

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Notice of Price Adjustment)

Docket No. R2009-4

PUBLIC REPRESENTATIVE COMMENTS
IN RESPONSE TO NOTICE OF PRICE ADJUSTMENT
FOR STANDARD MAIL HIGH DENSITY FLATS

(June 22, 2009)

The Public Representative hereby comments on the Postal Service's notice of price adjustment, effective July 19, 2009, for market-dominant Standard Mail High Density flats filed pursuant to 39 U.S.C. § 3622 and 39 CFR part 3010 (Adjustment Notice).¹

The Postal Service proposes to decrease the rate for Standard Mail High Density flat prices by 0.1 cent and to decrease the pound price element for commercial and nonprofit High Density flats to match the Standard Mail Saturation flats pound price element. Revenues will be reduced by about \$3 million in FY2009 and \$7 million in FY 2010.

The Postal Service avers that with, at most, a "modest decrease" in revenues, the price reductions "could potentially avoid diversion of large volumes" of High Density flats mail. *Id.* at 5. The Postal Service does not offer any estimate of the magnitude of

¹ United States Postal Service Notice of Market-Dominant Price Adjustment (Notice), June 1, 2009.

the “large volumes” that could be diverted. It is therefore impossible to compare accurately the probable costs of this rate change in terms of lost revenues with the potential risk of lost revenues if these rates are not reduced.²

The Postal Service claims that because the proposed Standard Mail High Density flat price adjustments are price decreases and are not part of the annual CPI-cap price change, the Commission’s current rules for price adjustments do not cover this situation and therefore are not applicable. Notice at 3. From this, the Postal Service concludes that the price adjustments “have no impact on price cap issues,” and, therefore, the Postal Service has not calculated the cap or price changes described in Commission rule 3010.14(b)(1)-(4). *Id.* Further, the Postal Service “is not claiming any new unused rate adjustment authority as a result of this price decrease.” *Id.*

I. THE COMMISSION REQUESTS COMMENT ON FOUR QUESTIONS

The Commission’s notice for comment requests interested parties to address four topics discussed seriatim below.³

² The Notice indicates only that, “The Postal Service has heard the concerns expressed by High Density flats mailers that the above-average price increases implemented May 11, 2009, will have a detrimental impact on their businesses. After taking these concerns into consideration...High Density flat prices that reflect an increase from the previous year similar to the average Standard Mail increase are more appropriate at this time.” *Id.* at 2. No further detail is offered in support of the Postal Service’s decision to reduce these rates.

³ Notice and Order Concerning Price Adjustment for Standard Mail High Density Flats, Order No. 220, June 4, 2009.

1. Whether the language of section 3622(d)(1)(A) of the PAEA, which requires the Commission's regulations to include an annual limitation calculation from the last date that the Postal Service files its notice of intention to *increase* rates, applies to permanent rate decreases?

Based upon a logical reading of the PAEA, the annual limitation language of 3622(d)(1) does not apply to price decreases. Section 3622(d)(1) of the PAEA refers only to price increases and the policy of imposing a price cap limitation is rational only if it applies to price increases. Mathematically, under the methodology established for calculating price caps, a price *decrease* cannot exceed a price cap where the consumer price index is positive over the relevant 12 month period. An analysis under section 3622(d)(1)(A) is not only unnecessary but illogical for price decrease filings because the price cap (assumed to be a positive amount) could only be exceeded if rates increase.⁴ The price cap limitation reflects a policy in the PAEA to deter runaway postal service prices. Where the rate is decreased, by definition, the rates are not rising and cannot exceed a positive price cap limitation.

Furthermore, in the case where consumer prices have dropped, as they have over the most recent twelve month period at issue in this docket, nothing in the PAEA suggests the Postal Service would be required to reduce rates by an amount equal to or greater than the drop in consumer prices, *i.e.* a negative price cap limitation. If the Postal Service files a notice of a rate decrease when, by chance, the price cap limitation is negative, the PAEA does not include any provision even suggesting that the rate decrease must be at least as great as the decline in prices. If the PAEA were read so

⁴ Due to falling prices over the most recent twelve month period at the time of filing the notice of rate change, the annual price cap limitation calculated under section 3010.21 is a negative 0.1 percent. (-0.07116 rounded). See Response to Chairman's Information Request No. 1(CIR No. 1), June 12, 2009, question 1.

restrictively, in the face of falling consumer prices, the Postal Service could be deterred from filing any rate decreases out of a concern the PAEA would be interpreted to require that the rate decreases match the decline in the consumer price index. The Postal Service would be concerned legitimately that a larger price decrease amounting to the percentage drop in consumer prices would be ordered by the Commission.

In fact, section 3622(d)(1) *only* provides that the “system for regulating rates and classes for market-dominant products shall include an annual limitation on the percentage changes in rates” being determined for the period prior to the date of filing the notice to “increase rates.” Congress, in the PAEA, could have easily also required that the system for regulating rates cover rate decreases or negative changes in the Consumer Price Index. In the case of a negative Consumer Price Index for the relevant periods, Congress might have required the Postal Service to file rate decreases. Further, Congress might have established, or required the Commission to establish, rules about the timing and extent that rate decreases must track drops in consumer prices. In the absence of any such directives in the PAEA to devise such a system for regulating rates, the most reasonable interpretation is that Congress did not intend to place such a burden on the Postal Service.

Moreover, it would not be a reasonable interpretation of the PAEA to extend the annual price limitation policy to price decreases merely because of the silence of Congress on the issue. A plain reading of the statute indicates the annual limitation does not apply where the Consumer Price Index over the relevant period is negative. It has long been held that if the language of a statute is plain and not unreasonable, the

courts will not go outside the statute to give it a different meaning.⁵ Congress intended to provide flexibility to the Postal Service when establishing market-dominant rates. Congress did not require the Postal Service to raise its rates in line with the Consumer Price Index. The price cap limitation only serves as a ceiling to insure against unreasonable price increases, not as a price line, while allowing pricing flexibility below that level. The policy favoring pricing flexibility would be hindered if the Postal Service is penalized for rates that do not track decreases in the Consumer Price Index over the relevant period.

2. If the price cap provision does not apply in this case, is the analysis of unused rate adjustment authority calculation under section 3622(d)(2)(C) also not required?

In the absence of a price increase, calculation of the unused rate adjustment is not required and is not needed. Because this is not a rate *increase* filing, the unused rate adjustment authority cannot be calculated in accordance with the provisions of the PAEA until a rate increase is filed. In fact, any such calculation must be purely academic. It would be based on the change in the consumer price index over the previous twelve months. Inasmuch as that period does not coincide with the statutory period which is twelve months prior to the date of a rate *increase*, the calculation would assume erroneously that a rate increase had been filed.

⁵ *Caminetti v. U.S.*, 242 U.S. 470 (1917); See generally Sutherland Statutory Construction, section 46:1 (7th ed. 2007); See also, *Financial Panning Ass'n v. SEC*, 482 F.3d 481, 487(D.C. Cir. 2007) (courts look to the text, structure, and overall statutory scheme, as well as the problem Congress intended to solve in interpreting the meaning of a statutory provision); Sutherland Statutory Construction, section 45:9 (7th ed. 2007) (“the primary task of the court when construing a statute is to attribute to the enactment the meaning most consistent with its policies and with the obvious purpose of the legislature, by viewing the statute in light of the circumstance that motivated its passage”).

Unused rate adjustment authority is calculated as the difference between the maximum amount of rate adjustment authority in any year based on the “annual limitation” (section 3622(d)(1)(A)) and “the amount of the rate adjustment the Postal Service actually makes in that year.” Section 3622(d)(1)(C)(i)(II). Focusing on the second clause first, the language of the provision is not limited to rate increases, but applies to the rate adjustments actually made in the year. The adjustment is not limited to adjustment *increases*. Rate adjustments may also involve rate decreases. Logically, if there is more than one adjustment during the period, the sum of all of the adjustments (increases as well as decreases) should be combined to determine the actual net rate adjustment made during the year. That amount would then be offset against the maximum annual limitation determined in accordance with section 3622(d)(1)(C)(i)(I). The maximum annual limitation also takes into account the prior accumulated unused rate authority.

However, the annual limitation determined in accordance with section 3622(d)(1)(C)(i)(I), used for comparison to the rate adjustment actually made in that year, cannot be properly determined in the absence of a rate increase. The maximum amount of rate adjustment is based upon the change in the consumer price index for the period “preceding the date the Postal Service files *notice* of its intention to *increase* rates.” Because that calculation is based upon the date of a notice of an *increase* in rates, with strict adherence to the PAEA language, the annual limitation is inapplicable.

The PAEA requirement that any annual limitation is based upon a rate increase is carried forward into the Commission’s rules: section 3010.21, *Calculation of annual limitation*, and section 3010.22, *Calculation of less than annual limitation*. For rate

adjustments filed less than 1 year after the last rate change (Type 1-A or 1-B), the annual limitation implicitly recognizes there must be *rate increases*. Also, section 3010.26, *Calculation of unused rate adjustment authority*, is dependent upon a calculation of the unused rate adjustment authority that utilizes an applicable rate limitation which is, in turn, dependent upon a rate increase filing. It states:

When notices of Type 1 rate adjustments are filed ... the new unused rate authority for each class is equal to the difference between the maximum allowable percentage change in rates under the *applicable rate limitation* and the actual percentage change in rates for that class” Section 3010.26(b). (Emphasis supplied).

The “applicable rate limitation” is defined as a limitation calculated as of the date of a notice of rate increase.

Although, in the absence of a rate increase filing, the unused rate authority cannot be calculated under a strict application of the methodology, these amounts can be calculated if one ignores the lack of a rate increase. The Postal Service has provided the calculations in response to the Chairman’s Information Request with the caveat that the annual limitation may not apply to this rate adjustment. The Postal Service, in response to the question posed, assumed away the clear instructions in the PAEA that the applicable 12 month period of consumer price indices must end with a rate increase. Determining the amount of unused rate authority after a rate decrease is simply an academic exercise. There is little benefit in calculating the unused authority at this time. Rather, the applicable calculation must be delayed until the annual price increase filing. At that time, as noted above, the impact of the rate decrease will be factored in through the new base rate.⁶ The net of the increases and the decreases in

⁶ The Postal Service has indicated the base rate is the new reduced rate for purposes of applying the price cap limitation when the next rate increase is filed. CIR No. 1, question 4.

rates for the year for each class of mail will comprise the “rate adjustment” actually made in that year.

Section 3010.11(c) provides that the recapture of unused rate authority is limited to an *annual occurrence*: “An exception to the inflation-based limitation allows a limited annual recapture of unused rate authority.” (Emphasis supplied.) That opportunity will arise with the annual rate adjustment filing.

3. Even if the unused rate adjustment authority calculation may potentially apply, can the Postal Service waive some or part of the unused rate adjustment authority and can waiver be enforced by the Commission?

Postal Service waiver. Waiver of the rate adjustment authority in this case is a moot question. Even if the unused rate adjustment authority calculation is attempted, in this case there would be no unused rate adjustment authority. This is because a rate decrease does not generate any unused rate adjustment authority and because consumer prices have decreased. Therefore, the Postal Service does not have any benefits to waive. Further, the Postal Service does not say it is foregoing the benefits of this rate reduction forever; only that it is not claiming any new unused price adjustment authority. *Id.* at 3.

The Postal Service’s statement that it is not claiming any new unused rate adjustment authority as a result of this price decrease” is somewhat misleading. The Postal Service cannot claim a benefit because there is no benefit available for two reasons. First, as noted above, as the Postal Service has correctly concluded, the statute and the Commission’s rules do not apply to price decreases; second, using the formulas in the Commission’s rules (ignoring the requirement for a rate increase), the

unused rate authority for Standard Mail would be reduced rather than increased because the applicable 12 month consumer price index is negative.

The Postal Service has demonstrated there would be no new unused price adjustment authority resulting from this filing. In fact, if the methodology is applied, most of the existing unused price adjustment authority is actually used up by the filing (0.063 percent out of an available 0.081 percent or about three fourths of the available authority, leaving only 0.018 percent available for Standard Mail).⁷ Thus, the Postal Service could not claim any new unused price authority as a result of this price decrease, even if it so desired. Therefore, the Postal Service has no benefits to waive in this case, even if the rules for price increases applied, which they do not.

Once a rate increase is filed, the unused rate adjustment authority will be recalculated. The Commission's rules provide, "Part or all of the unused rate adjustment authority may be used in a subsequent adjustment for that class, subject to the expiration terms in section 3010.26(d)." Section 3010.3(c). This rule has no provision for current waiver of future rights to use adjustment authority. Under the PAEA, the recalculation of unused rate adjustment authority will reflect, on a net basis, not only the increase at that time but also the downward revision in the base rate resulting from this decrease in the rate.

Enforcement of waiver. The Commission also asks for comment on its ability to enforce a Postal Service waiver of unused rate adjustment authority. As noted above, there is no rate adjustment authority benefit to waive and the statute does not provide for unilateral waiver of a right to unused rate adjustment authority. Under the PAEA,

⁷ CIR No. 1, question 3.

unused pricing authority is available for five years. There is no provision in the PAEA that permits the Commission to modify the methodology for calculating the unused price authority.

If a waiver were feasible, a waiver could be enforced by the Commission if provided in the context of a settlement with another party or with the Commission. That is, if the Postal Service received a *quid pro quo* in return for its waiver of unused price adjustment authority, the Postal Service would be bound by its agreement if reflected in the Commission's authorization. If a settlement were involved, then by accepting a settlement the Commission would be able to enforce the Postal Service's agreement to forego future increases in rates derived from unused rate authority. There is no settlement on the table in this case. The mere statement that the Postal Service does not claim unused price adjustment authority, without more specificity, would probably not be enforceable unless it is included as a necessary condition in approving the rate increase.

In any event, the PAEA contains no provision, *per se*, for waiver of the unused price adjustment authority. Such a provision would be superfluous in view of section 3622(d)(2)(C)(ii) providing that unused rate authority may be used for five years, subject to limitations. The Postal Service can effectively waive that authority simply by not utilizing the unused rate adjustment authority. Thus, there is no justification for the Commission to grant a waiver to the Postal Service to eliminate the potential impact of this rate reduction on the unused price adjustment authority.

4. Should the Postal Service's statement that it is not claiming any new unused rate adjustment authority be construed as a waiver of that authority resulting from these rate decreases?

The Postal Service's statement that it is not claiming any new unused rate adjustment authority should not be construed as a waiver. In the first place, for the reasons stated in response to question 3, above, the issue of waiver is moot.

In addition, the Postal Service states that it "is not claiming any new unused price adjustment authority as a result of this price decrease." Notice at 3. The Postal Service has not stated that it waives any and all future opportunities that may arise after a rate increase filing to make use of the unused rate authority that may be generated in this case.

II. CONCLUSION

The Commission's rule in section 3010.13(c) provides that rate adjustments pursuant to section 3010 shall focus primarily on whether the rate adjustment is "at or below the annual limitation" established in rules 3010.11 and 3010.28. Being a rate decrease, the adjustment, *prima facie*, meets those criteria and the Public Representative concludes the rate filing is consistent with the annual limitation requirements.

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

Respectfully submitted,

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