

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

Consideration of Workshare Discount)
Methodologies)

Docket No. RM2009-3

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
REPLY COMMENTS ON WORKSHARING ISSUES
IN RESPONSE TO ORDER NO. 243 AND NOTICE OF INQUIRY NO. 1
(September 11, 2009)**

INTRODUCTION

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereafter "Valpak") submit these joint reply comments in response to Order No. 243 and to Notice of Inquiry No. 1.

PROCEDURAL BACKGROUND

On March 16, 2009, the Commission issued Order No. 192, Notice of Proposed Rulemaking on Application of Workshare Discount Rate Design Principles, commencing Docket No. RM2009-3, and inviting the submission of "initial presentations" with respect to certain workshare discount issues in First-Class Mail and Standard Mail. Initial presentations were submitted by many parties, including one by Valpak, and a separate presentation by Dr. John Haldi on behalf of Valpak. Thereafter, the Commission scheduled a public forum on August 11, 2009, and Valpak participated in that public forum. The Commission also invited reply comments to the initial presentations and to issues raised at the public forum, due September 11, 2009. *See* Order No. 243 (July 10, 2009). Lastly, on August 27, 2009, the Commission issued Notice of Inquiry No. 1 seeking comment on three topics.

COMMENTS

I. Workshare Issues Raised in Order No. 243

Commission Order No. 192 commencing this docket identified as its purpose:

to afford the Postal Service (and interested persons supporting its rationales) an opportunity to address the **legal, factual, and economic underpinnings** of the methodologies used by the Postal Service to develop its proposed First-Class Mail and Standard Mail discount rates in Docket No. R2009-2. In addition, interested persons, including the Postal Service, may submit alternative workshare discount rate design and cost avoidance calculation methodologies. [Order No. 192, p. 3 (emphasis added).]

In response to that Order, Valpak filed its “Initial Presentation,” which focused:

on what it considers to be the **threshold issue** — precisely **which rate differences** constitute “workshare discounts” under 39 U.S.C. section 3622(e)(1), and therefore **are subject to statutory limitations** in the balance of that section. [Valpak Initial Presentation, p. 2 (emphasis added).]

Along these same lines, in Order No. 243, the Commission stated, “It is clear from the comments that resolving some of these issues will be contingent on how others are resolved.”

P. 2. The first example given for this point was:

if the Commission were to agree with the Postal Service’s view that, **as a legal matter**, the worksharing discount standards of 39 U.S.C. 3622(e) **apply only to components of individual “products”** as defined in the Mail Classification Schedule, it would **render moot** any consideration of the market positions of the various First-Class and Standard Mail categories issued in Docket No. R2009-2. [*Id.* p. (emphasis added)]

Valpak agrees with this analytical construct suggested by the Commission under which the legal issue of the scope of the limitation on discounts for workshare activity is addressed first.

The Commission is certainly correct that if the worksharing discount limitations do not apply

between products, many of the issues addressed in this docket would be mooted. And, on that legal issue, Valpak agrees with the Postal Service's view that 39 U.S.C. section 3622(e) "applies only to components of individual 'products.'" *See* Valpak Initial Comments, pp. 19-20, for a discussion of three reasons why section 3622(e) is properly construed in this fashion.

However, even if the worksharing limitations apply only to components of individual products, it would still require the Commission to resolve other issues relating to the scope of section 3622(e).

Within Standard Mail, the Commission's FY2008 Annual Compliance Determination explains that there are currently six products:

The Standard Mail class has six products: Letters; Flats; Not Flat Machinables (NFMs) and Parcels; Carrier Route Letters, Flats and Parcels; High Density and Saturation Letters; and High Density and Saturation Flats and Parcels. [ACD, FY2008, p. 59.]

Of these, the first three products had their origin in the former Standard Regular Subclass:

- Letters;
- Flats;
- Not Flat Machinables (NFMs) and Parcels.

The other three products had their origin in the former Standard ECR Subclass:

- Carrier Route Letters, Flats and Parcels;
- High Density and Saturation Letters; and
- High Density and Saturation Flats and Parcels.

As between products, the issue would devolve to whether the products in question are being priced appropriately vis-a-vis the various objectives and factors contained in Section 3622 as modified by PAEA. However, within products, the scope of the workshare discount limitation would still need to be resolved.

With respect to the categories of mail formerly in the ECR subclass, the Commission observes that a:

mailer's decision to sort mail into walk-sequence order **depends on the menu of rates** ... a mailer who presents High Density or Saturation mail rather than Carrier Route mail to the Postal Service does so because the **difference in his cost** between sorting to line of travel and sorting to walk-sequence is less than the **corresponding rate difference**; otherwise, a prudent mailer would not sort the mail in walk-sequence order." [Order No. 243, p. 7 (emphasis added).]

The question of whether to regard any categories of mail — and Carrier Route, High Density, and Saturation in particular— as workshare variants ought to be informed by an analysis of pertinent market and economic considerations. For instance, if these three categories of mail have a high sensitivity to differences in rates, as discussed in Order No. 243, one could expect to find a meaningful cross-elasticity of demand between the respective categories.

Within the context of the discussion here, as between any two categories of mail, the term cross-elasticity of demand denotes mailer response to changes in the relative price — *i.e.*, the price differential — between the respective categories **over a meaningful positive range**.¹ The critical issue is the extent to which volume shifts between the various categories as price differentials are expanded or reduced over that positive range. It should be noted that the three

¹ Econometric studies of cross-elasticity between individual categories may not always be available. When quantitative estimates are lacking, an evaluation of substitutability might aid the analysis. Quantification is not required to analyze substitutability. That is, if mailers perceive one category of mail to be a reasonable substitute for another, and if mail can be induced to shift from that category to another on the basis of changes in the price difference between the two categories, a meaningful cross-elasticity could be inferred. Conversely, an acknowledged lack of substitutability indicates low cross-elasticity.

products discussed here have a hierarchical order vis-a-vis mailing requirements. That is, Saturation meets and exceeds all the requirements for High-Density, which in turn exceeds all the requirements for Carrier Route. Obviously, if there were no price differential whatsoever — an extreme case — then, apart from a desire to achieve better service, prudent mailers would do none of the required preparation, as Order 243 observes.² But assuming there is some price differential (albeit possibly small) for using the more difficult-to-achieve category, and if the cross-elasticity is very low, or even non-existent, it is the case that a small change in the rate difference, one way or the other, will not cause mailers to revert or additional mailers to convert.³

A. Geo-Targeted Mail is Significantly Different than Individual-Targeted Mail

The minimum numbers of pieces required to qualify for Saturation and High Density limit use of these categories to those mailers that seek comprehensive (Saturation), or fairly comprehensive (High Density), coverage within **targeted geographic areas**.

Other categories with small (or no) minimums per route **target individual households**.

The distinction between targeting geographic areas and targeting individuals is important, as mailers' marketing considerations (and other factors) can result in:

² If, for some anomalous or perverse reason, the price of, say, Carrier Route were to be set below the prices of High Density and Saturation (this might be termed a “negative” price difference), then prudent mailers of course would shift their entire volume of High Density and Saturation to Carrier Route. Thus beyond a reasonable range the cross-elasticity would become infinite (or meaningless), but any such consideration is not pertinent to a discussion of what happens over the relevant range of positive price differences.

³ The purpose of applying the principle of Efficient Component Pricing (“ECP”) to two categories of mail is to encourage the lower cost entity to do the work. If cross-elasticity is essentially zero, then parties do not respond to rate differences.

- (i) significantly different **own-price elasticities** of demand,⁴ and
- (ii) virtually no **cross-elasticity** between geographic-targeted mailings on the one hand, and individual household-targeted mailings on the other.

Econometric studies have found repeatedly that the **former ECR subclass**, which includes geographic-targeted Saturation and High Density, has a significantly higher own-price elasticity of demand than the non-ECR categories of mail. This alone is sufficient reason for these categories to be priced separately from, and not in lock-step fashion with, the non-ECR categories. The Commission's decision in Docket No. MC95-1 to recognize categories in the former ECR subclass as having characteristics sufficiently different to warrant separate treatment was based on solid econometric studies, and has been shown to be correct.

In Docket No. MC95-1, the Commission also de-linked 5-digit and Carrier Route (formerly Basic) mail (as discussed in Order No. 243, n.4). Carrier Route was grouped within the ECR subclass, along with High Density and Saturation, because the data available at that time indicated that it had a significantly higher own-price elasticity of demand than 3- and 5-digit mail.⁵ The Commission then seemed adverse to creating a proliferation of subclasses,

⁴ The density of Saturation mail especially, and High Density mail to a lesser degree, tends to make these two products more susceptible to delivery by alternate private delivery companies. Particularly without the protection of the mailbox rule and the Private Express Statutes, this density increases substantially the elasticity of demand for delivery by the Postal Service.

⁵ The fact that two items (*e.g.*, carrier route and saturation) could be found to have a similar own-price elasticity of demand can be a rather weak rationale for linking the two items in lock-step for pricing purposes. By itself, a similar own-price elasticity does not prove that one is nothing more than a closely-related (workshare) variant of the other. For example, it is entirely conceivable that an econometric study of food items would find (coincidentally) the own-price elasticity of demand for broccoli to be essentially equal to the own-price

and grouping Carrier Route in this manner may have been the better alternative. At the same time, the Commission's decision to group Carrier Route with High Density and Saturation is somewhat problematic, because a minimum of only 10 pieces per route is required to qualify for Carrier Route. This means that most, if not all, Carrier Route mail differs from Saturation and High Density, in that it is targeted to individual households, rather than seeking some meaningful degree of geographic coverage.⁶

Regardless of its own-price elasticity, Carrier Route clearly is not a meaningful option (or substitute) for Saturation, and rarely — if ever — would one expect it to be an option (or substitute) for High Density. Conversely, neither High Density nor Saturation is a meaningful option for Carrier Route. Consequently, one would not expect to find any meaningful cross-elasticity between (i) Carrier Route on the one hand, and (ii) High Density and Saturation on the other. *See* Order No. 243, n. 5.

Inasmuch as PAEA now has replaced subclasses with products, Carrier Route is no longer grouped with, and has no need to be linked to, High Density and Saturation. Nor, for that matter, does it have to be linked (or re-linked) with 5-digit. Whether Carrier Route is a

elasticity of demand for ice cream. Just because these two food items should happen to have the same own-price demand elasticity does not mean, though, that grocery stores should impose some lock-step linkage between the prices of broccoli and ice cream. The cross-elasticity between broccoli and ice cream may be quite low, indicating that despite the similar own-price elasticity, most people do not consider one to be a substitute for the other.

⁶ Ten pieces per route was always a small percentage of the addresses on a typical route. DPSing of letters has reduced carrier in-office time and increased both (i) street time, and (ii) length of routes. The Flats Sequencing System promises to continue this trend. As routes lengthen and the number of addresses served by each increases, 10 pieces/route constitutes an even smaller percentage.

sufficiently distinct market segment to warrant being priced as a separate product is beyond the scope of these comments, but the matter should be decided on facts pertinent to those two categories.⁷

B. High Density and Saturation Have Extremely Low Cross-Elasticity And are Not Differentiated by Worksharing.

Within postal circles, Valpak is known as a saturation mailer. And indeed with good reason — approximately 95 percent of Valpak’s mail is entered at the saturation rate. Valpak does, however, enter about 5 percent of its mail at the High Density rate. Valpak’s experience and reasons for selecting between the two categories may help inform the discussion.

In those instances where Valpak uses High Density, it is solely for marketing reasons. In the vast majority of neighborhoods, the marketing characteristics of addresses on carrier routes are fairly homogeneous. On those routes, Valpak uses Saturation exclusively. In some places (generally urban areas), however, individual carrier routes may span segments with substantially different (*i.e.*, non-homogeneous) marketing characteristics. On those routes, Valpak’s customers (advertisers) want to have their mail reach only selected segments of those routes.⁸ When the de-selected segments cause the density to fall below the level required for Saturation, Valpak pays the higher rate for High Density. In those instances, even if the rate differential were increased substantially, Valpak would continue to use High Density. Thus, in

⁷ The Postal Service could take the position that creating unreasonable linkages between products constrains Postal Service pricing flexibility needlessly and, perhaps, unlawfully.

⁸ Most of Valpak’s advertisers are local businesses, hence they know which neighborhoods they want to reach and which they want to avoid (if any).

the circumstances described here, Valpak's decision to use High Density reflects marketing considerations, not the price differential between High Density and Saturation. That is, Valpak would not switch from High Density to Saturation even if the Postal Service were to reduce somewhat the Saturation rate relative to High Density on just those routes. Where Valpak uses High Density to geo-target certain areas within a carrier route,⁹ for all practicable purposes, the cross-elasticity of demand with Saturation mail is essentially zero.

During the Commission's forum on August 11, 2009, counsel for the Newspaper Association of America ("NAA") stated that major newspapers use both High Density and Saturation, and often switch some volume back and forth between High Density and Saturation. *See* Tr. 1/77-78. Since preparation requirements for both Saturation and High Density require walk-sequencing, and the rate for Saturation is lower, one can surmise that newspapers will use the Saturation rate on those routes where volume exceeds the required minimum threshold. If the number of subscribers on a postal route changes, thereby increasing or decreasing the number of households that a newspaper's Total Market Coverage program needs to reach via the mail, the newspaper can be expected to, and will, switch from High Density to Saturation when possible (or vice versa, from Saturation to High Density when they lack the required density). In either event, the driving force in making the election between Saturation and High Density is not the price differentials between these categories.¹⁰

⁹ Of course, geo-targeting by neighborhood within a large carrier route is not different in kind from geo-targeting the totality of a homogeneous carrier route.

¹⁰ The advertising material inserted into the fold of newspaper may be identical to that entered into the mail. The fact that the same advertising material is being mailed at both High Density and Saturation rates can give the appearance that the two categories are closely

Further, according to counsel for NAA, newspaper switching between High Density and Saturation also can result from carrier route realignments by the Postal Service, *i.e.*, without any change in the number or location of newspaper subscribers. *Id.* Here, one can surmise that switching between High Density and Saturation, as described by counsel for NAA, depends almost completely on the number of subscribers on each carrier route (*i.e.*, a critical market consideration), and not upon changes in the rate difference between High Density and Saturation. Here again the cross-elasticity of demand is quite low.

Nothing on this record has indicated any significant cross-elasticity between High Density and Saturation. Without such demonstrated cross-elasticity, no economic basis exists to support treating High Density and Saturation as similar categories differentiated chiefly by worksharing and considerations focused on cost and rate differences.¹¹ Neither do High Density and Saturation meet the “conversion/reversion” standard used by the Commission.¹² For this reason, differences between the two are not matters of worksharing, and deserve to be regarded and priced as if they were separate categories, not as two worksharing variants.

related. However, that appearance is superficial insofar as it ignores more fundamental factors that segment the market for the two categories.

¹¹ ECP is predicated on getting work done at the lowest cost. If the price signal plays no role in causing mail to move back and forth between rate categories, thus indicating there is no cross-elasticity, then one discount level is no better than another in terms of achieving lowest combined costs.

¹² *See* Docket No. RM2009-3, Statement of John Haldi, Ph.D., Concerning Workshare Discounts (submitted May 26, 2009), pp. 14-15.

C. Defining and Measuring Cost Avoidance in the Context of Standard Mail

Order No. 243 states (at 6), “The Commission also welcomes additional comment on how worksharing cost avoidance should be defined and measured in the context of Standard Mail.”¹³ The topic of cost **avoidance** raises interesting issues, not only in the context of Standard Mail, but other classes as well. By definition, costs **avoided** are costs that are not **incurred**. Consequently, **avoided** costs **never** are recorded by any accounting or costing system, anywhere.¹⁴ For this reason, the concept of costs **avoided** can be nebulous.¹⁵

Mail within any single product is not necessarily homogeneous, *i.e.*, the unit cost of handling each piece within a product is not necessarily identical. As between two separate but similar products, a variety of factors may cause the **costs incurred** by each to differ.¹⁶ The amount of mailer processing, or worksharing, could be one important factor, but it is not

¹³ Order No. 243 also says (at 3) “[t]echnical issues of how avoided costs should be calculated will be considered after the need for benchmarks has been confirmed and appropriate benchmarks have been identified.”

¹⁴ A working definition of costs **avoided** might be something like “costs the Postal Service does **not incur** when handling mail with reduced processing or transportation requirements.”

¹⁵ Measurement of costs (or expenses) **avoided** has an ephemeral quality. During the Vietnam war then-Secretary of Defense McNamara made frequent mention of savings from various initiatives, which gave rise to the following story. One day his son told him “Today I saved 50 cents.” To which his dad responded, “How did you do that?” “By running home along side the bus,” replied the son. “That is very commendable,” said Dad. “Tomorrow I want you to save \$5.” “How do I do that?” inquired the son. “Run home along side a taxi,” came the sage advice.

¹⁶ The rate structure for Periodicals has formally recognized cost-driving factors such as the number of bundles in a mailing, and whether bundles are in sacks or on pallets. Such cost drivers also are applicable to Standard Mail, but they are not recognized in the rate structure.

necessarily the sole reason for cost differences between two separate but similar products. The Postal Service's accounting and costing systems record costs **incurred**. Ultimately, all costing results as reported in the CRA are reconciled with the audited statement of total costs **incurred**. This process of reconciling with costs **incurred** acts as a vital check on results developed by the Postal Service's various costing systems. No such check or reconciliation is available for costs **avoided**.

For instance, as discussed below, the recording of costs **incurred** automatically takes account of, and reflects, evolutionary changes in operations, *i.e.*, each year it records the cost of operations as they then exist, which includes deployment of any new or improved automation equipment. For costs **avoided**, however, that is not necessarily the case. As noted above, **avoided** costs are neither recorded nor measured in an accounting sense. Instead, they must be estimated. Consequently, when pricing of products relies on costs **avoided**, one must scrutinize how **avoided** costs are estimated and ensure that the procedure for estimating **avoided** costs accurately reflects evolutionary changes in operations.

Within the context of Standard Mail, the kind of problems that can arise with costs **avoided** is illustrated by the text and footnote 6 in Order No. 243.

The observed cost difference, however, could be characterized as gains in efficiency brought about by worksharing activity, *i.e.*, the Postal Service's cost per piece of sorting mail to walk-sequence order declines **as density increases**. ... This is confirmed by Witness Shipe's testimony in Docket No. R90-1. It shows that **carriers case mail** at a rate of 20.6 pieces per minute for non-sequenced Carrier Route letters, 29.0 pieces for walk-sequenced High Density letters, and 41.2 pieces for Saturation letters. The corresponding numbers for flats are 10.7, 13.6 and 27.4 pieces per minute.... This constitutes declining marginal cost. [Order No. 243, p. 8 and n.6 (emphasis added).]

At the time witness Shipe undertook his study, carrier casing of Saturation mail may have been the standard operating procedure; the record is not altogether clear on that point. In any event, at that time costs **avoided** were estimated as costs **not incurred** by virtue of faster casing enabled by the combination of walk-sequencing and higher density. Even in that operating environment, **density** was seen to be a major contributor to cost avoidance, as the footnote itself observes. Since that time, however, operating procedures have changed somewhat, as discussed below.

In Docket Nos. R2005-1 and R2006-1, the operational procedures for handling Saturation mail, as well as the cost of handling Saturation mail using those procedures, were the subject of extensive discussion and debate. **Carrier casing** is now the **least preferred** method of handling saturation flats, according to testimony by Postal Service witnesses.¹⁷ The Postal Service has developed and implemented a procedure, described generally as the third bundle technique, whereby carriers generally avoid casing altogether by taking Saturation walk-sequenced mail directly to the street as an extra bundle. With this procedure firmly in place, the Postal Service now goes to great lengths to avoid carrier casing of Saturation flats.

When carriers happen to have two mailings of saturation flats for delivery on the same day, the preferred procedure would be to defer one mailing until the next day, thereby taking each mailing to the street using the extra bundle procedure. Should deferral not be feasible, such as when two mailings of saturation flats must be delivered on the same day to meet delivery standards, then — rather than taking one mailing to the street as an extra bundle and

¹⁷ See, e.g., rebuttal testimony of USPS witness Jeffrey W. Lewis, USPS-RT-2, Docket No. R2005-1, pp. 2-3.

casing the other mailing — carriers usually will **collate** the two mailings, then take the collated mailings to the street and handle them as one extra bundle, *i.e.*, by delivering two pieces to each address. In comparison with taking mail directly to the street, the cost **incurred** for carrier collation is significantly higher, but generally preferred because it is said to be less costly than carrier casing.

Evolution of the operating procedures just described eroded pertinence of the Shipe data for estimating costs **avoided**. Today, costs of saturation flats are indeed lower (as Shipe found), not because carriers case them faster than High Density or Carrier Route flats, but because they generally are not cased at all.¹⁸ The CRA shows that the average cost **incurred** to handle saturation flats clearly is lower than the average cost **incurred** to handle High Density flats. At the same time, Saturation flats have not **avoided** costs by virtue of carriers casing them faster than High Density flats. The Shipe data, although they established a firm rationale for Saturation Flats having a lower cost, no longer constitute a relevant benchmark vis-a-vis current operating procedures. In the face of operational changes described above, to continue estimating **avoided** costs using a model based on the Shipe data clearly would produce erroneous results.

Today, both Saturation and High Density flats are presorted to walk sequence by mailers. Much of the difference in unit cost incurred by Saturation and High Density flats reflects different handling methods (other cost driving factors also may be present), and

¹⁸ Handling of letter mail also has evolved since the time of witness Shipe's study. It too can be handled as a third bundle in many instances, and an increasing percentage is sorted into delivery point sequence on high-speed automated equipment.

labeling cost differences between the two as a reflection of worksharing and cost avoidance is a stretch. Any attempt to develop a model to estimate the costs **avoided** by Saturation flats vis-a-vis High Density flats would be fraught with problems. For instance, how does one estimate the number of times the cost of collating two saturation mailings was avoided by virtue of separately taking each mailing directly to the street on different days?

As between two similar categories (or products), one possible way to estimate **costs avoided** would be to use the costing system already in place to develop average cost **incurred** to process each category,¹⁹ then take the difference between the categories and, for the category of mail that has the lower average cost, assume that each piece **avoided** the difference in average unit cost **incurred** by mail in the category with the higher cost. In other words, as between two categories, simply assume that costs avoided are equal to the difference in costs incurred.

However, any such approach involves implicit assumptions about homogeneity of mail in the two categories. For instance, billions of pieces of mail, including Standard Mail, now pay reduced rates (*i.e.*, receive “discounts”) in recognition of formal worksharing, as well as numerous other cost-reducing measures, some of which may be recognized in the tariff structure, and some of which may not have received formal recognition.

¹⁹ When various categories are priced as products, and the concepts of ECP and **avoided** costs are not applicable, with respect to costs all one needs to know is the cost **incurred** to provide each product. Cost differences, or costs **avoided** by one product versus another, need not be estimated. Forcing the use of costs **avoided** can be seen as introducing an unnecessary overlay into pricing procedures.

Viewed in the aggregate, and from the perspective of Section 3622(e), the question is whether the total costs **avoided** for each workshare activity (*e.g.*, presortation, destination entry, etc.) were less than, equal to, or more than the aggregate value of the respective discounts. Although the total value of discounts (billions of dollars when aggregated over all classes of mail) can be computed fairly readily, less clear is how one computes the costs that the Postal Service would have had to **incur** (*i.e.*, the costs thought to be **avoided**) should it have had to adjust operations so as to accommodate and provide full processing and transportation for those tens of billions of pieces of mail that received workshare discounts and reduced rates. An assumption that the current marginal cost of mail requiring full processing is applicable to such a huge volume of mail in workshared (*i.e.*, discounted) categories involves a heroic leap of faith; the concept of incremental cost would be more appropriate. Designing a model to produce an aggregate estimate of costs avoided, to be compared with the total value of discounts given to mailers, would present challenges.²⁰ But without any way to make such an aggregate check, how can one be assured that the value of all discounts given does not exceed costs avoided?

One alternative way is to model differences in procedures and handling rates between the two (more or less as Shipe did), and use the modeled results to estimate the costs **avoided**.²¹ If the modeled cost alternative is used within Standard Mail, one would hope that

²⁰ Such a model doubtless would show costs avoided to vary greatly based on whether total Postal Service mail volume was increasing or decreasing (as now).

²¹ Any model for **avoided** costs would have to include numerous assumptions, such as the frequency with which Saturation Mail is taken directly to the street as an extra
(continued...)

cost differences generated by the model would be approximately equal to differences in costs **incurred** as generated by the accounting system. If this turns out **not** to be the case, then differences between CRA costs **incurred** and modeled costs **avoided** would be problematic, and raise questions needing explanation (as has been the case in First-Class Mail).

Order No. 243 (at 7) states that

Sequencing mail, however, appears to fit the definition of worksharing activity in section 3622(e). If the mailer does not sequence the mail, then the Postal Service must do it. ... Absent demand differences, the relationship between these categories of mail suggests that the less deeply sequenced categories could serve as benchmarks from which the costs avoided by more deeply sequenced categories could be measured. ... the cost of sorting mail to the line-of-travel order as reflected in the attributable delivery cost of Carrier Route mail could be viewed as the appropriate benchmark for both High Density and Saturation mail.

Before carriers can go forth and deliver the mail in an efficient manner out on the street, most mail must be sorted and, simultaneously, **interspersed** with other mail. This is certainly true for all Carrier Route mail, even though it is presorted to line-of-travel. The activities of sorting and interspersing normally occur concurrently, regardless of whether the mail is cased by carriers or sorted into delivery sequence on automation equipment. Saturation mail, however, by virtue of its density, does not need to be interspersed with other mail because it often can be (and is) taken directly to the street as an extra bundle, as described previously. *See* also Tr. 1/99 (comments of Ashley Lyons). Using mail that requires

²¹(...continued)

bundle (which avoids all casing costs), and the number of times Saturation flats first have to be collated (which replaces casing cost with a lower cost). Significant time lags can exist between updates of Postal Service cost models.

interspersing as a benchmark for another category of mail whose density does not require interspersing would not seem appropriate.

II. Workshare Statutory Construction Problems Raised in Notice of Inquiry

A. The Search for Statutory Meaning is not Advanced by Development of a Non-Statutory Lexicon and a Search for Optimal Policy.

When this docket was commenced on March 16, 2009, the Commission identified the Standard Mail issue presented using the plain language of the statute in 39 U.S.C. section 3622(e)(1). The Commission explained that this rulemaking would focus on the merits of the Postal Service's rationale that the "density differences between Carrier Route Basic and High Density, and between High Density and Saturation are not the result of 'presorting, prebarcoding, handling, or transportation' as **worksharing** is defined under 39 U.S.C. section 3622(e)(1)." Order No. 192, p. 2 (emphasis added). It seemed clear at that time that this docket would be a search for the proper meaning of the words of the statute.

On July 10, 2009, however, Order No. 243 introduced a new non-statutory term into the mix when it asked whether "**workshare-related**" activity is subject to the limitations of 3622(e). *See* Order No. 243, pp. 4-5, 8 (emphasis added). Moreover, before identifying the scope of its legal authority under the statute, Order No. 243 framed a number of what it called "**policy**" issues for comment at a public forum. The Order also spoke of mailer worksharing by a "**direct substitute**" for Postal Service activity.

The terminology morphed again with a handout (entitled "Forum on Worksharing Policy Issues") distributed at the public forum of August 11, 2009, which summarized Order

No. 243 and then asked whether the definition of workshare activity should “include other cost-reducing characteristics that facilitate or naturally support **pure worksharing** activities like **density** and **address cleansing**.” Handout, p. 4 (emphasis added).

The forum on August 11, 2009, saw discussion of “**pure worksharing**” activities, and discussants introduced the even newer concept of “**pure plus worksharing**.” *See e.g.*, Tr. 73-74, 79.

On August 27, 2009, NOI No. 1, question 3, inquired about what was again called “**workshare-related**” activity.

As the summer has worn on, the evolving lexicon of the docket, and the desire to explore policy issues before clarifying the scope of legal authority, have combined to threaten derailment of the search for statutory meaning. Indeed, the only terminology which is important here are the words of the statute, and the only meaning that is important is the authorial intent of Congress in selecting and using those words. *See, generally*, E.D. Hirsch, *Validity in Interpretation*, pp. 5-6 (Yale University Press, 1967). Indeed, as the Supreme Court has emphasized, “[t]he determination of the extent of authority given to a delegated agency by Congress is **not** left for the decision of him in whom authority is vested.” Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 616 (1944) (emphasis added). Rather, the determination of the scope of any administrative agency’s powers must be “faithful to the meaning of a statute,” according to the “words” chosen by Congress, not by words substituted by the agency, itself. *See id.*, 322 U.S. at 617. Those words may “reveal[] gaps or inadequacies of one sort or another that may call for amendatory legislation[,] [b]ut it is no

warrant for extending a statute that experience may disclose that it should have been made more comprehensive.” *Id.*

How the search for statutory meaning can be derailed by an extra-textual approach is demonstrated by a close examination of the first step off the path of proper statutory construction. Order No. 243 identified not a legal issue, but rather what it termed a “**policy issue,**” and, then phrased the issue using non-statutory terms, as to whether a workshare discount should be defined as either:

- A “pure” presorting, prebarcoding, handling, or transportation activity that is a **direct substitute** for an equivalent Postal Service activity; or
- A “pure” worksharing activity as described above, **plus other** cost-reducing mail characteristics that are **facilitated by** or **naturally support** the “pure” worksharing activity, *e.g.*, walk sequencing and density.

[Order No. 243, p. 4 (emphasis added).]

The approach taken in Order 243 created two problems.

First, Order 243 sought to discuss policy issues before it resolved legal authority. As noted above, an administrative agency can only make policy choices within the parameters of its delegated legal authority. If Congress uses broad language, such as “to effectuate the policies of this Act,” then the “determination of ‘the relation of remedy to policy is peculiarly a matter for administrative competence.’” Addison, 322 U.S. at p. 616. Had section 3622 simply granted the authority to establish and revise by regulation “a modern system for regulating rates and classes for market-dominated products,” as stated in subsection (a), then such a discussion of policy issues relating to “workshare discounts” would plausibly be within

the Commission's authority. But Congress did not stop with such a general grant of authority. Instead, it adopted subsection (e), which contains a detailed description of the activities that qualify for "workshare discounts," along with additional limitations governing the power of the Commission in relation to those activities. Thus, the grant of authority to promulgate regulations set forth in subsection (e)(1) is circumscribed by the specific provisions of subsection (e), not the more general guidelines in subsection (a). *See, e.g., Addison*, 322 U.S. at 614.

Second, Order No. 243 manufactures the phrases "pure" and "direct substitute" to identify the type of workshare activities defined in section 3622(e)(1). Indeed, section 3622(e) uses neither term, and there is no indication from the text that Congress imposed any such "pure" or "direct substitute" requirement. The worksharing performed by the mailer must replace an activity otherwise undertaken by the Postal Service in one of the four specified activities ("presorting, prebarcoding, handling, or transportation"), and there is no support for the view that the mailer needs to do work in **the precise same way** that the Postal Service would otherwise be required to do this work. Therefore, there is no "direct substitute" requirement.

This confusion could be exacerbated by the way question 3 is posed in NOI No. 1:

Under the established method of estimating the costs avoided by the Postal Service as a result of worksharing, the savings from some (**workshare-related**) mail preparation functions performed by a mailer that are not a **direct substitute** for a Postal Service function are included. Examples include **[i] savings from electronic presorting**, which avoids Postal Service physical sorting; **[ii] address cleansing**, which avoids Postal Service forwarding and return costs; and **[iii] automation compatible mailpiece design**, which reduces the likelihood of manual Postal

Service sorting. [Notice of Inquiry No. 1, p. 3 (emphasis added).]

This first “example” in question 3 demonstrates the unworkability of the “direct substitute” test. What the Notice of Inquiry terms “electronic presorting” is mailer “presorting” via computer; it is unquestionably “worksharing” under section 3622(e)(1). It is irrelevant that mailer “electronic presorting” avoids the need for Postal Service “physical sorting,” and that “electronic” and “physical” are different types of sorting, as the statute nowhere requires they be identical. Such presorting, however, has always been known as actual worksharing, not workshare-related.²² Reading into the statute a “direct substitute” requirement artificially constricts the types of workshare activities covered by the limitation.²³ By itself, such a result would be bad enough. Paradoxically, however, this artificial constriction of the application of the statute (*e.g.*, “direct substitute”) has provoked a search for other non-textual methods of interpretation (*e.g.*, “workshare related,” “pure plus”) to

²² Section 3622(e) limits the definition of “workshare discounts,” *inter alia*, to that activity which is “presorting” or “prebarcoding.” These are specific activities that the Postal Service **never** undertakes. For the majority of mail, however, the Postal Service does **sort** and **barcode** mail. The prefix “pre-” indicates that this activity is completed before it is entered with the Postal Service.

²³ The second example in question 3 is “address cleansing, which avoids Postal Service forwarding and return costs.” While address cleansing can help avoid a Postal Service cost, (i) it is not something the Postal Service would have to do if the mailer did not do it (so it is not worksharing), and (ii) it is not “presorting, prebarcoding, handling, or transportation.”

The third example in question 3 of supposedly workshare-related mail preparation is “automation compatible mailpiece design, which reduces the likelihood of manual Postal Service sorting.” This activity obviously helps the Postal Service save costs, but it is not “presorting, prebarcoding, handling, or transportation.”

expand the statute artificially, to achieve what some think Congress intended. This extra-textual approach to statutory construction does violence to PAEA and should be rejected.

B. The Scope of the Commission’s Rulemaking Authority is Limited by PAEA.

Notice of Inquiry question three assumes that section 3622(e) authorizes the Commission to define “workshare discount” so as to include “worksharing related” functions in addition to the four statutorily-specified “workshare discount” activities, namely “presorting, prebarcoding, handling, or transportation of mail.” By this assumption, the Notice of Inquiry has, in effect, asserted that the power conferred upon it by the phrase, “as further defined by the Postal Regulatory Commission under subsection (a)” is the power to “further define[]” the term “workshare discount.” But this reading of the statute “disregards — indeed, is precisely contrary to — the grammatical ‘rule of the last antecedent,’ according to which a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). In the case of section 3622(e), the last antecedent is the phrase, “presorting, prebarcoding, handling or transportation,” not “workshare discount.”

Thus, section 3622(e) does not confer upon the Commission broad powers to promulgate regulations to expand the category of “workshare discounts” to include “‘**pure**’ worksharing activity [as defined by statute] **plus** other cost-reducing mail characteristics that are facilitated by or naturally support the ‘pure’ worksharing activity, e.g., walk sequencing and density.” Order No. 243, p. 4 (emphasis added). To the contrary, the grant of regulatory authority is a narrow one, confined to the refinement of the definitions of the detailed list of activities immediately preceding the grant of authority. As the Supreme Court observed in

Addison “the **wider** a delegation is made by Congress to an administrative agency the **more incomplete** is a statute and the ampler the scope for filling in ... the details. But when Congress wants to give wide discretion it uses broad language.” *Id.*, 322 U.S. at 616 (emphasis added).

Had Congress intended to grant to the Commission the authority to extend “workshare discounts” to “workshare-related” activity or to “pure plus workshare activity,” it would have written section 3622(e) to read “the term ‘workshare discount’ refers to rate discounts to mailers, as further defined by the Postal Regulatory Commission under subsection (a).” Instead, it inserted immediately before the grant of rule-making authority the four distinct activities for which the provision of rate discounts qualified as workshare discounts. Thereby, it relegated to the Commission only such power as might be appropriate to “further define[]” those four terms, not to add other activities to the statutory list, no matter how closely the additional activities may be related to any one or more of the activities expressly stated in the statutory list. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 342-43 (2005).

C. Conclusion

The PAEA limitation on worksharing discounts can be faithfully implemented only by a careful examination of the text of the statute, in a search for the authorial intent underpinning the actual words employed by Congress — not from creation and examination of some new non-textual lexicon, not from subjective perceptions of the intentions of members of Congress, and not from prioritizing a set of preferred policies over the text of section 3622(e).

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