

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Periodic Reporting Rules)
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)

Docket No. RM2008-4

REPLY COMMENTS OF THE PUBLIC REPRESENTATIVE

(November 14, 2008)

The general public's reply comments address several issues raised by the parties' initial comments. The general public believes that adopting the suggestions discussed below will allow the Commission to meet the additional requirements and challenges of its enhanced responsibilities under the Postal Accountability and Enhancement Act (PAEA).

I. INTRODUCTION

A general theme of the Postal Service's initial comments is that in promulgating its periodic reporting rules, the Commission should focus on "avoiding unnecessary or unwarranted administrative effort and expense on the part of the Postal Service." See 39 U.S.C. § 3652(e)(1)(B). While the Commission should keep this factor in mind, it must remember that this is just one of several factors the Commission needs to take into consideration under § 3652(e)(1). The Commission must be mindful of the other factors of § 3652(e)(1) including subsection (A), under which the Commission must give

due consideration to “providing the public with timely, adequate information to assess the lawfulness of the rates charged.” The general public agrees that the Commission’s proposed rules should (and do) avoid unnecessary burdens on the Postal Service.

Congress anticipated that the new statutory scheme would result in significant cost savings from avoiding the litigation associated with a 10-month long rate case under the Postal Reorganization Act (PRA). This change alone saves the Postal Service countless man-hours and expense. In place of the old, lengthy, expensive rate cases, Congress required an increase in the transparency of Postal Service operations and finances. Congress also demanded an increase in accountability of the Postal Service resulting in enhanced oversight. This increased accountability implies that the Postal Service will provide greater information and data to the Commission and interested mailers than it provided under the PRA. Of great benefit to the Postal Service, the costs associated with this increase in transparency and accountability are expected to be much lower than those the Postal Service used to expend on litigation in old, traditional rate cases.

In exchange for this increased transparency and accountability, the Postal Service was given much greater autonomy and flexibility. Congress anticipated that the Postal Service would use its increased flexibility to significantly raise revenues and cut costs through innovative strategies. Congress expected these innovations to be a significant driver of the Postal Service’s ability to meet upcoming challenges.

The mailing community requires the information required by the periodic reporting rules in order for the entire statutory scheme to be effective. The data, reports, and other information to be provided according to the proposed rules allows interested persons to determine whether or not complaint procedures are justified under the applicable provisions of the PAEA. They also act as an early warning system and learning tool. The information provided according to these rules allows the Commission and mailers to stay current regarding new programs, unexpected developments, and other issues which may impact their interests and responsibilities in the future.

Additionally, these proposed periodic reporting rules are designed to implement *all* of the PAEA's provisions to make the Postal Service's operations and finances transparent and accountable, not just those enumerated in 39 U.S.C. § 3652. Accordingly, the factors of § 3652(e)(1) may not apply to many of the requirements listed in the proposed rules.

Below, the Public Representative provides specific comments on the many issues raised by the Postal Service, Valpak, and MMA. In particular, these reply comments address the following issues: (1) the scope of this rulemaking, (2) suggestions for future rulemakings, (3) concerns raised in the Postal Service's initial comments, (4) concerns raised in Valpak's initial comments, and (5) concerns raised in MMA's initial comments.

II. COMMENTS

A. The Scope of the Periodic Reporting Rules Rulemaking

1. The Scope of the Commission's Annual Compliance Determination Jurisdiction is Outside the Scope of this Rulemaking

Time Warner believes that the Commission's proposed rules may cause "confusion" with respect to the Commission's authority to make determinations of compliance or noncompliance under 39 U.S.C. § 3653(b). Time Warner's comments in this regard are misplaced; it seems to be confused about the scope of the Periodic Reporting Rules rulemaking.

This rulemaking's purpose is to "implement *all of the PAEA's provisions* that make the Postal Service's operations and finances transparent and accountable." PRC Order No. 104 at 2 (emphasis added). The proposed rules are much broader than simply gathering data and other information so that the Commission can fulfill its

responsibilities under 39 U.S.C. § 3653(b) in making determinations of “compliance” or “noncompliance.”

It is true that as part of this rulemaking the Commission is developing implementing regulations for the “Form and Manner” requirements of reports and other data that the Postal Service is to provide to the Commission pursuant to 39 U.S.C. § 3652(e)(1). These data are necessary for the Commission to fulfill its annual responsibility to make determinations of compliance or noncompliance under 39 U.S.C. § 3653. However, these proposed rules are also designed to address additional Congressional goals.

In several other statutory provisions, Congress expressly set forth certain expectations with respect to reports and data to be produced in order to provide the public with the enhanced transparency and accountability envisioned by the PAEA. See *e.g.*, 39 U.S.C. §§ 3651, 701, 702, 2803, 2804, 3654. Thus, the data and reports to be filed under the proposed rules, while important to fulfilling the goals of the PAEA, may not find their way into the Commission’s Annual Compliance Determination (ACD). For example, while the Commission’s compliance jurisdiction applies to whether “rates or fees...were not in compliance with applicable provisions of this chapter,” the Postal Service has to provide an annual report to the Commission “demonstrating that all products during such year complied with all applicable requirements of this title.” *Compare* § 3653 *with* § 3652. The latter requirement may be broader than the former.

Besides the Commission’s ACD, Congress had other goals in mind when it tasked the Commission with the responsibility of setting up the periodic reporting requirements. For example, Congress wanted increased transparency of Postal Service finances and operations so that mailers could determine whether sufficient justification exists for filing a complaint under 39 U.S.C. § 3662. Thus, it is difficult to see how the proposed periodic reporting rules – which seek information broader than that required by 39 U.S.C. § 3653(b) – can cause “confusion” about the scope of the Commission’s jurisdiction with respect to 39 U.S.C. § 3653(b).

Furthermore, the proposed rules and preamble do not discuss or otherwise attempt to deal with the scope of the Commission's responsibilities under 39 U.S.C. § 3653(b). Indeed, whether an issue is subject to the Commission's ability to make a determination of compliance or noncompliance under 39 U.S.C. § 3653(b) is outside of the scope of this rulemaking proceeding. In essence, these are procedural rules setting forth filing requirements. They are not substantive rules attempting to interpret the scope of the Commission's jurisdiction. The Public Representative submits that it would be best for the Commission to resolve issues of the scope of its compliance jurisdiction through a separate rulemaking or on a case-by-case basis in each ACD as such issues arise. The next ACD will only be the Commission's second ACD ever. It may make the most sense for the Commission to wait until it gains several years of experience before deciding to issue any rules of general applicability on the scope of its compliance jurisdiction.

In any event, the scope of the Commission's annual compliance jurisdiction is broadly defined by statute. Title 39, U.S.C. § 3653(b)(3) states that the Commission is to make determinations of whether "rates or fees...were not in compliance with applicable provisions of this chapter." This clearly includes "the *requirement* that each class of mail or type of mail service bear the direct and indirect postal costs attributable to each...." See 39 U.S.C. § 3622(c)(2) (emphasis added), *implemented by*, 39 CFR § 3010.14(b)(7) (requiring the Postal Service to follow the criteria in § 3622). Indeed, Time Warner concedes as much when it states that "[i]f a provision of the PAEA *determines* the proper choice or outcome with respect to some issue, that provision constitutes (with respect to that issue)...a 'requirement.'" Time Warner Comments at 9 (emphasis in original).

In addition to a "requirement" directing a "proper choice or outcome" under a provision of the PAEA, the Postal Service can also "meet an objective" or "achieve a goal" under a provision of the PAEA. Its actions can also promote public policy objectives, have no effect on public policy objectives, or discredit a public policy

objective. Thus, as currently written, proposed rule § 3050.20 will not result in arbitrary action on behalf of either the Postal Service or the Commission.

2. Valpak's and MMA's Comments Underscore the Need for the Commission to Develop Procedural Rules in a Separate Rulemaking to Govern Participation in the Commission's Annual Compliance Determination Proceeding

Valpak suggests that the Commission move expeditiously to adopt rules setting forth the procedures that interested persons must follow in order to participate in the Commission's issuance of an ACD. Valpak suggests that such rules include timelines for the filing of comments and discovery. While such rules are outside the scope of this rulemaking dealing with the Postal Service's filing of periodic reports and other data with the Commission, the general public agrees that rules regarding the procedures to be followed allowing for public input and discovery should be promulgated in the near future. Such rules will allow mailers to provide more meaningful and accurate input into the ACD process.

Allowing for mailers to obtain expedited discovery, under an extremely abbreviated schedule – through such methods as written interrogatories and informal technical conferences – may also help satisfy some of MMA's and Valpak's concerns with the periodic reporting rules on input data, quantification techniques, and anomalous results.¹ Both Valpak and MMA ask the Commission to alter its proposed periodic reporting rules to require the Postal Service to identify and explain *every* change to a cost segment or rate category that is likely to result in an increase or decrease in a unit cost of a certain magnitude. While the general public is sympathetic with the goals of these proposals, such a task will place a significant additional burden on the Postal Service in identifying all of those changes and determining the causes of those

¹ MMA Comments at 4; Valpak Comments at 18 & n.8.

changes. Much of this additional work may not even have a corresponding benefit to the public and the Commission if the causes of those changes are not explored in detail at a future date.

However, if participants are able to obtain expedited discovery about potentially troubling data in an ACD proceeding, the participants will obtain the more detailed explanations that MMA and Valpak desire without placing too much of an additional burden on the Postal Service. Obtaining this information during the course of an ACD proceeding limits the already short time participants will undoubtedly have to provide comments to the Commission. Nonetheless, participants may use the information obtained during that proceeding to determine whether the issue should be explored in more detail through a complaint proceeding.² Furthermore, anomalies may indicate problems with an accepted analytical principle which would be resolved in an informal rulemaking according to the procedures set forth in the proposed rules. Under the proposed rules, participants can ask the Commission to review those anomalies in the context of an analytical principle change proceeding. This allows these issues to be addressed without the 90-day time constraint of a Commission ACD proceeding.

² Similar to 39 CFR § 3010.13(j), the Commission should not apply principles of *res judicata* or *collateral estoppel* to implicit findings of compliance under 39 U.S.C. § 3653(b). In other words, if a participant chooses to refrain from raising an issue during an ACD proceeding, the Commission should not be precluded from exploring such an issue during the course of a subsequent complaint proceeding based upon information obtained through discovery in a prior ACD proceeding. Furthermore, if the Commission is not convinced that an issue has been fully explored in an ACD proceeding due to the Commission's limited time for review, the Commission can defer the issue and either (1) appoint a public representative to initiate a complaint to explore such issue in greater detail, (2) avoid making a definitive finding in the ACD and suggest that participants file a complaint to explore such issues, or (3) explore the issue in greater detail in the next year's ACD.

B. Concerns Raised in the Postal Service's Initial Brief

1. Rules Relating to Special Studies

Proposed rule § 3050.12 requires the Postal Service to certify that each special study used in its Annual Report reflect current operating conditions and procedures. If the Postal Service cannot provide certification for a particular study, it would have to provide a timetable for updating that study. A waiver could be obtained from these requirements under certain conditions. A presumption of obsolescence would attach to studies that are five years old or older.

There are numerous special studies involved in developing the Postal Service's Annual Report. These studies vary widely in terms of their use, expense, impact, complexity, whether they utilize available data or require data collection, and whether or not they are updated on a systematic basis and the extent of any such update. While the goal of using information that represents current operations is unassailable, the proposed rule dealing with special studies should be refined to adequately address the diverse types of studies.

The Postal Service's initial comments explain that all parties should be "comforted" because despite the age of the special studies because they tie to aggregate as well as disaggregated cost data that are current for each year. Moreover, many studies, like the cost avoidance and cost difference type studies, are updated with current data annually. It argues that pro forma adherence to the proposed rule would be burdensome and a waste of resources. The Postal Service suggests that no rule addressing the obsolescence of special studies be established at this time. Rather, it contends that other procedures in the proposed rules, such as mailer comments and strategic rulemakings, are appropriate to monitor whether special studies are outdated. If necessary, it believes that more enlightened rules could be developed after the Commission gains experience with these issues.

As noted by the Postal Service, there are two general types of special studies. One type, cost avoidance and cost difference type studies, are updated annually to reflect changes in productivities, equipment coverage, wage rates, piggyback factors, mail flows, and other factors.

The other type of special study consists of point-in-time (snapshot) studies that often develop input data for cost attribution and rate setting purposes. These are usually “one-time” studies. The results of these studies are sometimes inputs to other analyses and the results are often expressed as proportions or constant terms, rather than monetary units. They often entail significant data collection efforts. These types of studies are often not fully updated regularly, and some were the subject of considerable controversy regarding their accuracy in rate proceedings under the PRA due to the age of the studies.

The Public Representative recommends that the special study provisions be adjusted to better reflect fundamental differences in the types of special studies. One such approach is to provisionally exclude the cost avoidance/cost difference type study from the scope of the obsolescence rule. In general, these studies are designed to accommodate changes in operations. Their results are driven by data inputs that are updated annually. They use time tested techniques which are fairly easy to trace and understand. The input data are often produced for operating or other reasons and are already available. Unusual results may occur, but are usually caused by specific input data that can be traced without undue difficulty. There are numerous studies relating to the various products and rate categories which generally follow the same basic approach. Anomalous results in these type studies can be addressed in several of the procedural vehicles presented in the proposed rules.

This exclusion from the certification process could be contingent on each cost avoidance/cost difference study being examined thoroughly and comprehensively to ensure that no incidental outdated information is embedded in the models. Assuming a “clean bill of health,” a cost avoidance study could avoid the certification process. The

actual procedural process for detecting embedded data could take any number of forms, but the end result should include Postal Service assurance that each individual cost avoidance model is based on appropriate data. This could be based on an initial inventory and thorough examination, putting parties on notice regarding the input data utilized.

The point-in-time studies are appropriate for the type of treatment envisioned by the proposed rules. The Postal Service should be required to attest to the currency of point-in-time studies on an annual basis. These studies tend to have a wider effect than individual cost avoidance studies. Since they often provide inputs for the cost attribution process, they tend to impact all products. This is an important consideration given the Commission's responsibilities under the PAEA. Those responsibilities include ensuring that all products cover attributable costs and evaluating contributions to institutional costs individually for market dominant products and collectively for competitive products.

In addition, their one-time performance makes them susceptible to changing conditions as time passes. This type of study is not usually updated on a systematic basis. They often entail data collection in the field and the expenditure of significant resources. The Postal Service will typically not use the data produced for other purposes. These studies tend to be unique unto themselves, not formulaic like the cost avoidance studies. Transparency and accountability militate in favor of these studies being subject to the certification process.

It may be possible to draw further distinctions between the types of point-in-time special studies. To this end, it is recommended that some procedure be developed for purposes of categorizing all special studies. The first step would involve an inventory of the various special studies used in the Postal Service's most current Annual Report. A technical conference or other procedure would allow all interested parties to participate. The result of whatever procedure is used would be the grouping of special studies into at least two categories, one to receive the certification treatment contemplated in the

Commission's proposed rules (point-in-time studies) and one to be excluded from that treatment (cost avoidance studies). Following the initial analysis discussed above, issues concerning studies in the latter category would be dealt with on an ad-hoc basis in the manner the Postal Service suggests. Studies in the former category, point-in-time studies requiring certification procedures, could be prioritized or otherwise identified for unique treatment.

2. Demand Projections

The Postal Service argues that while the Commission has the authority to prescribe costing methodologies, neither demand analysis nor volume forecasting are under the Commission's control. The Postal Service is concerned about a reference in the proposed rules to elasticity of demand in connection with the section addressing advance review requirements. It is also concerned with several references and examples in the discussion of the proposed rules which, in the Postal Service's view, may demonstrate the Commission's intention to assert control over these functions.³

The Postal Service seemingly acknowledges the legitimacy of the Commission's need to examine the elasticity of demand associated with the various postal products. It also concedes its right to review the underlying calculations and data that produce those elasticities. However, the Postal Service maintains that the Commission has no authority over the development of those elasticities or any role in the volume forecasts that use the elasticity data.

It is important to note that the Commission does have legitimate interest in volume estimates for negotiated service agreements and in understanding how those

³ The Postal Service does not object to providing certain demand analysis information. Unobjectionable data consists of econometric estimates of demand elasticity, the underlying econometric models, and the appropriate input data sets. This is essentially the information the Postal Service made available for the Commission's FY 07 ACD. The Postal Service contends this level of information satisfied all interested parties in that proceeding and should suffice going forward.

estimates are developed. The public also needs to be aware of the soundness of those estimates, since significant misestimates could affect all mail users and result in cross-subsidies.

Also, the public interest and the objectives of the PAEA are better served when the forecasts are made public. In its initial comments, the Public Representative argued that current year forecast volumes are necessary. See Public Representative Comments at 3-6. However, details of the development of the volume forecasts – such as the underlying demand analysis – need not be presented to comply with the Public Representative’s proposal.

3. Compliance Analysis Required by Proposed Rule § 3050.20

The Postal Service argues that the compliance analysis required by proposed rule § 3050.20 is unnecessary because it is duplicative of the statutory requirement that it prepare and submit a Compliance Statement to the Commission pursuant to 39 U.S.C. §§ 2401(e) and 3652(g). To the extent that the information is truly duplicative,⁴ the general public believes that would be in everyone’s best interest for the Postal Service to highlight the portions of its Compliance Statement that address the current requirements in proposed rule § 3050.20.⁵ That could be a way for the Postal Service to fulfill the requirements of § 3050.20 with minimal effort. However, to the extent that the requirements of 39 CFR § 3050.20 are not duplicative of the requirements of 39

⁴ The Public Representative is not convinced that the information required by 39 U.S.C. § 2401(e) and 39 CFR § 3050.20 is equivalent, and the Postal Service’s Initial Brief does not explain how these requirements are coextensive.

⁵ The Public Representative notes that last year’s Comprehensive Statement was not filed with the Commission until 15 days after the Postal Service’s Annual Compliance Report was filed with the Commission. For portions of the Comprehensive Statement to be a true substitute to certain requirements in 39 CFR § 3050.20, the Postal Service must file both documents contemporaneously. This is especially important since the Commission only has 90 days to issue its ACD based on the Postal Service’s Annual Report.

CFR §§ 2401(e) and 3652(g),⁶ the Postal Service should have to separately respond to the requirements of 39 CFR § 3050.20. In its Initial Brief, the Postal Service has provided no argument that the information required by that proposed rule is unduly burdensome or otherwise does not meet the goals or objectives of the PAEA's reporting requirements. Without such an argument, the Public Representative does not believe that it is in the interest of the Commission or general public to delete the requirements of 39 CFR § 3050.20 which will provide valuable insight into whether the Postal Service has met the goals established under 39 U.S.C. §§ 2803 and 2804.

4. SEC-Type Reporting Requirements of Proposed Rules § 3050.40-42

The Postal Service argues that proposed rules § 3050.40-42 should not be adopted because the statute already adopts clear, detailed filing requirements for the Postal Service to follow with respect to Securities and Exchange Commission (SEC) type reports.⁷ The Postal Service is concerned that the Commission's proposed rules may create a conflict with a statutorily mandated requirement that the Postal Service follow SEC requirements and forms or may otherwise create an unnecessary additional burden on the Postal Service without a corresponding increase in accountability or transparency.

The Public Representative believes that the Postal Service's arguments with respect to the SEC-type reporting requirements have some merit. It is difficult to deduce how the proposed rules will enhance transparency or accountability in the areas where they go beyond the statutory requirements, and the Commission's explanation for

⁶ Indeed, it is difficult to see how these requirements could overlap completely since the Commission has no control over the contents or timing of the Comprehensive Statement while Congress provided the Commission with authority to establish and interpret, in the first instance, periodic reporting rules on data and other information to be submitted to the Commission.

⁷ Valpak agrees with the Postal Service on this point. Valpak Comments at 44-46.

proposing these additional requirements is scarce. Accordingly, the Public Representative suggests that the Commission adopt one of the following options: (1) refrain from adopting § 3050.40 until the Commission gains experience with such data and determines that it needs additional information to fulfill its statutory responsibilities with respect to SEC-Type information or (2) provide greater justification and explanation for proposed rule § 3050.40 including the enhanced benefits that the Commission expects to obtain from such additional data.

However, the Commission should not accept the Postal Service's argument pertaining to rule § 3050.42. That is, the Commission *should* adopt § 3050.42 in order to implement § 3654(e). Congress specifically directed the Commission to allow participants and the Commission, on its own motion, to improve the quality, accuracy, or completeness of the Postal Service's reports relating to SEC-type information. 39 U.S.C. § 3654(e). Indeed, without this rule, participants would not have a procedural mechanism to petition the Commission to improve the quality of the Postal Service's financial data required under 39 U.S.C. § 3654(e).

5. Public Disclosure of the National Consolidated Trial Balances and Revenue and Expense Summary on a Monthly Basis

The Postal Service argues that it should not have to publicly disclose its National Consolidated Trial Balances (NCTB) and its Revenue and Expense Summary (RES) on a monthly basis.⁸ The Public Representative believes that the NCTB and RES data should be subject to the same statutory and regulatory requirements for confidentiality as all other information that the Postal Service submits to the Commission. The statute contemplates such a result. Title 39 of the United States Code, section 504(g), provides that the Commission shall determine the appropriate level of confidentiality to be given

⁸ Instead, the Postal Service seeks to provide such information to the Commission under seal for the Commission's use only.

to information submitted by the Postal Service based upon a balancing test which weighs the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.⁹

If the Postal Service can meet such a test with respect to the NCTB and RES, then the information should be subject to appropriate protective conditions. If not, then the information should be publicly disclosed. Here, the Postal Service has identified no commercial injury that would result from publicly disclosing such information.¹⁰ However, the Commission has identified a compelling public interest in maintaining transparency – the members of the mailing community need such information to determine whether cause exists for the filing of a complaint under 39 U.S.C. § 3662. See PRC Order No. 104 at 22. Accordingly, unless the Postal Service provides detailed justification for a contention that disclosing such information will cause severe commercial injury that outweighs the identified public need for the information, the monthly NCTB and RES should be disclosed publicly as contemplated by proposed rules.

6. The Requirement that the Postal Service Provide Miscellaneous Publications, Handbooks, and Forms to the Commission

Proposed rule § 3050.60(a)-(c) requires the Postal Service to provide electronic copies of certain publications, handbooks, and forms at the beginning of each fiscal year. The Postal Service argues that it is burdensome for it to create electronic copies of all the items and that it is redundant for it to have to provide a new set of publications, handbooks, and forms at the beginning of each year if the documents have not changed

⁹ This confidentiality test is currently the subject of Commission Docket No. RM2008-1.

¹⁰ The Postal Service does state that disclosing such information would not provide a level playing field with its competitors. However, the statutory balancing test requires the Postal Service to show commercial injury; it does not contemplate a level playing field as being relevant.

from the previous year. The Postal Service does not have an objection, however, to initially providing all of these documents to the Commission.

The Public Representative wants to ensure that these documents are available to every potential participant in each ACD proceeding, not just the parties that participated in the first ACD proceeding under these rules. Accordingly, all of these documents should be available to all potential participants each year. To avoid unnecessary burden on the Postal Service with respect to the submission of potentially repetitive documents each year, the Public Representative suggests that the Commission require the Postal Service to maintain a current list of such publications and other documents on its website with links to the full documents on that webpage. Thus, in its annual submission, the Postal Service can easily cite to the appropriate webpage to fulfill these requirements. This will ensure that all potential participants have access to current documents while reducing the burden on the Postal Service in producing these publications, handbooks, and forms.

C. Concerns Raised in Valpak's Initial Brief

1. Defining the Term "Narrative"

Valpak suggests that the Commission standardize its language in the various sections of its proposed rules requiring a narrative explanation in addition to the submission of raw data and financial reports. Valpak Comments at 15-17. It suggests the phrase "a narrative setting forth a full and detailed explanation" be used. Valpak further suggests defining the phrase "full and detailed explanation" in a definitional rule. *Id.* at 16. Valpak believes that these minor changes will result in a detailed explanation from the Postal Service that would benefit mailers and the Commission in understanding the Postal Service's submissions and result in more informative reports.

The Public Representative agrees with Valpak that its proposed standardized language and definition relating to the phrase “full and detailed explanation” will result in all participants and the Commission having a better understanding of the Postal Service’s filings. It should also eliminate many of the questions and potential interrogatories directed to the Postal Service that would otherwise be necessary to clarify and explain its filings.

2. Minor Changes to the Definition of the Term “Analytical Principle”

Valpak suggests that the definition of the term “analytical principle” be fine-tuned by replacing the phrase “theory, precept, or assumption” with “theory, precept, assumption, method, or technique.” Valpak argues that the currently proposed definition appears to be too narrow, especially since the Commission intends for a change in a regression model to be viewed as an analytical principle change. See PRC Order No. 104 at 28. It believes that its proposed minor change better conforms to Commission intent.

The Public Representative agrees with Valpak’s proposed alteration of the definition of the term analytical principle. In addition to better reflecting the Commission’s intent to have changes in regression analyses be considered changes to analytical principles, it will also require changes to other methods or techniques to be treated as analytical principle changes. Such a result ensures that the Postal Service cannot change its techniques or methods without first following proper procedures.

3. Public Access to Information

Valpak points out that proposed rule § 3050.3(a) explicitly provides that “[t]he Commission shall have access...” to certain materials; it does not mention whether parties will have access to this information. Valpak points out that not allowing parties

access to such information would be inconsistent with proposed rule § 3050.3(b), which requires the Commission to perform a balancing test with respect to information the Postal Service seeks to treat as confidential. Unless the Postal Service can convince the Commission that such information should not be publicly disclosed under the confidentiality rules, such information should be made publicly available. *See supra* Section II.B.4 and Docket No. RM2008-1.

4. Publication of the Status of Ongoing Special Studies

Valpak suggests that the Commission require the Postal Service to publish a short status report on a regular basis that indicates the status of special studies. Valpak is concerned that if the Postal Service is not required to publish such a list, the Postal Service will surprise mailers with a completed study and initiate a proceeding to change an accepted analytical principle without any public awareness. It submits that requiring the Postal Service to keep the Commission and mailers abreast of the status of ongoing studies will increase transparency of the process.

The Public Representative agrees in principle with Valpak's suggestion. However, there are several problems with Valpak's proposal that need to be explored prior to implementation. It will be difficult to draw the line as to when a study has begun. In other words, does a study begin when it enters its data collection stage? This may not be an acceptable starting point for studies to be included on a status report since some special studies just use existing data in a new way. Does a study begin at the planning stage? This also may not be a good starting point since the study may never materialize due to budgetary or other constraints.

If the Postal Service is required to disclose the potential existence of special studies in its initial planning stages, that may result in a "chilling effect" on the Postal Service's willingness to explore undertaking new studies. Accordingly, while Valpak's suggestion has merit, the Commission should be careful in determining how to draw the

line between studies that should be reported and studies that are not yet sufficiently far along to warrant inclusion in such a report. The Commission may seek to explore this issue further in a separate rulemaking.

5. Information on Products that Fail to Comply with the Applicable Provisions of the PAEA

As Valpak points out, proposed rule § 3050.2 does not contemplate the situation where the Postal Service may not have complied with all applicable provisions of the PAEA. The rule should be altered to provide for the circumstance that certain products may not comply with all applicable provisions of the PAEA. For those products that do not comply with all applicable requirements, Valpak suggests that the proposed rule require the Postal Service to (1) explain the circumstances underlying the failure to meet the applicable provisions of the PAEA, (2) explain what steps the Postal Service plans to take or is taking to bring the products into full compliance, and (3) indicate the time frame within which the Postal Service expects to bring such products into compliance.

Having such information will allow the Commission and interested mailers to know what types of remedies to fashion under 39 U.S.C. § 3653(c) in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance. See 39 U.S.C. § 3662(c). It will also increase transparency and accountability by providing the public with the steps that the Postal Service is taking or plans to take in order to meet the requirements of the PAEA.

D. Concerns Raised in Time Warner's Initial Brief

1. Using Multiple Years of Data in Some Statistical Systems

To overcome potential problems with insufficient sample size in certain rate categories that have few or even no observations in the IOCS and other statistical systems used to measure costs, volumes, and revenues, Time Warner suggests that the Commission consider whether to use more than one year's worth of observations in some of the statistical systems.

While Time Warner's suggestion may have some merit, the Public Representative submits that Time Warner's proposal is outside the scope of this rulemaking. The purpose of this rulemaking is to ensure that the Commission receives all the data and other information it needs on a periodic basis in order to fulfill its statutory responsibilities. The purpose of this rulemaking is not to debate adequacy of sample sizing for particular rate categories of mail. At the appropriate time during an analytical principle change proceeding or during an ACD proceeding, Time Warner should raise these concerns in the context of a particular factual background with inadequate sample size.

2. Finer Levels of Disaggregation with Respect to Certain Periodicals

Time Warner proposes a finer level of disaggregation for Outside County Periodical rate categories than listed in the appendix to the Commission's proposed rules. Noting that sacks, pallets, and bundles have separate and distinct rates, Time Warner would like IOCS data to be accumulated separately for each of these rate categories. Currently, IOCS data are not presented separately for these categories; rates for each category are developed using special studies.

The Time Warner proposal is an example of the type of issue that appears tailor-made for a strategic rulemaking as described in the proposed rules. That proceeding could explore relevant considerations such as the costs involved in processing the data as proposed and the benefits that might result. It is necessary to bear in mind that costs developed through the overall subclass attribution process using the IOCS sometimes reflect more cost characteristics than the more focused rate category studies. In any event, a change in methodology is obviously at issue. The determination of the appropriate approach for setting rates would undoubtedly present the possibility of a change in analytical principle and needs to be thoroughly explored for all possible ramifications. This is exactly the type of issue that proposed rule § 3050.11 was designed to address. Accordingly, assuming these rules are promulgated, Time Warner should petition the Commission to initiate a rulemaking to consider its proposed analytical principle change.

III. CONCLUSION

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully Submitted,

/s/ Robert Sidman

Robert Sidman

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Docket No. RM2008-4

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