

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Notice of Price Adjustment

Docket No. R2009-2

**COMMENTS OF THE  
PLATINUM COALITION  
(March 2, 2009)**

The Platinum Coalition respectfully submits these comments, which concern the price increases that the Postal Service proposes for the Platinum level of Confirm service. The Platinum Coalition is a coalition of users of Confirm. Its members include Data-Mail, Inc.; DHL Global Mail; GrayHair Software, Inc; Harte-Hanks; Transcontinental Direct; World Marketing, Inc; and The Flute Network. These comments are supported by the separate declarations of Mark Mandell of Data-Mail, Inc. (“Mandell Decl. ”), Cameron Bellamy on behalf of GrayHair Software, Inc. (“Bellamy Decl.”), Charles M. Howard on behalf of Harte-Hanks (“Howard Decl.”), Janyce Pritchard on behalf of The Flute Network (“Pritchard Decl.”), and Wanda Senne on behalf of World Marketing, Inc. (“Senne Decl.”).

**SUMMARY**

The proposed price of \$250,000 for a Platinum-level Confirm subscription purchased by a “mail agent” would violate 39 U.S.C. § 403(c), which forbids “undue or unreasonable discrimination among users of the mails.” The \$250,000 price is *ten times*

the price that the Postal Service proposes to charge mail owners for the same subscription. The Postal Service has offered no plausible justification for this enormous disparity, and none exists. Value-added resellers have been a major contributor to the usefulness and growing acceptance of Confirm. The record contains no evidence that Platinum subscriptions cost significantly more for the Postal Service to supply to mail agents than to mail owners, or that the demand for Platinum subscriptions by mail agents is significantly more inelastic, or that a 10-to-1 price disparity could be justified by differences in transaction volume or any other conceivable fully-distributed cost (“FDC”) distribution key. Courts and regulatory agencies have repeatedly held in analogous circumstances that discrimination against resellers (whether value-added resellers or pure arbitrageurs) is unlawful.

The proposed subscription price of \$250,000 would also be unjust and unreasonable in absolute terms. First, it is unnecessary to ensure that Confirm covers its costs. If all Platinum subscriptions were priced at \$25,000—the same price that the Postal Service proposes for mail owners—Confirm services as a whole would generate a coverage ratio of approximately 200 percent. Raising the Platinum subscription price for mail agents to \$250,000 would inflate the coverage ratio to approximately *500 percent*, and would increase total Confirm revenue approximately three-fold. About 61 percent of total Confirm revenue would be extracted from the 15 Platinum subscriptions that the Postal Service expects to sell to mail agents. Moreover, such a disproportionate increase would likely shrink both the demand for and the supply of value-added Confirm services, damage the competitiveness of the value-added service sector, and reduce the volume of Confirm transactions and First-Class and Standard Mail. These consequences would clearly violate 39 U.S.C. §§ 404(b) and 3622(b)(8) (which require that rates within each

class be “equitable,” “just and reasonable”), the policy of § 3622(c)(2) that rates bear only a reasonable share of institutional costs, the policy of § 3622(b)(2) favoring rate stability and disfavoring rate shock, and policy of § 3622(c)(3) that requires consideration of “the effect of rate increases upon the general public [and] business mail users.”

For all of these reasons, the Commission should decline to approve the \$250,000 price, and instead should limit the price of Platinum subscriptions to \$25,000 for both mail owners and mail agents.

### **BACKGROUND**

Confirm is an optional service that provides an authorized subscriber with tracking data electronically collected from the optical scanning of specially barcoded automation-compatible letter- and flat-shaped mailpieces as they pass through certain automated mail processing operations. DMM 503.13.2.1. The service dates to 2002, when the Governors approved a Commission decision recommending, with minor changes, a stipulated settlement in support of the proposed service. *See* Docket No. MC2002-1, *Classification and Fees for Confirm*, PRC Op. & Rec. Decis. (July 26, 2002).

The Confirm rate structure is a two-part rate design. All users pay a reservation charge (the periodic subscription price); some subscribers also pay a volumetric charge (the per-scan charge). Subscription fees are currently \$2,000 per quarter for a Silver subscription, \$6,500 per year for a Gold subscription, and \$23,500 per year for a Platinum subscription. Although all three categories of subscribers generally must pay the same fee for additional ID codes (\$900 each for three months, and (for the Silver and Gold subscriptions) \$2,500 for one year), only Silver and Gold subscribers must pay

additional charges for additional scans. A Platinum subscription entitles its holder to an unlimited number of scans at no additional charge. *See* DMM 503.13.1.

This rate structure has fostered the development of a vigorously competitive niche industry of value-added resellers. These resellers provide a variety of services. Some mail service providers utilize the Confirm service to add value to other services they provide their customers as mailing agents (e.g., mail preparation and entry). For these vendors, the Confirm related software and data processing component of their business is provided as an add-on to other direct mail or mailing services. *See, e.g.,* Howard Decl. at 1-2 (describing the services of Harte-Hanks); Senne Decl. at 1 (describing the services of World Marketing, Inc.). Other service providers provide storage and analysis of Confirm as a stand-alone service. *See, e.g.,* Bellamy Decl. at 1-2 (describing the services of GrayHair Software, Inc.). Competition among these value-added suppliers has produced a diverse range of innovative options for mail owners. As Mr. Bellamy testified in 2006:

Among the Platinum Confirm service providers, there are a variety of business models designed to appeal to different segments of the market. GHS aimed to provide multi-year storage capacity with customized reports, providing fast turnaround in a highly secure environment. Others emphasized providing large numbers of customers with a low-priced and easy to use service, while seeking to get many of these same customers to use more advanced services, or to use services more often. Several Platinum subscribers sought to combine advanced logistics capability with near real time mail tracking on an aggregate basis. Still others sought to add proprietary data to Confirm observations to create unique information capabilities of use to direct marketers.

R2006-1 Bellamy Direct (GHS-T-1) at 6-7.

The complementary services offered by resellers of Confirm have provided great value to mailer owners. The tracking and tracing capabilities of Confirm enhance the value of First-Class and Standard Mail for mailers by enabling better management of the

timing of mail entry, and enhanced relationships with the mailers' customers.<sup>1</sup> Nick Barranca, then the Postal Service's Vice President for Product Development (and the Postal Service official responsible for Confirm service) stated in 2006 that Confirm service "allows a degree of mail tracking and improved delivery capability that otherwise would not exist within these mail classifications." Barranca Presentation at 8 (R2006-1 Tr. 33/11424). Mailers "can thus use Confirm to more precisely align their business processes and resources with the actual processing and delivery of the mail." R2006-1 Mitchum Direct (USPS-T-40) at 15.<sup>2</sup> And the value added services offered by resellers have made Confirm a practical option for many mail owners that lack the mail volume, resources, or expertise to use Confirm on their own. *See* Pritchard Decl. at 5; Bellamy Decl. at 1-2; Senne Decl. at 1-2.

By increasing the use of Confirm, value-added resellers have benefitted the Postal Service itself. In testimony to Congress in 2004, Postmaster General Potter stated:

To increase the use of our traditional products, we are using technology to add value to the mail through the development of new features and services. *Our Confirm service – one of the first of our Intelligent Mail initiatives – provides the Postal Service and mailers with a rich stream of information about mail as it moves through our system. It helps the Postal Service improve processing efficiency and helps mailers better achieve their business objectives.*<sup>3</sup>

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<sup>1</sup> R2006-1 Mitchum Direct (USPS-T-40) at 15, 20; MC2002-1 Direct Testimony of Paul Bakshi (USPS-T-1) at 1. *See also* R2006-1 Bentley Direct (MMA-T-1) at 32.

<sup>2</sup> *Accord*, MC2002-1 Direct Testimony of Paul Bakshi (USPS-T-1) at 12. *See also* R2006-1 Bentley Direct (MMA-T-1) at 30, lines 12-15.

<sup>3</sup> *The Postal Service In Crisis: A Joint Senate-House Hearing On Principles For Meaningful Reform*, Joint Hearing Before the Committee on Government Reform, House of Representatives, and the Committee on Governmental Affairs, United States Senate, 108<sup>th</sup> Cong., 2d Sess. 70 (March 23, 2004) (testimony of John E. Potter; emphasis added). *See also* R2006-1 Tr. 33/3981 (Mitchum) (agreeing with the Postmaster General's statement).

Likewise, Mr. Barranca stated in 2006 that “Confirm represents a definite ‘win-win’ for the USPS and its customers.”<sup>4</sup>

Since 2006, however, the attitude of the Postal Service toward Confirm—and the value-added resellers who make its use practical for many mail owners—has changed. The Postal Service apparently has come to regard Confirm resellers not as downstream suppliers of complementary services that increase the value of the Postal Service’s own offerings, but as competitors to be squashed, or sources of rents to be appropriated.

In Docket No. R2006-1, the Postal Service proposed to eliminate the unlimited-scan subscription option. The proposal led to a firestorm of opposition by mail owners as well as mail service providers. *See* R2006-1 Op. & Rec. Decis. ¶¶ 6186-6218. The Commission ultimately recommended the continuation of the unlimited scan subscription option. *Id.* at ¶¶ 6219-6228.

In the present case, the Postal Service has seized upon a different stratagem. Instead of imposing per-transaction charges on all Platinum subscribers, the Postal Service would discriminate against value-added resellers in their annual *subscription* charges. Specifically, while the annual Platinum subscription price for a mail owner would increase by 6.4 percent (from \$23,500 to \$25,000), the Platinum subscription price for a “mailing agent” would increase by *964 percent* (from \$23,500 to \$250,000). The Postal Service asserts that the resulting 10-to-1 disparity in Platinum subscription prices would “better align the revenue source with the source of the costs of providing the service.” USPS Notice of Market-Dominant Price Adjustment (Feb. 10, 2009) at 24.

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<sup>4</sup> Barranca Presentation at 11 (R2006-1 33 Tr. 11427). USPS witness Mitchum acknowledged that Mr. Barranca “is the vice president under which the [Confirm] product falls.” R2006-1 Tr. 33/11332 (Mitchum).

This extraordinary increase is unnecessary to cover the costs of Confirm service. The Annual Compliance Report filed by the Postal Service two months ago for FY2008 reported that (i) Confirm costs totaled \$1,222,394 in that year, (ii) Confirm generated \$2.6 million in revenues in the same year, and (iii) the resulting cost coverage was 214 percent.<sup>5</sup> By comparison, the FY2008 cost coverage reported by the Postal Service for all of Market Dominant Mail was 171 percent.<sup>6</sup>

In this proceeding, the Postal Service projects before-rates Confirm revenue of \$2,458,100, and after-rates revenue of \$6,126,100.<sup>7</sup> Assuming that the costs attributable to Confirm remain in the range of \$1.2 million or so, these revenue projections imply a before-rates coverage ratio of approximately 200 percent and an after-rates coverage ratio of approximately 500 percent.<sup>8</sup>

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<sup>5</sup> United States Postal Service Annual Compliance Report FY2008 at 44-45 (Table No. 5) and Library Reference USPS-FY08-28 (FY 2008 Special Cost Studies Workpapers – Special Services).

<sup>6</sup> Library Reference USPS-FY08-1 (FY 2008 Public Cost and Revenue Analysis (PCRA) Report).

<sup>7</sup> Library Reference USPS-R2009-2/5 (“Rates” worksheet).

<sup>8</sup> This assumption is a reasonable one. The costs attributed by the Postal Service to Confirm have been declining in recent years—from \$4.5 million in FY2005 to \$2.2 million in FY 2006 to \$1.5 million in FY 2007 to \$1.2 million in FY 2008. Library Reference USPS-FY2008-28, Attachment 3, cells E66, F66, G66 and H66.

## ARGUMENT

### I. THE PROPOSED SUBSCRIPTION PRICES FOR THE PLATINUM LEVEL OF CONFIRM WOULD UNLAWFULLY DISCRIMINATE AGAINST MAIL AGENTS.

A Platinum subscription price of \$25,000 for mail owners but \$250,000 for “mail agents” would amount to “undue or unreasonable discrimination among users of the mails.” 39 U.S.C. § 403(c). Section 403(c) provides:

In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized under this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

An undue discrimination claim under Section 403(c) has three basic elements: (1) a difference in prices (2) for like services (3) without a reasonable justification. *National Easter Seal Society v. USPS*, 656 F.2d 754, 760-762 (D.C. Cir. 1981); *accord*, *MCI Telecomms. Corp. v. FPC*, 917 F.2d 30, 39 (D.C. Cir. 1990) (applying cognate provision of Communications Act). The proposed Confirm prices clearly establish the first two elements: the Postal Service is proposing to charge a ten-fold difference in price for the identical service—a Platinum subscription—based solely on the identity of the ratepayer. Accordingly, the proposed Confirm price structure must be found unduly discriminatory absent a reasonable economic justification for the discrimination.

The burden of establishing a reasonable business justification increases when, as here, the targets of the discrimination are resellers. Courts and regulatory agencies have repeatedly found that price discrimination against resellers is forbidden under antidiscrimination statutes that are cognates of 39 U.S.C. § 403(c). In the telecom

industry, for instance, the FCC has held more than 30 years ago that tariffs restricting the resale of service are inherently unjust, unreasonable and discriminatory. *In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), *amended on reconsideration*, 62 F.C.C.2d 588 (1977). In upholding the FCC's decision, the Second Circuit pointed to the FCC's conclusion that unlimited resale would (1) encourage cost-related pricing, (2) promote just, reasonable charges and discourage discrimination, thereby reducing the need for FCC oversight, (3) lead to more efficient utilization of facilities that were going to waste, (4) result in better management and marketing, (5) generate increased research and development, (6) produce an increased variety of communications services, and (7) effect growth of the total market for specialized telecommunications services. *AT&T v. FCC*, 572 F.2d 17, 23 (2d Cir. 1978). The FCC and the court viewed resale as a beneficial component of the market for telecommunications services, and thus determined that restrictions on resale were unjust, unreasonable, and discriminatory.

Courts have reached similar conclusions in antitrust cases, finding that value-added resale—and even pure arbitrage without any value-added services at all—have great economic value to end users and the public. As the Ninth Circuit explained,

Prohibiting sellers from eliminating arbitrage thus can enhance consumer welfare under certain conditions. For instance, if the seller's increase in profits from a greater number of sales due to the discounted price outweighs the loss in profits from the decrease in sales at the higher price due to customers switching to the reseller, the seller would find it profitable to continue to offer the product or service at a discounted price despite the presence of arbitrage and an inability to eliminate it. Consequently, favored consumers would still be able to purchase the product or service at the lower discounted price from the seller. In addition, some disfavored consumers who were willing to pay the seller's higher price could buy the product or service at a lower price from the reseller, and other disfavored consumers who were unwilling to pay the seller's higher price might be willing to buy the product at the reseller's

lower price. Under these conditions, deterring the seller from eliminating arbitrage would increase consumer welfare and allocative efficiency.

*MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1134 (9th Cir. 2004).

While the court in *MetroNet* deferred to the state PUC's determination that these conditions did not exist in the case before it, the conditions in which arbitrage provides a net benefit for consumers described by the court perfectly summarize the conditions surrounding Confirm service. As described in Section II, *infra*, the cost of providing Confirm service is reasonably expected to be covered if all subscribers are charged the proposed "mail owner" rate. Additionally, there are a number of mail owners who are willing to pay the price charged by resellers, but not the price charged by the Postal Service—meaning that a sale by a reseller does not necessarily replace a sale by the Postal Service. As the *MetroNet* court recognized, restricting resale and eliminating arbitrage in situations like this would in fact harm customers and lead to an inefficient allocation of resources.

Similarly, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Court uphold an antitrust judgment against a ski resort for refusing to sell lift tickets to a competitor at retail price. 472 U.S. 585, 593-94 (1985). The Postal Service's current proposal is closely akin to the discrimination found unlawful in *Aspen Skiing*, for the proposed rate schedule would deny value-added resellers the opportunity to obtain the Platinum level of Confirm service at the same *retail* price offered to mail owners.

In any event, the Postal Service has provided no cogent justification for charging mail agents ten times as much as mail owners. First, there is no evidence in the record that providing a Platinum subscription to a value-added reseller costs the Postal Service

more—let alone ten times more—than providing a Platinum subscription to a mail owner. This is hardly surprising: the Postal Service’s own testimony in MC2002-1 and R2006-1 makes clear that the cost of a Confirm subscription is almost completely insensitive to the number of scans performed for the subscriber—i.e., the marginal cost of additional scans is virtually zero. As USPS witness Kiefer testified in Docket No. MC2002-1, and USPS Vice President Barranca reiterated in 2006, “Once Confirm’s hardware and software were in place, the cost of additional scans is extremely small. A transaction-based price then would exceed the true marginal cost by a large factor.” Barranca Presentation at 8 (R2006-1 Tr. 33/11424); MC2002-1 Kiefer Direct, at 4 (reproduced at R2006-1 Tr. 33/11429 *et seq.*). *Accord*, R2006-1 Tr. 33/11347 (Mitchum) (agreeing that the “per usage costs” of Confirm “are extraordinarily small, so small that they approach zero”); R2006-1 Mitchum Direct, USPS-T-40 at 18 (“today’s passive scans have a very low marginal cost for the Postal Service”); R2006-1 Tr. 14/4192 (Mitchum) (agreeing that costs of additional scans are “extremely small” once the confirmed hardware and software are in place).<sup>9</sup>

Nor has the Postal Service justified the proposed 10-to-1 price disparity on a Ramsey pricing or value-of-service theory. The Postal Service’s rate filing offers no evidence that the demand for Platinum subscriptions by “mail agents” is significantly more inelastic than the demand for Platinum subscriptions by mail owners, let alone that the difference in elasticity is so vast as to justify the proposed price differential.

Nor has the Postal Service justified by the proposed price disparity in terms of fully allocated costs. Even assuming *arguendo* that fully distributed costing were an

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<sup>9</sup> *Accord*, R2006-1 Bellamy Direct (GHS-T-1) at 9-10; R2006-1 Callow Direct (OCA-T-5) at 12-13; R2006-1 Bentley Direct (MMA-T-1) at 32.

appropriate method of setting postal rates, the Postal Service has failed to identify any distribution key that would support the proposed price disparity. As noted above, the variable costs of Confirm service are extremely low. And the Postal Service has offered no evidence that the average “mail agent” Platinum subscriber to has ten times the volume of Confirm transactions as the average “mail owner” Platinum subscriber.

**II. THE PROPOSED PLATINUM SUBSCRIPTION PRICE OF \$250,000 FOR MAIL AGENTS WOULD BE UNJUST AND UNREASONABLE.**

The proposed subscription price of \$250,000 would also be unreasonably high in absolute terms. While the Postal Accountability and Enhancement Act of 2006 (appropriately) allows the Postal Service greater pricing flexibility than did the Postal Reorganization Act of 1970, *see* 39 U.S.C. § 3622(b)(8), the flexibility not unlimited. Prices set by the Postal Service must still be “reasonable and equitable” (39 U.S.C. § 404(b)) and “just and reasonable” (*id.*, § 3622(b)(8)). Moreover, the objectives and factors spelled out at 39 U.S.C. §§ 3622(b) and (c) make clear that PAEA did not leave price levels for individual services within a class completely unbounded. A \$250,000 price for a Platinum-level subscription to Confirm would violate both the general rule of reasonableness and several of the specific objectives and factors of § 3622(b) and (c).

**A. \$250,000 Subscription Price Would Burden Subscribers With An Unreasonable Share Of Institutional Costs.**

The second pricing factor of PAEA, a carryover from the Postal Reorganization Act, requires consideration of “(2) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to each class or type of mail service through reliably identified causal relationships plus that portion of all other costs

of the Postal Service reasonably assignable to such class or type.” 39 U.S.C. § 3622(c)(2); 39 C.F.R. § 3010.14(b)(7). While PAEA certainly establishes a broad zone of reasonableness for variations in coverage ratios, the markup over attributable costs that the Postal Service would impose on value-added resellers of Platinum-level Confirm service is unreasonably high by any standard.

As described above, the Postal Service projects after-rates revenue of \$6,126,100 from Confirm, an amount equivalent to an overall cost coverage of approximately 500 percent.<sup>10</sup> Not a single Special Service had such a high markup over attributable cost in FY2008.<sup>11</sup> Indeed the highest level of cost coverage achieved for any Special Service in FY2008 was 233 percent (for Stamped Envelopes), with Confirm a close second at 214 percent.<sup>12</sup> Likewise, no class or subclass of mail has such a high cost coverage.<sup>13</sup>

Moreover, a disproportionate share of the overall contribution from Confirm would be borne by mail service providers. The Postal Service projects that it will sell a total of 45 Platinum subscriptions under the proposed rates, and that 15 of these subscriptions will be purchased by “Mail Agents.”<sup>14</sup> These 15 subscriptions alone are projected to generate \$3.75 million in revenue, or 61 percent of the total revenue of \$6.13 million that the Postal Service projects to collect from *all* Confirm services.<sup>15</sup>

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<sup>10</sup> Library Reference USPS-R2009-2/5; Library Reference USPS-FY08-28 (Docket No. ACR2008).

<sup>11</sup> United States Postal Service Annual Compliance Report FY2008 at 44-45 (Table 5).

<sup>12</sup> *Id.*

<sup>13</sup> Library Reference USPS-FY08-1 (FY 2008 Public Cost and Revenue Analysis (PCRA) Report) (“Cost 1” and “Cost 2” worksheets).

<sup>14</sup> Library Reference USPS-R2009-2/5 (“Rates” worksheet).

<sup>15</sup> *Id.*

**B. The Proposed Rate Increase For Mailing Agents Receiving Platinum Level Confirm Service Would Violate The Statutory Policy Favoring Predictability And Stability In Rates.**

The proposed price increase for Platinum subscriptions purchased by mail agents also violates the policy of PAEA that rates should be reasonably predictable and stable. 39 U.S.C. § 3622(b)(2); 39 C.F.R. § 3010.14(b)(7). As noted in Section I above, the magnitude of the increase could not have been predicted, particularly in light of the Postal Service's report on Confirm costs and revenues in Docket No. ACR2008. In its Annual Compliance Report for 2008, the Postal Service reported that (i) FY2008 Confirm costs totaled \$1,222,394, (ii) Confirm generated \$2.6 million in revenues in FY2008, and (iii) the cost coverage for Confirm in FY 2008 was 214 percent.<sup>16</sup> By comparison, the Postal Service reported the FY2008 cost coverage for all of Market Dominant Mail was 171 percent.<sup>17</sup> Since 2005, the reported total costs for Confirm service have been declining. USPS-FY08-28 Confirm2008.xls. Under these circumstances, a ten-fold increase in price for any subset of Confirm customers could not have been reasonably anticipated.

**C. The \$250,000 Subscription Price Would Harm Business Mail Owners And The General Public.**

The proposed subscription price of \$250,000 would also violate one of the most important objectives of PAEA by harming business mail users and the general public. See 39 U.S.C. § 3622(c)(3) (requiring consideration of “the effect of rate increases upon the general public [and] business mail users”); 39 C.F.R. § 3010.14(b)(7).

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<sup>16</sup> United States Postal Service Annual Compliance Report FY2008 at 44-45 (Table No. 5) and Library Reference USPS-FY08-28.

<sup>17</sup> Library Reference USPS-FY08-1 (Public Cost and Revenue Analysis, Worksheet Cost 1 at line 52, column R).

First, Confirm usage would drop almost immediately. To the extent that value added resellers passed on the subscription price increase, many clients would either reduce their use of Confirm or discontinue it altogether. Wanda Senne, for example, expects that World Marketing's clients will reduce or discontinue their use of Confirm, and that the company would reduce its subscription from the Platinum to the Gold level. Senne Decl. at 4. Cameron Bellamy of GrayHair Software "anticipates that the market will respond through retraction and consolidation." Bellamy Decl. at 4. And Charles Howard of Harte-Hanks states:

"Our customer base simply will not pay for the additional increase to cover this cost; they would most likely opt out of using our Confirm- data management and reporting services. ... If the increase to \$250,000 for mailing agents is realized, we would need to look to the viability of the program and determine if we would continue to offer our value-added Confirm related services."

Howard Decl. at 3.

Mailers would also suffer to the extent that mail service providers could *not* pass on Confirm price increases to mail owners. Howard Decl. at 3. Many contracts between mail agents and mail owners have multi-year terms, and preclude price adjustments before the contract expiration or renewal date. *See* Bellamy Decl. at 4; Pritchard Decl. at 5. Unable to recoup the higher cost of a Platinum subscription some mail agents could exit the Confirm market entirely. Howard Decl. at 3; Bellamy Decl. at 4. Others would remain, but would shrink their Confirm business, or their investment in developing new value-added services. *See* Senne Decl. at 4; Bellamy Decl. at 4.

The proposed increase in the price of a Platinum subscription would also be likely to lead to greater market concentration and less competition among Confirm resellers. Smaller Confirm resellers would face cost pressures to abandon the market to larger

rivals, who could spread the cost of a Platinum subscription over a bigger customer base. As the industry became more concentrated, and the total number of Confirm subscriptions declined, the Postal Service would gain a pretext to raise the subscription price further. The logical conclusion of this iterative process would be a single Confirm reseller (or a tight oligopoly) that dominated the entire market. Less innovation and higher prices would be the likely result. *See* Bellamy Decl. at 4. Moreover, because Confirm is a complement to the mail classes for which is offered, further downward pressure on the Postal Service's mail volume would also be a likely consequence. This outcome would also hurt the Postal Service and the general public. Pritchard Decl. at 5.<sup>18</sup>

The mail owners most likely to suffer most from these developments would be the businesses, nonprofit organizations and state and local government bodies that lack the mail volume, financial resources or expertise to use Confirm directly. For example, the Flute Network, without the value-added services provided by Confirm resellers, "will very likely stop mailing all together, and go to the online-only form that we so very much wish to avoid." Pritchard Decl. at 5; *accord*, Senne Decl. at 4, Howard Decl. at 3, Bellamy Decl. at 4.

Finally, as the Postal Service does not and can not offer comparable services, restricting mailing agents' ability to resell Confirm service would harm postal customers who rely on these services. A recently issued Postal Service marketing brochure raises the question whether the Postal Service plan to capture the market for complementary

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<sup>18</sup> We further observe that the anticipated decrease in overall use of Confirm services would diminish the value of Confirm data as a performance measurement tool.

services for itself.<sup>19</sup> If so, the Postal Service's \$250,000 price tag for Platinum level mailing agents could be interpreted as a blatant attempt to raise rivals' costs and establish a barrier to entry in this market, to the detriment of postal customers who would benefit from choices and competition among value-added Confirm service providers. Entry into the value-added sector would give the Postal Service both the means and the incentive to use Confirm pricing to squeeze out more efficient and innovative competitors in that sector. Such a strategy would raise serious competitive issues.

**D. The Postal Service's Definition of "Mailing Agent" Could Require Mailers And Agents To Buy Duplicate Subscriptions To Gain Access To A Single Set Of Confirm Data.**

Nowhere in its Notice of Price Adjustment does the Postal Service define the terms "Mail Owner" or "Mailing Agent." A recent Postal Service notice to existing Confirm Service Providers, however, states:

2. A mail owner is the business entity (or individual) who makes business decisions regarding the mailpiece content, directly benefits from the mailing, and ultimately pays for postage on the mailpiece.
3. A mailing agent is a business entity acting on behalf of one or more mail owners by providing mailing services for which the mail owners will compensate the mailing agent. Services include, but are not limited to: printer; letter shop; address list provider/manager; mail preparer; postage payment provider; mailing logistics provider; mailing tracking provider; and mailing information manager.

74 Fed. Reg. 8925 (Feb, 23, 2009). This definition of "mailing agent" is so broad that it could require even a pure information technology vendor ("mailing information manager")—a vendor providing data processing services only after the fact—to obtain a

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<sup>19</sup>See [http://ribbs.usps.gov/intelligentmail\\_latestnews/documents/tech\\_guides/IntellTake5FINAL.pdf](http://ribbs.usps.gov/intelligentmail_latestnews/documents/tech_guides/IntellTake5FINAL.pdf).

subscription if the vendor is compensated for managing Confirm data “on behalf of one or more mail owners”—*even if the mail owners obtained the data through their own Confirm subscriptions*. This language appears to contradict the Postal Service’s representation to this Commission that “[i]f the subscriber is a client of a mailing agent subscriber, then the agent may be able to reduce the number of scans and additional IDs needed.” Notice of Price Adjustment at 24. Perhaps this is so, but apparently, even a mailing agent with only one subscribing client would not be permitted to allow its own Confirm subscription to expire. This is an unreasonable result, plainly inequitable, and impermissible under the law. 39 U.S.C. § 404(b).

**E. The Justness And Reasonableness Of The Proposed Confirm Prices Is Properly Before The Commission In This Proceeding.**

The Postal Service, while conceded that the Commission should consider whether the Postal Service’s new prices “comply with the policy considerations of 3622(c)” (Notice of Price Adjustment at 9-11), argues that the objectives of Section 3622(b) are achieved primarily through the design of the new regulatory system itself, not the particular pricing changes made pursuant to that system. *Id.* at 8. This theory would reduce the new regulatory system to an empty formality. Pricing rules, no matter how well crafted, are useless unless the rules actually constrain prices.

The rules established by the Commission in Docket No. RM2007-1 clearly recognize this fact. They require the Postal Service to demonstrate, and the Commission to consider, how the specific rate adjustments at issue will help achieve the objectives listed in 39 U.S.C. § 3622(b), taking into account the factors listed in 39 U.S.C. 3622(c). 39 C.F.R. § 3010.14(b)(7). Having required the Postal Service to discuss the

achievement and balancing of these objectives and factors, the Commission cannot now ignore the question of whether the Postal Service has flagrantly disserved these objectives and factors in redesigning its Confirm rates. 39 U.S.C. §3622(b) and (c).

### **CONCLUSION**

To remedy the problems discussed above, the PRC should follow the lead of other agencies and the courts that have examined similar issues, and limit the Confirm prices for mailing agents to the prices that the Postal Service proposes to charge mail owners for the same level of Confirm service. Doing so would yield the Postal Service after-rates revenue in excess of \$2.6 million, and an expected cost coverage of over 200 percent – approximately the same coverage reported by the Postal Service in FY2008.

Such rates would be just, reasonable and nondiscriminatory. They would (i) bear a reasonable relationship to attributable and reasonably assignable costs, (ii) achieve predictability and stability of rates and avoid rate shock, and (iii) avoid the harms to Confirm users, their customers, the Postal Service, and the public that would result from a \$250,000 subscription price for Confirm.

Respectfully submitted,

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