

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Annual Compliance Report, 2008

Docket No. ACR2008

**REPLY COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA**
(February 13, 2009)

The Newspaper Association of America (“NAA”)¹ respectfully submits these reply comments on the United States Postal Service’s annual compliance report for Fiscal Year 2008. NAA will address the issue of the correct understanding of the Saturation worksharing discount in Standard flats Mail, and the difference between High Density and Saturation flats rates, in response to comments made in this proceeding by the Postal Service and Valassis/Saturation Mail Coalition.

As this Commission well knows, many newspapers in the United States use Standard Mail to distribute advertising to residents (who do not subscribe to the newspaper) as part of the their Total Market Coverage (“TMC”) programs.² These programs meet the needs of advertisers for “saturation” distribution to all of the residents in a given area. As such, newspapers compete directly with so-called “saturation” mailers such as Valassis’s Red Plum and SMC members.

¹ The Newspaper Association of America (“NAA”) is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers.

² See, e.g., Docket No. R2000-1, Rebuttal Testimony of William Wilson at 19-25l.

Newspapers achieve the requested distribution by combining delivery of advertising inserts in newspapers delivered to subscribers and advertising inserts delivered by the Postal Service to non-subscriber households. Newspapers and saturation mailers compete daily to serve the same local retailers, restaurants, and other merchants. Both use the Postal Service to serve this local advertising market demand.

Newspaper TMC programs mail at both High Density and Saturation rates to meet the demands by advertisers, and frequently use both rate categories within an existing SCF. Whether a TMC program uses High Density or Saturation rates depends on factors such as the proportion of subscribers on a route and the number of nonsubscribers that must be reached. A given carrier route can change from High Density to Saturation (and back) depending on factors such as the number of newspaper subscribers on a route and, on occasion, Postal Service adjustments to carrier routes.

According to the most recent data available, NAA member newspapers spent nearly \$800 million in Standard Mail postage in 2006, the vast majority of which was in High Density and Saturation mail. Of the Standard Mail postage, NAA understands that about 60 percent pays High Density rates, and 40 percent pays Saturation rates (both frequently at the higher pound-rated levels).

For this reason, NAA members are keenly interested in High Density and Saturation rates. Ever since the Commission originally recommended the High Density and Saturation discount rates in Docket No. R90-1³ in recognition of the

³ To be precise, the Commission recommended both 125-piece and Saturation rate discounts in Docket No. R90-1. The Governors rejected the former recommendation, but the

worksharing done in mailers in presorting those mailings into carrier walk-sequence, NAA has supported the cost-based difference between those rates.

I. THE HIGH DENSITY/SATURATION PASSTHROUGH IN THIS PROCEEDING

A. The Costs Avoided

Pursuant to 39 U.S.C. §3652, the Postal Service filed its annual compliance report on December 29, 2008. As part of its review, the Commission correctly observed that the Postal Service made a number of methodological changes, including departing from the “established method of estimating cost avoidances between (1) Basic and High Density, and (2) High Density and Saturation for letters, flats, and parcels.” *Order No. 169* at 5. The Commission directed the Postal Service to file data using the established methodology.⁴

The Postal Service complied by filing data using the established cost avoidance methodology on January 21. According to that Response, the discounts between High Density and Saturation flats – the rate difference of interest to NAA members -- complied with the statutory criteria set forth at 39 U.S.C. § 3622(e). Accordingly, the Commission may find, for purposes of this proceeding, that the discounts comply with legal requirements.⁵

Postal Service promptly changed its mind and filed to reinstate the 125-piece discount (now called High Density) in Docket No. MC91-1.

⁴ *Responses of the United States Postal Service To Commission Order No. 169 at 17-19 & Items 6 & 9 Spreadsheet.xls* (January 21, 2009).

⁵ However, this issue may recur in the Postal Service’s proposed rate adjustments for market-dominant products, filed February 10, 2009.

B. The Postal Service Disregarded The Established Methodology

In its January 21 Responses, the Postal Service argued that the established costs avoided methodology should not apply to the difference between High Density and Saturation rates.⁶ In this effort, it was supported by the Initial Comments of Valassis Direct Mail, Inc. and the Saturation Mail Coalition,⁷ which clearly have a self-interest in increasing their rate advantage over newspaper TMC companies with which they compete.

The Postal Service and Valassis/SMC attempt to justify the departure from the standard methodology by asserting that the difference between the High Density and Saturation tiers is not a worksharing activity under Section 3622(e) of the Postal Accountability and Enhancement Act.⁸ They argue that the cost difference is due to “density” and that “density” is not named as a worksharing activity in Section 3622(e). Accordingly, they object to recognizing these differences as presort cost differentials subject to Section 3622(e).

In support of their “density” argument, the Postal Service and Valassis/SMC assert that High Density and Saturation mail serve “different market segments” although it concedes that “in some cases these markets are related, and in some cases, perhaps, these markets may overlap slightly.” *USPS Responses* at 18. The Postal Service in the past has evidenced a better

⁶ *Id.* at 17-18.

⁷ *Initial Comments of Valassis Direct Mail, Inc. and The Saturation Mailers Coalition Concerning The Postal Service’s FY2008 Annual Compliance Report* (Jan. 30, 2009). Valassis is the successor company to ADVO, Inc.

⁸ The Postal Service Responses also discuss the relationship of basic Carrier Route mail to the High Density and Saturation tiers; NAA will address only the difference between High Density and Saturation rates.

understanding of newspapers' overlapping use of High Density and Saturation mail.⁹

Valassis/SMC concede that "High-Density (flat) mailers are typically mailers who do attempt to saturate carrier routes but do so through the combined use of private and postal delivery." However, they characterize this as "not a worksharing characteristic but a market/demand-based characteristic." *Id.*

C. The Commission Should Continue To Apply The Established Methodology

The Commission should continue to use the established methodology when reviewing the Postal Service's market-dominant rates. The Postal Service and Valassis/SMC are incorrect for several reasons.

1. The High Density/Saturation discount has always been a worksharing discount based on presortation into carrier walk-sequence

It is abundantly clear that the High Density (then called "125-piece") and Saturation rates were established as, and are, worksharing discounts. In its Opinion and Recommended Decision in Docket No. R90-1, the Commission stated that "walk sequencing is the critical distinguishing feature of the Service's proposal" (for a Saturation discount). *R90-1 Op.* at V-209. Preparation of a mailing in carrier walk-sequence is, of course, quintessentially a worksharing activity by the mailer. The Commission stated that the discount rate "is based on the savings associated with walk sequencing." *Id.* (in Docket No. R90-1, the

⁹ See, e.g., Docket No. R2006-1, Tr. 17/5084 (O'Hara).

savings measured consisted of in-office costs. The word “density” nowhere appears in the Commission’s discussion of the discounts.¹⁰

This line of reasoning continued to apply in every rate case since Docket No. R90-1. The Commission always based the rate difference between High Density and Saturation on the cost differences from walk-sequencing. In Docket No. MC95-1, the Commission reiterated that cost differences between rate categories should reflect only the costs avoided by worksharing and not other costs. *Docket No. MC95-1 Op.* at ¶4210. In Docket No. R97-1, the Commission accepted the inclusion of worksharing savings in mail processing costs in addition to delivery cost savings, but these savings were still related to the mailer worksharing. *Docket No. R97-1 Op.* at 451-454. *See also* Docket No. R2006-1 Op. at 296-298 (“The Commission uses a passthrough of 100 percent for all shape, presort, and dropship cost differentials” with one exception not relevant here).

The Postal Service and/or Valassis/SMC are trying to rewrite history before this Commission. The record clearly demonstrates that these rate categories were created, and have consistently been reaffirmed as, worksharing discounts.

2. The Postal Service’s statutory argument is flawed

With this background, it is also evident why the Postal Service’s statutory argument is incorrect. The Postal Service bases its legal argument on the

¹⁰ What the Postal Service and Valassis/SMC refer to as “density” came into play only insofar as the cost study relied upon by the Postal Service in that case found different delivery cost savings from walk-sequencing at the 125-piece and Saturation levels. *Id.* at V-210-212.

omission of the word “density” from the statutory definition of “workshare discount” found in Section 3622(e)(1), which states:

The term “workshare discount” refers to rate discounts provided to mailers for the presorting, prebarcoding, handling, or transportation of mail, as further defined by the Postal Regulatory Commission under subsection (a).

Nothing in the legislative history remotely hints that the Congress, through this provision, intended to disrupt the Commission’s longstanding treatment of presortation/walk-sequencing discounts in general or the High Density/Saturation discounts in particular. Rather, Congress enacted Section 3622(e) to address concerns that the Postal Service may be giving mailers excessive discounts. This explains why the other provisions of Section 3622(e) establish the general rule that discounts may not exceed 100 percent of avoided costs, subject to certain exceptions not relevant here.

Congress is presumed to have known and understood the Commission’s historical treatment of presort discounts, including High Density/Saturation differential as a presort discount. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988)(“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”)¹¹ Accordingly, there is no basis for believing that Congress intended to disrupt that longstanding treatment of the difference between High Density and Saturation rates as a worksharing presort discount due to the cost savings from mailer walk-sequencing. Surely,

¹¹ *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute . . .”); “[L]egislative language will be interpreted on the assumption that the legislature was aware of existing statutes, the rules of statutory construction, and judicial decisions . . .” C. Sands, *Sutherland Statutory Construction*, § 45.12 (1973).

had such been the intention, Congress might have been expected to have said something to that effect.

The Commission's treatment of the High Density/Saturation rate difference as a presort discount in Docket No. R2006-1, decided only two months after enactment of the PAEA, confirms this understanding. Although Docket No. R2006-1 was decided under the previous law, the PAEA clearly influenced the Commission's decision. That, only two months after passage of the PAEA, the Commission continued to treat the High Density/Saturation rate differential as a presort discount is a contemporaneous agency interpretation deserving of weight.

Furthermore, in its review of the Postal Service's proposed rate adjustments under the PAEA only last year, the Commission clearly treated different presort tiers as worksharing discounts. See *Order No. 66*, Docket No. R2008-1 at 35 (referring to mailings that "lack the density to qualify for deeper presort discounts . . . the majority of mail that earns this discount [discussing the mixed automation AADC category] . . . receive substantial discounts for presenting barcoded mail presorted to 3-digit and 5-digit destinations). Nothing in that decision suggests that different reasoning would apply to the High Density and Saturation tiers.

In any event, it is the Commission that "further defines" these provisions, not the Postal Service unilaterally. The Postal Service simply does not have authority under the Act to redefine a longstanding discount through the pretext of relabeling it on the basis of some other criterion, declare the relabeled discount

outside the definition of Section 3622(e), and thereby circumvent Section 3622(e) because it finds them inconvenient.

Finally, the Commission should reject the argument by Valassis/SMC (at 18) that continuing to apply Section 3622(e) to the High Density and Saturation discounts would “arbitrarily constrain the rates for those products by virtue of the statutory worksharing cost-avoidance limitation” and reduce the Postal Service’s pricing flexibility. However, as the Commission recently noted, Section 3622(e) reflects a deliberate policy decision by Congress that “places restrictions on the Postal Service’s flexibility to set workshare discounts.” *Order No. 66*, Docket No. R2008-1 at 32. What Valassis/SMC prefer to call an arbitrary restraint was, in fact, the very purpose of Section 3622(e) -- an important and conscious restriction established to apply to a certain aspect of postal pricing that Congress feared might be subject to abuse.

3. Establishing what must be contained in the Annual Compliance Report is the Commission’s responsibility, not the Postal Service’s

Section 3652 of the PAEA provides, in several places, that it is up to the Commission, not the Postal Service, to define what the Postal Service must file in an Annual Compliance Report. Section 3652(a) directs the Postal Service to analyze its costs and revenues using methodologies the Commission “shall prescribe.” By Section 3652(b), this requirement specifically applies to worksharing discounts. Section 3652(e) provides that the Commission shall prescribe the content and form of the Postal Service’s annual compliance reports.

Notably, Congress did not authorize the Postal Service to decide on its own what information to provide, or what methodologies to apply. Those decisions are the province of the Commission. The Commission establishes the methodologies by which the Postal Service's compliance with the law, including Section 3622(e), is to be evaluated. Accordingly, the Postal Service may not lawfully redefine a worksharing discount.

4. The arguments regarding density are without merit

Valassis/SMC and the Postal Service argue that a mailer's choice to use High Density instead of Saturation rates is a market decision, not a worksharing decision, and that no amount of worksharing will shift a mailer from High Density to Saturation rates. Of course, this is not new; that is the very nature of any discount structure that varies by route volume (or even weight at a particular entry point). That eligibility for the discounts varies by volume on a particular route has never, throughout the 18 years since the High Density and Saturation discounts were introduced, caused the Commission to depart from basing that rate differential on costs avoided by worksharing.¹² Congress's addition of Section 3622(e) indicates that such volume-based considerations are of little relevance in the workshare discount regime.

II. CONCLUSION

For the foregoing reasons, the Newspaper Association of America urges the Commission to affirm that the methodology used to measure the High

¹² Logically, similar reasoning also could apply to the difference between destination entry at BMCs, SCFs, and DDUs. There too, mailers' choices between these entry points are influenced by the density of their mailings to each entry level. The Valassis/SMC argument would suggest that those discounts also could be redefined as density-related instead of worksharing?

Density/Saturation flats discount used in Tables VII-B-2 and VII-B-3 in the 2007
Annual Compliance Review.

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