

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Consideration of Workshare Discount)
Methodologies)

Docket No. RM2009-3

PUBLIC REPRESENTATIVE COMMENTS IN
RESPONSE TO ORDER NO. 243 CONCERNING PROPOSED
RULEMAKING ON APPLICATION OF WORKSHARE
DISCOUNT RATE DESIGN PRINCIPLES

(September 11, 2009)

Pursuant to Order No. 243,¹ the Public Representative hereby responds to the initial presentations and comments filed in response to the Commission's Notice of Proposed Rulemaking on Application of Workshare Discount Rate Design Principles.² This response will also address issues posed by the Commission for discussion at the public forum convened on August 11, 2009.³

In Order No. 243, the Commission illustrated by example that the issues to be resolved in the context of the proposed rulemaking were interrelated and contingent in nature. Moreover, the examples make it apparent that in determining whether Bulk Metered Mail (BMM) is the appropriate benchmark for establishing presorted First-Class

¹ Order on Further Procedural Steps (herein "Order No. 243"), July 10, 2009.

² Notice of Proposed Rulemaking on Application of Workshare Discount Rate Design Principles (herein "Order No. 192"), March 16, 2009, Appendix A. Order No. 192 requested presentations by interested persons addressing "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."

³ Order No. 243, at 4-5.

Mail workshare discounts, the most important issue to be resolved by the Commission is a legal one; that is, the Postal Service's interpretation of the interrelationship between sections 3652(b) and 3622(e) of the PAEA.⁴ The Postal Service relied upon that legal interpretation in Docket No. R2009-2 to justify its decision not to use the Commission's accepted methodology when proposing presorted workshare discounts⁵—a decision that prompted the current rulemaking proceeding. With its Initial Comments, the Postal Service has provided further exposition of its legal reasoning.⁶

At base, the Postal Service seeks to extricate itself from what it characterizes as “[s]trict adherence of a formulaic relationship between Presorted and Single-Piece prices for First-Class Mail,” which it considers “not only impractical, but . . . also inconsistent with the new law.”⁷ To do so, the Postal Service requests Commission concurrence with its interpretation of the interrelationship of sections 3652(b) and 3622(e)—that there can be no workshare relationship between presorted and single-piece First-Class Mail because they are two separate and distinct products. In its view, the PAEA requires that workshare relationships be analyzed only within a single product. The effect of concurring with the Postal Service's interpretation would permit larger presort workshare discounts and consequently higher single-piece rates.

⁴ See Order No. 243, at 2 and 3.

⁵ See Response of the United States Postal Service to Chairman's Information Request No. 1, February 20, 2009, at 2-3.

⁶ See Initial Comments of the United States Postal Service (herein “Initial Comments”), May 26, 2009, at 14-17.

⁷ *Id.*, at 11.

The Postal Service's claims of "impracticality" are without merit. As demonstrated in the Public Representative's initial Comments, the Commission's accepted workshare rate design methodology did not preclude the Postal Service from proposing lawful rates in Docket No. R2009-2. The Public Representative's Comments presented two alternative rate designs to those of the Postal Service. These alternatives not only complied with the price cap, adhered to the BMM benchmark and satisfied other important rate design policies, but also produced discounted presort workshare rates that were less than the percentage increase in the price cap.⁸

Moreover, the Postal Service's claim that the Commission's workshare rate design methodology is "inconsistent" with the PAEA is strained at best, and plainly wrong. The Postal Service's assertions and legal reasoning underlying its interpretation of sections 3652(b) and 3622(e) cannot be supported by a plain reading of the statutory language. The Postal Service attempts to stitch together two separate provisions of the PAEA, whose commonality is the phrase "workshare discount," that are otherwise distinct in the obligations each imposes upon the Commission and the Postal Service with respect to compliance. Consequently, the Postal Service overreaches in its reading of the PAEA to produce an interpretation designed to achieve its desired end—larger discounts not supported by avoided costs for presort mail at the expense of single-piece First-Class Mail. The Commission should reject the Postal Service's strained legal interpretation for the reasons set forth below.

⁸ See Public Representative Comments in Response to Notice of Proposed Rulemaking on Application of Workshare Discount Rate Design Principles (herein "Comments"), May 26, 2009, at 16-19.

ARGUMENT

I. THE POSTAL SERVICE'S LEGAL INTERPRETATION OF SECTIONS 3652(b) AND 3622(e) CANNOT BE SUPPORTED BY A CAREFUL READING OF THE PAEA AND WOULD EVISCERATE THE COMMISSION'S AUTHORITY TO ENSURE THAT WORKSHARE DISCOUNTS DO NOT EXCEED AVOIDED COSTS

The Postal Service's legal interpretation of sections 3652(b) and 3622(e) is the most important issue to be resolved by the Commission in the current rulemaking proceeding. According to the Postal Service, sections 3652(b) and 3622(e) reveal, when properly interpreted, that workshare relationships are to be analyzed within a product, and not between products.

The Postal Service's interpretation belies a plain reading of the PAEA in general, and sections 3652(b) and 3622(e) in particular.

A. The Postal Service's Interpretation of Section 3622(e) Lacks Merit As Section 3622(e) Does Not Require Reference to Section 3652(b) For Its Meaning

In its Initial Comments, the Postal Service succinctly states its interpretation of the interrelationship of sections 3652(b) and 3622(e):

[I]t is illogical to suggest that section 3622(e) would apply to a relationship for which section 3652(b) does not mandate the provision of cost information. Because 3652(b) only requires that costs avoided and passthroughs be reported "with respect to each market-dominant product for which a workshare discount was in effect," the standards of section 3622(e) should be applied within each market dominant product, rather than between market-dominant products.⁹

⁹ Initial Comments, at 15-16.

This follows from the Postal Service's reasoning that because the two sections were enacted in the same act and both refer to "workshare discounts," they "work together to a common purpose of ensuring that such discounts do not exceed the costs avoided by the Postal Service . . . except in specified circumstances."¹⁰ In effect, because both sections are *in pari materia*, the Postal Service concludes that "section 3622(e) should be construed in a manner consistent the section 3652(b)."¹¹

The Postal Service's interpretation that section 3652(b) should determine the interpretation of section 3622(e) is wrong. The intended purpose of section 3622(e) can be accomplished without reference to section 3652(b). Moreover, with respect to workshare discounts, it is section 3652(b) that is dependent upon section 3622(e) for its substance.

Section 3622(e) is a separate and self-contained requirement that specifically addresses "Workshare discounts." Section 3622(e)(1) defines a "workshare discount" as "rate discounts provided to mailers for the presorting, prebarcoding, handling, or transportation of mail." By definition, under the Commission's accepted methodology, the rate discount between Bulk Metered Mail and the first automation discount rate "tier," i.e., Automation Mixed AADC Letters, constitutes a "workshare discount" because that discount is provided for mailer presorting and prebarcoding. Moreover, the definition of "workshare discount" is not dependent upon, or otherwise modified by, any other provision of law. Section 3622(e)(2) imposes upon the Commission the affirmative duty to "ensure that such [workshare] discounts do not exceed the cost that

¹⁰ *Id.*, at 15.

¹¹ *Id.*

the Postal Service avoids as a result of workshare activity,” subject to four exceptions. Similarly, there is no reference in section 3622(e)(2) to section 3652(b) or, more specifically, the term “product.” Nor is there reference in section 3622(e)(2) to any other provision of law.

By contrast, section 3652 addresses the requirement of “Annual reports to the Commission.” Section 3652(a) requires that the Postal Service prepare and submit to the Commission an annual report 90 days after the close of each fiscal year. The Postal Service’s report must “analyze costs, revenues, rates, and quality of service . . . in sufficient detail to demonstrate that all products during such year complied with all applicable requirements of this title.” It is clear that “all applicable requirements of this title” includes section 3622(e) of Title 39. Section 3652(b) enumerates the specific information to be provided by the Postal Service in its annual report with respect to workshare discounts for market dominant products: “(1) The per-item cost avoided by the Postal Service by virtue of such discount. (2) The percentage of such per-item cost avoided that the per-item workshare discount represents. (3) The per-item contribution made to institutional costs.”

As is apparent, section 3652 requires the reporting of specific information on workshare discounts for each market dominant product in order to determine compliance with section 3622(e); that is, to “ensure that such discounts do not exceed” the costs avoided by the Postal Service. However, there is nothing in section 3652 that suggests, let alone requires, the linkage posited by the Postal Service that section 3622(e) must be interpreted “consistent” with the requirements of section 3652(b). The Commission is able to exercise its authority under section 3622(e) without reference to

section 3652(b). In this regard, section 3622(e)(2) directs the Commission's attention to the relationship of avoided costs, however calculated, and the size of the workshare discount, without regard to product. Pursuant to section 3652(b), the Postal Service is able to provide the required workshare-specific information and report its analysis as to whether workshare discounts for each market dominant product exceed costs avoided by the Postal Service, whether section 3622(e) is interpreted as proposed by the Postal Service or not. It is clear, however, that the content of the Postal Service's annual report must demonstrate the compliance of workshare discounts with the requirements of section 3622(e).

B. The Postal Service's Interpretation That Analysis of Workshare Discounts Must Occur Only Within "Products" Is Inconsistent With Section 3622(e) and Would Produce Illogical Results

The Postal Service assigns considerable import to the classification of presort and single-piece First-Class Mail as separate products. The Postal Service points to the Commission's determination to classify presort and single-piece mail as separate products in the new Mail Classification Schedule as being consistent with the definition of product found in the PAEA. By that definition, a product is "a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonable be, applied." 39 U.S.C. 102(6). Accordingly, the Postal Service considers the consequences of the Commission's determination to be "substantial in terms of the application of the workshare discount provisions of section 3622(e)."¹²

¹² *Id.*, at 13-14.

The Postal Service's view of the Commission's determination as having substantial consequences is appropriate, but not for the reasons stated. The workshare discounts proposed by the Postal Service in Docket No. R2009-2 were inconsistent with the Commission's accepted methodology, and consequently inconsistent with the principles of economically efficient rates embodied in section 3622. Moreover, the possibility of classifying all rate categories as separate products would have illogical consequences, nullifying the requirements of section 3622(e).

1. Workshare discounts not based on avoided costs are inconsistent with the principles of economically efficient rates embodied in section 3622

The Postal Service observes, correctly, that the PAEA "unambiguously loosened" the classification criteria as compared to the PRA.¹³ Thus, "the existence of either cost or demand differences is sufficient under the PAEA to require treatment as a product."¹⁴ Under the PRA, the pricing factors and other policies of the act were applied at the level of the "subclass." A mail service was classified as a subclass if it featured both market demand *and* cost characteristics. Accordingly, workshare discounts should reasonably match avoided costs for mail services that have essentially the same market demand characteristics. This principle of economically efficient rates for presorted mail was carried forward from the PRA and embodied in section 3622(e) of the PAEA. Otherwise, the section 3622(e) requirement specifying that workshare

¹³ *Id.*, at 12.

¹⁴ *Id.*, (emphasis original).

discounts should not exceed costs avoided by the Postal Service would be unnecessary.

Both presorted and single-piece First-Class Mail exhibit similar market demand characteristics, as measured by price elasticity of demand. In Docket No. R2009-2, the Postal Service's decided to use Automation Mixed AADC letters as a benchmark for other presorted workshare discounts that was no different than using the BMM benchmark in terms of market demand. The resulting workshare discounts and passthroughs were therefore inconsistent with the principle of economically efficient rates embodied in section 3622(e).

2. The Postal Service's legal reasoning, if extended to its logical conclusion, would render section 3622(e) meaningless

If the Postal Service's legal reasoning were extended to its logical conclusion, it would yield an illogical result as a consequence of the "unambiguously loosened" classification criteria that defines a "product" based on either distinct cost *or* demand characteristics. According to the Postal Service, section 3622(e) must be interpreted consistent with section 3652(b), *i.e.*, workshare discounts must be analyzed within a single product. However, under the classification criteria that defines a "product," virtually any mail service or rate category could qualify as a separate product. As a result, each product could constitute its own benchmark, and there could be no comparison of avoided costs *within* a single product, thus precluding the comparison required by section 3622(e) that each workshare discount not exceed the costs avoided by the Postal Service. Consequently, by defining products ever more narrowly, the Postal Service's interpretation tying together sections 3652 and 3622 would effectively write the enforcement authority of section 3622(e) out of the statute.

C. The Postal Service's Legal Interpretation Would Eliminate the Commission's Authority Under Section 3622(e), and Should Be Rejected

According to the Postal Service, "A prominent goal of the PAEA was to provide the Postal Service with increased flexibility in pricing, as compared to the prior pricing regime."¹⁵ In support of this proposition, the Postal Service cites 39 U.S.C. 3622(d)(4) and (c)(7), and findings by the Commission in its rulemaking establishing the modern system rate regulation.¹⁶

The Postal Service also maintains that "Congress clearly emphasized post-implementation review . . . as a means of ensuring compliance with the provisions of chapter 36." According to the Postal Service then, it makes "perfect sense" that Congress placed "the detailed reporting requirements necessary to support implementation of section 3622(e) in section 3652." Moreover, the Postal Service's detailed reporting requirements are complemented by the Commission's obligation under section 3653 to report on compliance, and take appropriate action concerning instances of noncompliance, with respect to any rates and fees after the close of each year.

The Postal Service's general propositions as to pricing flexibility and post-implementation review are unassailable as far as they go. However, the "goal" of pricing flexibility for the Postal Service is not unlimited; such a "goal" cannot override clear statutory authority granted to the Commission in section 3622(e) to ensure that workshare discounts do not exceed avoided costs. Nor does an "emphasis" on post-

¹⁵ *Id.*, at 11.

¹⁶ *Id.*, at 12.

implementation review preempt the Commission's authority to ensure that workshare discounts do not exceed avoided costs through pre-implementation review, if it is deemed necessary and appropriate. At best the Postal Service's propositions are irrelevant to interpreting the Commission's authority under section 3622(e).

1. Section 3622(e) operates as a pre-implementation check on Postal Service pricing flexibility

Section 3622, entitled "Modern rate regulation," comprises a set of instructions to the Commission. Section 3622 (a) directs that the Commission "by regulation establish . . . a modern system for regulating rates and classes for market dominant products." In establishing this modern system, sections 3622 (b) and (c) direct that the Commission achieve nine enumerated "Objectives," and that it take into account 14 enumerated "Factors," respectively. Section 3622 (d), entitled "Requirements," directs that the Commission establish the modern system for regulating rates that includes "an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission," which cannot be avoided except in limited circumstances. Section 3622 (e) is a separately stated requirement, directing the Commission to "ensure that such [workshare] discounts do not exceed the cost that the Postal Service avoids as a result of workshare activity."

The PAEA's only reference to "pricing flexibility" is found among the list of "Objectives" and "Factors" that guide Commission establishment of the modern system of regulation. In this regard, "Objective" (4) states: "To allow the Postal Service pricing flexibility;" 39 U.S.C. §3622(b)(4). With respect to "Factors," the Commission must take into account "(7) the importance of pricing flexibility to encourage increased mail volume and operational efficiency;" 39 U.S.C. §3622(c)(7).

The Postal Service's interpretation of the goal of pricing flexibility is flawed. As discussed previously, the Commission was required to establish the modern system so as to achieve all nine "Objectives." The requirement of section 3622(b) that "each of [the objectives] shall be applied in conjunction with the others" precludes an interpretation that "pricing flexibility" is to be elevated above any of the other nine "Objectives," such as "Objective (1)," which states that the modern system should provide "maximize incentives to reduce costs and increase efficiency;" 39 U.S.C. §3622(b)(1).

Moreover, even if the Postal Service's proposition that the "prominent goal" of pricing flexibility is conferred primacy above all other Objectives and Factors, it is clear that section 3622(e)(2) is neither an "objective" nor a "factor." Section 3622(e)(2) is a separately stated requirement which confers upon the Commission authority to ensure that workshare discounts do not exceed the costs avoided by the Postal Service from mailer workshare activities. As such, section 3622(e) provides a specific pre-implementation check on Postal Service pricing flexibility with respect to a specific type of rate, i.e., workshare discounts, in the same manner as section 3622(d) limits Postal Service pricing flexibility by precluding price increases that exceed the rate of inflation. Given that the multiple "objectives" and "factors" are subordinate to the specific ratesetting requirements of section 3622(d), the "goal" of pricing flexibility should be subordinate to the specific requirements of section 3622(e).

2. The Commission's authority under section 3622(e) is not limited to post-implementation compliance reviews pursuant to section 3653

The Postal Service asserts that the Commission's authority under section 3622(e) is inherently limited because compliance is housed in Subchapter IV—

Reporting Requirements and Related Provisions. See 39 U.S.C. §§ 3651 *et. seq.* As discussed previously, section 3652 entails post-implementation reporting by the Postal Service to demonstrate the compliance of all products with Title 39. Section 3653 requires a post-implementation “written determination” by the Commission as to the compliance or noncompliance of any rate or fee with the provisions of chapter 36, and “appropriate action” in instances of noncompliance. Accordingly, the Postal Service asserts that the Commission’s role in rate proceedings is limited to examining compliance with section 3622(e) “by requiring that the Postal Service discuss, in each price change notice under section 3622(d), how its new prices are consistent with section 3622(e).” In fact, the Postal Service asserts that, “under the language of section 3622, the only mandated topic of pre-implementation review was ensuring compliance with the price cap. See 39 U.S.C. 3622(d)(1)(C).”¹⁷

The Postal Service is in error. A plain reading of the statute and Commission regulations does not support the Postal Service’s interpretation of section 3622(e). Section 3622(d) operates through Commission regulation to preclude price increases that exceed the price cap. Similarly, section 3622(e)(2) imposes on the Commission an affirmative duty to ensure that workshare discounts do not exceed costs avoided by the Postal Service. This separately stated requirement is relevant not only for pre-implementation review and post-implementation compliance determinations, but also for Commission pre-implementation review and enforcement, if determined appropriate and necessary by the Commission. In fact, the Commission exercised its authority pursuant to section 3622(e) after determining that pre-implementation enforcement was

¹⁷ Initial Comments, at 16.

appropriate in Docket No. R2008-1, the first proceeding under the PAEA governing a market dominant price adjustment. In its review of the Postal Service's proposed rates in Docket No. R2008-1, the Commission rejected a workshare discount for non-automation machinable mixed AADC letters to automation mixed AADC letters in Standard Mail that exceeded avoided costs by 557.8 percent.¹⁸ The Postal Service subsequently filed, pursuant to Commission regulations, a revised rate that complied with 3622(e).¹⁹

The Commission's pre-implementation enforcement authority under section 3622(e)(2) is separate and apart from the Commission's obligation under section 3653 to make an annual determination of compliance or noncompliance with respect to rates and fees of products individually or collectively. Consequently, section 3653 does not limit the Commission enforcement authority under section 3622(e), and therefore the Commission is not limited only to post-implementation annual compliance determinations and "appropriate action."

¹⁸ Review of Postal Service Notice of Market Dominant Price Adjustment, March 17, 2008, at 36.

¹⁹ See Notice of the United States Postal Service of Filing Amended Notice Market-Dominant Price Adjustment, March 26, 2008.

II. THE COMMISSION SHOULD REJECT A QUALITATIVE OR SUBJECTIVE STANDARD OF PROTECTION FOR USERS OF SINGLE-PIECE FIRST-CLASS MAIL

In Order No. 243, the Commission identified two policy issues that it asked participants to this rulemaking to explore in the context of a public forum and in comments filed in response to Order No. 192. The Public Representative hereby addresses the following comments to the first policy issue.

With respect to the first policy issue, the Commission asks “whether the users of single-piece First-Class Mail are entitled to special protection under the PAEA, and, if so, [what form the] protection should take.”²⁰ The Commission further identifies four suggested options, plus “Other suggested forms of protection.”²¹

The Public Representative submits that the answer to the first part of this two-part policy issue is Yes, and that Congress has answered in the affirmative. With enactment of the PAEA, Congress preserved the Postal Service’s monopoly on the carriage of letters pursuant to the Private Express Statutes. That monopoly exists to fund “the universal service obligation of the Postal Service for the benefit of First-Class mailers that are not able to utilize presorted mail.”²² The Commission’s development of rates under the PRA and through its review of the market dominant rates under the PAEA have served to provide a reasonably priced universal service for all First-Class mailers.

²⁰ Order No. 243, at 4.

²¹ *Id.*

²² Comments, at 24.

Of more interest is the second part of the Commission's policy issue, concerning what form the protection should take. In the initial Comments, the Public Representative expressed support for the first and second suggested options when it urged the Commission to retain the accepted methodology using the BMM benchmark or, in the alternative, establish single-piece First-Class Mail as a separate class of mail subject to its own rate cap. Of the two options, establishing single-piece First-Class Mail as a separate class is the most straight-forward, permitting the Commission to revisit the issue of the proper benchmark for establishing workshare discounts for presorted First-Class Mail while protecting single-piece First-Class Mail from being the future funding source for such workshare discounts.

With respect to the third suggested option, the Public Representative reserves judgment about a regulation "that would limit the difference allowed between single-piece and presorted First-Class Mail in terms of either average revenue per piece or percent contribution to institutional costs" until such time as such a proposed regulation is issued for public comment.

The fourth suggested option is a "qualitative or subjective standard of protection, such as the 'just and reasonable' standard of section 3622(b)(8)." The Commission should reject such a standard as unrealistic, since it would provide little or no protection to single-piece First-Class Mail. By definition, a "just and reasonable" standard lacks a clear basis for determining when protection for single-piece mail is being eroded. As a result, such a "qualitative or subjective standard" would be subject to continual assault by the Postal Service as it seeks to justify virtually any workshare discount as "just and reasonable," and the changing make-up of the Commission over time.

III. CONCLUSION

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

Respectfully submitted,

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