) indicate when the Commission (and other mailers) can expect to see revenues from the product cover attributable costs. *See* Section III, *supra*.

To adequately prepare for these longer-cycle reviews, the Commission will need **forward looking** as well as historical information to stay abreast of developments in the Postal Service's finances and operations. The Commission needs a sound knowledge base from which it can evaluate the Postal Service's commercial and financial **prospects**. [*Id.*, p. 4 (emphasis added).]

In the absence of a revision to proposed Rule 3050.20 such as that suggested here, the Postal Service's Annual Report is unlikely to provide the Commission with sufficient information for it to fulfill its longer-term responsibilities under sections 701 and 702 of PAEA.

In addition to the Commission's need to fulfill its responsibilities, PAEA's goal of increased transparency and accountability means that mailers who are cross-subsidizing products not covering their attributable costs should be entitled to a more extensive analysis of the type described above.

Also, beyond the issue of how non-compliance is handled, some attention to the meaning of the word "demonstrate" is needed. It is suggest that the term "demonstrate" be clarified to require a full **explanation** of the way in which applicable provisions are complied with. Experience under PRA has shown that some provisions can conflict with others, in the sense that one provision points one way while another provision points in a different direction. There even have been cases where the way a particular provision point is ambiguous. An explanation is needed to make clear how, in the Postal Service's view, the various provisions are interpreted and balanced.

§ 3050.21 Content of Annual Report.

Appendix A to these comments presents a comparison between the content of (i) a formal request by the Postal Service for proposed changes or adjustments in rates or fees under the Commission’s Rule 3001.54, with (ii) PAEA requirements for an ACR, and (iii) the Commission’s rules for an ACR proposed in Order No. 104.¹⁸

Of course, as the perspective of the Postal Service’s Annual Report is different from that of a rate request under the old rules, it does not include much of the forward-looking documentation that was included in a formal rate request, including such data as estimated revenues and volumes resultant from the proposed change in rates. However, the Annual Report is intended to provide the Commission, as well as mailers, with an annual baseline of information and data that can be used to evaluate existing rates and fees.

A comparison of the two sets of requirements reveals that the Commission’s Rule 3001.54 seems to specify information and data requested from the Postal Service in a formal rate request in substantially more detail. One example is Rule 3001.54(f), “Total functionalized accrued costs,” that stated in subsection 54(f)(3)(i):

Show **operating costs in sufficient detail** as to the **accounting and functional classifications** and with such reasonable **explanation** so that the actual or estimated amount for each item of expense may be readily understood.... [Rule 3001.54(f)(3)(i) (emphasis added).]

¹⁸ The comparable primary requirements for the Postal Service’s Annual Report are provided in proposed Rule 3050.21, “Content of Annual Report”; however, many of the other proposed rules address information and data that are to be included in an Annual Report (*e.g.*, proposed Rule 3050.22, “Documentation supporting attributable cost estimates in the Postal Service’s Annual Report”), or are to be provided along with an Annual Report (*e.g.*, proposed Rule 3050.43, “Information on program performance”).

Proposed Rule 3050.21, “Content of Annual Report,” simply states:

[T]he Postal Service shall submit a report to the Commission analyzing its **cost**, volume, revenue, rate, and service information in **sufficient detail** to demonstrate that all products during such year **comply** with all provisions of title 39 of the United States Code. [Proposed Rule 3050.21 (emphasis added).]

It is not known if the Commission intends to seek the same level of cost data as previously filed in a formal rate request, or is signaling that it would accept less. It is submitted that less costing data would not “increase” transparency, and that one way to ensure this would be to add the following words drawn from Rule 3001.54(f) after “sufficient detail” — “and with such reasonable explanation so that the actual or estimated amount for each item may be readily understood” — in proposed Rule 3050.21.

§ 3050.23 Documentation supporting incremental cost estimates in the Postal Service’s Annual Report.

The proposed Rule simply states that “[i]nput data, processing programs, and output of an incremental cost model shall be reported.”

The Commission’s narrative explaining requirements for incremental costs states that “[t]he Postal Service should have as a goal the **development of a model** of incremental costs for individual market dominant products ...” Order No. 104, p. 12 (emphasis added). This statement recognizes that such a model currently does not exist, and will need to be developed.¹⁹ Such a study necessarily will present methodological issues involving analytical

¹⁹ In Docket No. RM2008-2, the Postal Service’s Proposal One, to change certain cost methodologies, represents an initial step in the direction of a new methodology for determining incremental costs for the group of competitive products (not for individual market dominant products).

principles pertinent to development of incremental cost estimates. Accordingly, the Rule should **require** that proposals for study of incremental costs be submitted in accord with Rule 3050.11.

Further, the Commission discusses the “nature of Rulemakings” in Section C, and distinguishes (1) Strategic Rulemakings from (2) Discrete Issue and (3) Expedited Rulemakings. Order No. 104, pp. 31-33. According to the Commission’s description, a Strategic Rulemaking might deal with “new analytical studies that need to be undertaken.” *Id.* The notion of a Strategic Rulemaking is an encouraging development which could have great benefit to all concerned. Therefore, Valpak would suggest that at its earliest convenience the Commission convene a Strategic Rulemaking to consider the development of a model (or models) of incremental costs for (i) individual market dominant products, and (ii) the group of competitive products.

§ 3050.25 Documentation supporting estimates of volumes and revenues in the Postal Service’s Annual Report.

The proposed Rule states:

The following items shall be provided: ...

(b) Revenue, Pieces, and Weight by rate category ... (within 30 days of the close of the quarter); ... and

(d) Billing determinants (within 40 days of the close of the quarter).

Historically, one type of mailpiece has been overlooked consistently — detached address labels. The proposed Rule is unclear as to whether the Postal Service would be required to report the number of DALs in the system. Following Docket No. R2006-1, a surcharge for use of DALs has been implemented, but it is not known if DALs constitute a rate

category, nor is it known whether DALs will appear in either the Revenue, Pieces, and Weight report, or the billing determinants. In the absence of such information, it is not known where and how mailers and the Commission would be able to obtain any volume or revenue information on DALs, although the rule on worksharing costs avoided requires information on DAL “costs calculations” (proposed Rule 3050.24(j)).

At minimum, it is submitted that the Postal Service should be required to identify the number of DALs by product (*e.g.*, High Density and Saturation flats, and Saturation Parcels), and preferably even below product level — High Density flats and Saturation flats — separately.

§ 3050.26 Documentation of demand elasticities.

The Commission’s discussion of “The General Role of Elasticity of Demand” (Order No. 104, pp. 10-11) indicates that proposed Rule 3050.26 “would require the Postal Service to provide estimates of the elasticity of demand **for all postal products for which adequate data can be obtained.**” *Id.*, p. 11 (emphasis added). The proposed Rule does not incorporate this qualification. Accordingly, to conform the rule to the Commission’s intent, the proposed Rule should be revised to insert the words which appear in bold, as follows:

By January 20 of each year, the Postal Service shall provide econometric estimates of demand elasticity for all postal products **for which adequate data can be obtained**, accompanied by the underlying econometric models and the input datasets used.

§ 3050.40 Additional financial reporting.

The Commission narrative points out that:

Section 3654 requires the Postal Service to submit quarterly and annual financial reports to the Commission that meet the

requirements that corporations issuing publicly registered securities must meet in their financial reporting to the Securities Exchange Commission, including the requirements of the Sarbanes-Oxley Act of 2002. The “Commission proposes to incorporate the reporting requirements of 39 U.S.C. 3654 into the periodic reporting rules under consideration in this docket. *See* proposed rules 3050.40-42. [Order No. 104, pp. 3-4.]

Aside from citing the clear statutory requirement, Order No. 104 makes no attempt to explain the rationale for imposing these reporting requirements on the Postal Service. Nor does the discussion in Order No. 104 indicate what use the Commission expects to be derived from these reports, either by itself or by any mailer.

In other sections of the proposed rules, the Commission has considered the reports which it is obligated by PAEA to submit to Congress, especially its ACD, and has used its expertise and experience to develop the requisite information for preparing those reports. The information required by proposed Rule 3050.40 is different. Order No. 104 correctly notes that the requirements here were designed and intended for “corporations issuing publicly registered securities.” It makes no express note, however, of the obvious fact that the Postal Service does not issue any publicly traded securities. And, of course, independent investors in Postal Service securities do not exist.²⁰

Aside from the fact that the information specified in proposed Rule 3050.40 fulfills a statutory requirement, Valpak suggests that the Commission review carefully which portion of such information, if any, it actually needs and plans to use when preparing its Annual

²⁰ The preparation and submission of information that complies with SEC reporting requirements might be a worthwhile exercise if partial or complete privatization of the Postal Service were being contemplated. Clearly, however, any such consideration is totally inapplicable here.

Compliance Determination and other reports that must be submitted to Congress. If none of this information is necessary, it is suggested that proposed Rules 3050.40, 41, and 42 be deleted. Presumably, the Postal Service would still submit whatever reports may be required by 39 U.S.C. section 3954, but such reports would not be associated with the Commission's Annual Compliance Determination.

Thereafter, and not directly relevant to this proceeding, Valpak respectfully suggests that the Commission consider recommending to Congress the deletion of unnecessary financial burdens on the Postal Service, such as compliance with Sarbanes-Oxley. In times of financial crisis, good stewardship moves from being a desirable quality to being an absolute necessity. As the Postal Service continues to do everything in its control to cut costs to keep rates low, the Sarbanes-Oxley requirement presents the Commission with an opportunity to aid the Postal Service and all mailers. The question must be asked as to whether Sarbanes-Oxley imposes costs on the Postal Service which can be justified in terms of their benefit to the Commission, and the mailing public. The annual cost of compliance with these requirements is not known, but can be assumed to be in the tens of millions of dollars. If the benefits are not sufficient, Commission support for a Congressional amendment to PAEA would relieve the Postal Service and mailers of these annual costs incurred in generating reports that are not necessary in these difficult financial times.

§ 3050.41 Treatment of additional financial reports.

This proposed Rule requires “an opinion from an independent auditor on whether the information listed in section 3050.40(b) is fairly stated in all material respects...” Valpak notes that the Annual Report of the Postmaster General, which contains the financial statements

of the Postal Service, is audited and contains an opinion from the auditor. To the extent that some or all of the reports required under Rule 3050.40 can be dispensed with, this additional, somewhat redundant report of the auditor also could be dispensed with.

§ 3050.50 Information on service performance for domestic products.

The Commission's explanation points out that the "Postal Service's annual compliance report must also allow the service quality of market dominant products to be identified and evaluated. *See* 39 U.S.C. 3622(b)(3), 3622(c)(9) and 3691." Order No. 104, p. 3. Despite the cited statutory requirement, for reasons unexplained, proposed Rule 3050.50 is left completely blank at this time.

Although development of a comprehensive service performance reporting system and data are still underway as part of Docket No. PI2008-1, it is submitted that the Commission nevertheless should require the Postal Service's Annual Report to contain performance **standards** for each class of mail, which have been previously agreed upon. Further, the Postal Service should be required to submit and include in its Annual Report explicit performance **goals** (or performance "targets") for each market dominant product as are required by PAEA to be submitted no later than June 19, 2008. Development of specific performance **goals** (or "targets") for each market dominant product in no way depends on the availability of actual performance **data**. Unless this situation changes, the Commission's next ACD will have to state that the Postal Service failed to comply with the statute, and that non-compliance is continuing — an important matter that cannot be overlooked.

Finally, even at this early stage, the Postal Service should be required to update such performance data as were submitted in its FY 2007 Annual Report.

CONCLUSION

Valpak respectfully requests that the Commission modify its proposed rules in accordance with the recommendations set out above.

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Appendix A

Comparison of Former PRA Rate Case Filing and Proposed PAEA Periodic Reports

Former PRC Rule 3001.54 (under PRA)		PAEA ACR Requirements (39 USC § 3652) (subsections specified below)	PAEA Proposed PRC Rule 3050
	Required in request from USPS to PRC	Needed for report of PRC to Congress and the President	Required in report from USPS to PRC
(b)(1)	Schedules of then-effective rates and proposed rates	Analysis of rates (a)(1)	3050.21
(b)(2)	Specifications of mailability and standards	Product information of market dominant products (a)(2)(A)	None
(b)(3)	Description of cross-elasticity of demand		3050.21(d) -- Requires elasticity estimates but does not require cross-elasticities or a discussion of substitutability
(b)(4)	Identification of nonpostal services		3050.21(i)
(c)	Identification of the characteristics of mailer and recipient and a description of the contents of items mailed at various subclasses		None
(d)	Physical attributes of the items mailed by subclass, including shape, weight, and distance		None
(e)	Special service arrangements		None
(f)(1)	Total actual accrued costs for the most recent fiscal year	Analysis of costs (a)(1)	3050.21(b)
(f)(2)	Estimated total accrued costs for the fiscal year in which the filing is made		None
(f)(3)(i)	(f)(1) and (f)(2) must show the costs in sufficient detail as to accounting and functional classifications so that they may be readily understood		(f)(1) -- 3050.21(b) -- Not explicitly stated (f)(2) -- None
(f)(3)(ii)	State and fully explain amounts for (a) depreciation on capital facilities and equipment; (b) debt service; (c) contingencies; and (d) extraordinary or nonrecurring expenses		3050.21(b) -- Detail not explicitly stated
(f)(3)(iii)	Assign and distribute costs by cost segments and functions together with related mail volumes and to subfunctions and an explanation of the method of assignment/distribution	Information relating to workshare discounts: (1) per-item cost avoided; (2) percentage of such per-item cost avoided that the per-item workshare discount represents; and (3) the per-item institutional contribution (b)	3050.21(b) -- Detail not explicitly stated
(g)	Total actual accrued costs since the most recent filing		None
(h)(1)	The separation of costs between postal and nonpostal services including methodology		3050.21(b) -- Detail not explicitly stated
(h)(2)	Direct attributable costs, indirect attributable costs, costs reasonably assignable, and costs which cannot be attributed or assigned		3050.21(b)

Former PRC Rule 3001.54 (under PRA)		PAEA ACR Requirements (39 USC § 3652) (subsections specified below)	PAEA Proposed PRC Rule 3050
	Required in request from USPS to PRC	Needed for report of PRC to Congress and the President	Required in report from USPS to PRC
(h)(3)	Methodology of attribution or assignment		3050.21(b) -- Detail not explicitly stated
(h)(4)	Attribution shall be to classes, subclasses, special services, or rate categories with an analysis of the effect on volume, peaking patterns, priority of handling, mailer preparations, quality of service, physical nature, expected gains in productivity, and any other factor affecting costs		3050.21(b) - Detail not explicitly stated
(h)(5)	Roll-forward model		N/A
(h)(6)	Attributable cost final adjustments by class, subclass, rate category, and service; details of the development and an explanation of each adjustment		3050.21(b) - Detail not explicitly stated
(h)(7)	Other services adjustments		3050.21(b) - Detail not explicitly stated
(h)(8)	An overall summary cost table		3050.21(b) - Detail not explicitly stated
(h)(9)	For each cost segment, base-year amounts for each included account and sub-account shall be provided		3050.21(b) -- Detail not explicitly stated
(h)(11)	Clearly and separately identify any nonattributed or unassigned costs		3050.21(b) - Detail not explicitly stated
(h)(12)	The data relevant to the analysis of the effect on costs specified in (h)(4)		3050.21(b) - Detail not explicitly stated
(i)	Statement of criteria employed in constructing the proposed rate schedule		None
(j)(1)	Actual and estimated revenues for the fiscal years selected for (f) and (g) using before rates	Analysis of revenues (a)(1)	None
(j)(2)	Estimated revenues based on proposed rates for fiscal year selected for (f)(2)		N/A
(j)(3)	Actual and estimated revenues shown in (j)(1) and (2) disaggregated by class, subclass, each unique rate element, and postal service		Actual revenue -- 3050.21(a); estimated revenue -- N/A
(j)(4)	Documentation of (j)(1)-(3) sufficient to allow independent replication, with references to data sources		3050.21(b) -- Detail not explicitly stated
(j)(5)(i)	An econometric demand study by class and subclass		3050.21(b) -- Detail not explicitly stated
(j)(5)(ii)	Actual and estimated volumes at current rates beginning with the last complete fiscal year and ending with the last full future year	Mail volumes of market dominant products (a)(2)(A)	Actual volumes for last year -- 3050.21(a); Estimated volumes for future year -- N/A
(j)(5)(iii)	Estimate volumes at the proposed rates beginning with the quarter when the rates are assumed to be effective and ending on with the last full future year		N/A

Former PRC Rule 3001.54 (under PRA)		PAEA ACR Requirements (39 USC § 3652) (subsections specified below)	PAEA Proposed PRC Rule 3050
	Required in request from USPS to PRC	Needed for report of PRC to Congress and the President	Required in report from USPS to PRC
(j)(6)	Supporting rationale for forecasted volumes and revenues, including computer implementation		N/A
(j)(7)	All of the input files need to replicate the econometric demand study, price indices, used to prepare the data for use in the econometric demand study		3050.22 -- Generally
(k)(1)	For the two preceding complete fiscal years the Balance Sheet, the Statement of Income and Expense, basic statistical information and the Statement of Income and Expense by budget categories (and supporting schedules)		3050.31(a) -- Detailed schedules not specified
(k)(2) and (3)	A reconciliation of the budgetary information with actual accrued costs for the most recent fiscal year (or preliminary or pro forma information if actual not fully available on the filing date)		None
(l)	Billing determinants		3050.25(d)
(m)	Continuing and phasing appropriations		None
(n)(1)	Performance goals	Analysis of quality of service (a)(1)	3050.21(c)
(n)(2)	Achieved levels of service for those classes/subclasses and services for which performance goals have been set	Measures of the quality of service of market dominant products including (1) level of service (speed of delivery and reliability) provided and (2) degree of customer satisfaction (a)(2)(B)	3050.21(c)
Rule 53(b)	Overview of filing		None
		Market Test information, including costs, revenues, quality of service, and such other data as the PRC requires (c)	None
		Working papers and any other supporting matter that the PRC shall prescribe (d)	3050.2(b)
		Comprehensive Statement under § 2401(e)(g)(1)	3050.43(a)
		Performance plan under § 2803 (g)(2)	3050.43(b)
		Program performance report under § 2804 (g)(3)	3050.43(c)