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**BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001**

REVIEW OF PRICE ADJUSTMENT)
AND CLASSIFICATION CHANGES)
RELATED TO MOVE UPDATE)
ASSESSMENTS)

Docket No. RM2010-1

**COMMENTS OF
NATIONAL ASSOCIATION OF PRESORT MAILERS
ON ORDER NO. 318
(November 4, 2009)**

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The National Association of Presort Mailers respectfully submits the following comments on the *United States Postal Service's Notice of Market Dominant Price Adjustments and Classification Changes Related to Move Update Assessments* (the "Notice") filed with the Commission on October 15, 2009.

In the Notice, the USPS asserts that a calculation of a First-Class price cap is not really appropriate because the change actually reduces the amount a mailer would have to pay in the event it failed MERLIN Performance Based Move Update verification ("MERLIN PBMUV"). This assertion simply ignores the fact that what the Postal Service is doing is denying mailers the right to use services, forwarding and return of undeliverable as addressed ("UAA") First-Class mailpieces (and the destruction of UAA Standard Mail mailpieces) despite the fact that the postage paid covers those services.

The prices that the USPS placed in effect following R2006-1 included the full cost of forwarding and returning First-Class UAA mailpieces. They also included the cost of destroying UAA Standard Mail mailpieces. Now, the USPS wants to finally deny mailers

the right to use those services despite the fact that the cost of rendering those services is included in the prices currently being charged.

Now one might assume that since the Move Update rule has been in effect for First-Class discounted mail since 1996, what the USPS is doing does not represent a price increase for First-Class Mail. But if that is true, the Commission should revise its Order and Recommended Decision in R2006-1 to remove from the costs used to calculate the rates, the cost of forwarding and returning UAA First-Class mailpieces (and destroying UAA Standard Mail mailpieces).

Under the old rate setting process, had the Postal Service asserted that Move Update actually reduced UAA costs, then mailers would have asked the Postal Service and the PRC to reduce those costs accordingly in rate cases. So, at most, enforcement of the USPS's Move Update rule would have produced temporary "savings" since the USPS should ultimately have been required to remove the UAA costs avoided by the application of the rule. Now, the USPS is saying that its enforcement efforts are working, but it has not proposed a price decrease.

Though the Move Update rule was promulgated in 1996, with the exception of a poorly conceived and poorly executed effort in the Southeastern Area in 2002, the Postal Service has made no real effort to enforce the rule. This comported nicely with the USPS's repeated assurances that the rule had not produced any reduction in UAA costs. This, in turn, supported the Postal Services' continued inclusion of UAA costs in every rate case following promulgation of the rule.

Now that the USPS is no longer subject to cost-of-service rate setting, but is, instead, subject to a CPI-based rate cap, it has suddenly decided to enforce the Move

Update rule. Its objective, one must assume, is to keep the revenue but eliminate the costs. So, it seems clear that some adjustment to price is required. If the USPS eliminates services then the base-prices, the prices coming out of R2006-1, need to be adjusted.

In the course of investigating this issue, the Commission may also wish to examine the accuracy of USPS claims that discounted First-Class mail was responsible for the lion's share of UAA cost—not because it had more UAA mailpieces than Standard Mail, but because the cost of forwarding and returning UAA mail pieces was so much higher than the cost of destroying UAA Standard Mail mailpieces.

Since January, the NAPM has examined literally hundreds copies of USPS generated "Mailing's Move Update Address Validation Reports" ("MMUAVR"). While we do not assert that this "sample" is statistically valid, several things struck us about these reports. The most striking thing is the very low number of change of address orders ("COAs") on file with the USPS.

Each MMUAVR discloses the number of COAs the USPS has on file for names and address in the verification sample for several time periods. The MMUAVRs for May of this year submitted by members of the NAPM, indicate that the number of COAs per thousand for the period from 95 days to 48 months preceding the date of the MMUAVR, averaged 122. That's a ratio of twelve point two percent (12.2%). Now, if, as the USPS asserts, 17% or 44 million Americans move every year, one would expect the number of COAs on file for the period from 95 days to 48 months to be somewhere around 60%. So why is the actual figure so much less? We are not suggesting that a few COAs are

missing; we're suggesting that over 3/4ths of all the COAs one would expect are missing.

If all this is accurate, and it's all USPS data, where did all the COAs go? Just how big is the UAA problem anyway and are discounted First-Class mailpieces the real source of the problem? Only the USPS knows for sure! Unless, of course, the Postal Regulatory Commission decides it should know too.

The small number of COAs in the mail of most of the customers of NAPM members wasn't known to the NAPM, its members, or its member's customers before NAPM members began receiving copies of MMUAVRs. But the MERLIN PBMUV is based on a formula (which can only be described as "funky") that the USPS devised last winter. That formula compares the number of COAs updated by the mailer with the total number of COAs on mailpieces in the test sample for the time period from 95 days to 18 months. Thus, passing or failing is **not** based on the percentage of mailpieces in a mailing (or even a sample drawn from a mailing) that have stale names and addresses. The funky fraction is the total number of COAs (in the 95 days to 18 month time frame) that were updated by the mailer over the total COAs (for the 95 days to 18 month time frame) in the sample. Whether the number of COAs has been determined accurately is and will, of course, remain completely unknown to and unknowable by mailers.

The number of COAs in a MERLIN test sample is important because as the total number of COAs for the period being tested (currently 95 days to 18 months) declines, the passing score becomes more and more unstable and subject to greater variance based only on one or two addresses.

The funky enforcement ratio seems to have been developed solely to allow the USPS to assert that the tolerance is 30%. The real tolerance is not 30%; it is less than 1%! To avoid the absolutely absurd situation of penalizing a mailer for just a couple of UAA mailpieces in a MERLIN sample, the USPS has, sensibly, included a floor (a minimum number of un-updated (stale) addresses that must be found before the sample can fail). Thus, a test sample must have at least 5 mailpieces with names and addresses not updated by the mailer before a penalty is assessed. This means that the error rate must be at least one half of one percent—at least when the test sample is 1,000 pieces. But, if a test sample has only 18 COAs on file for the time period in question (currently 95 days to 18 months), then the actual tolerance is six UAA mailpieces—i.e., a mailer with six mailpieces with un-updated names and addresses would fail. This means that a test sample with names and address that are more than 99.4% current could cause a million piece mailing to fail.

Now one might assume that it would be unlikely that a mailing would have only 18 COAs in the 95 days to 18 months time frame, but the NAPM has numerous MMUAVRs that show 18 or fewer COAs per thousand mailpieces in the 95 days to 18 month time frame. Indeed, when one was pulled at random from a stack of MMUAVRs just now, it had only 9 COAs on file for the names and addresses used on 1059 mailpieces for the 95 days to 18 month time frame, and it appears that the average number of COAs per thousand pieces of MLOCR processed First-Class mail in the 95 days to 18 month time frame is around 30. That's 30 not 300 and 30% of 30 is just 9.

There are many other problems with the USPS's proposed MERLIN PBMUV, that are not directly related to whether the USPS's proposed process will violate the

Postal Accountability and Enhancement Act price cap, that the Commission would, we think, want to consider.

First, the MERLIN PBMUV process assumes incorrectly that a sample of a mailing chosen at random is representative of the mailing as a whole despite the fact that it may not be. The USPS simply doesn't care if the reciprocal of being 95% certain that some value determined by use of a sample is within a given range is that one is equally certain that 5% of the time it is not within that range. The asymmetrical structure of the penalty assessment process thus ensures that the process will penalize the innocent.

The proposed MERLIN PBMUV process assumes the occurrence of stale names and addresses in a mailing are evenly distributed. But an even distribution (e.g., one in which say one in every one hundred mailpieces has a stale address) is very different from and a far, far rarer event than a random distribution. Random events cluster! Thus, if you toss a fair (balanced) coin two hundred times, 95% of the time you will have a run of six heads or six tails in a row. In short, the occurrence of heads and tails will not be evenly distributed throughout the 200 tosses. You will **not** get heads on the first toss and tails on the second toss and heads on the third toss and tails on the fourth, etc.

A better example may be a jar filled with 900 white balls and 100 red balls. If one were to draw samples of 100 balls from the jar, there would be many samples that had more than 10 red balls despite the fact that at no time did the number of red balls in the jar exceed 10% of the balls in the jar. Indeed one would expect that about 10% of the 100 ball samples would have more than 10 red balls. Thus, if the tolerance were set at 10 red balls, then about 10% of the samples would exceed the "tolerance" despite the

fact that the red balls in the jar were never more than 10%. This problem could be very substantially mitigated, (though not entirely eliminated) by requiring that whenever an initial sample fails, a second (preferably larger) sample be drawn and tested and that a penalty be assessed only if both samples exceed the tolerance. The odds that both samples would be outliers are less than one in a hundred or one percent, not ten percent.

Second, the double-barreled enforcement of Move Update presents another problem. Under the rule, mailers are required to have updated names and addresses used on mailpieces within 95 days using a USPS approved Move Update compliance process. But, even if a mailer conscientiously uses a USPS approved Move Update compliance process, it may still fail a MERLIN PBMUV. So, a mailer who does what it is required to do by the USPS may fail. This is ridiculous! The USPS should be required to pick its remedy! Either mailers must properly employ a USPS approved Move Update compliance process or they should be subject to MERLIN PBMUV, but not both!¹ If mailers must hit a number at acceptance, then how they hit that number should be of no concern to the USPS.

Third, the application of the 7¢ per piece penalty assessment on certain First-Class Mailings could drive the postage above the full, single-piece First-Class rate. For example, if a mailing entered at the nonautomation Presort rate (currently 41.4¢) fails, a MERLIN PBMUV because only 4 of 15 COAs in the 500 piece sample had been

¹ The Commission should also note that an assertion by the USPS that a mailer has no Move Update address update process means only that the mailer is not employing a USPS approved Move Update process. It is not an assertion that the mailer has no process for changing names and address when requested to do so by a customer. Nor does the assertion that a mailer is not employing a USPS approved Move Update compliance process mean that any (much less a disproportionate number) of the addresses used by the mailer are not current. A mail could have names and address that are 100% current and still violate the Move Update rule if the mailer was updating its names and address by use of a process that had not been approved by the USPS.

updated, the assessment of a 7¢ per piece on 40% of the mailpieces (the failing score of 70% minus the 30% “tolerance”) would raise the average rate payable on the mailing to 44.2 ¢ per piece which is 2/10ths of a cent higher than the full, single-piece rate.

Fourth, the MERLIN PBMUV process cannot deal with newly acquired addresses, or addresses on mailpieces from mailers with an alternative Move Update compliance process.

The Move Update rule allows mailers to use names and addresses provided directly to them as a result of a transaction with or request for information from an individual for 95 days. But MERLIN does not know whether a name and address on an envelope was or was not provide directly by the addressee to the mailer in connection with a transaction or request for information. At best the mailer may have the right to pay the assessment of additional postage then appeal the decision to the USPS by proving (though the USPS has not even suggested what would constitute adequate proof) that the name and address it used had been provided directly to it by the addressee within the 95 days preceding the mailer’s use of the name and address. In short the proposed USPS Move Update enforcement process stands the legal system on its head. It says mailers must prove their innocence because the USPS is going to assume mailers are guilty and require them to pay additional postage before it will even listen to mailers’ claims that they are not guilty. Thus, has the USPS neatly combined the roles of legislature, judge, jury, and appellate court.

A similar albeit somewhat more complicated situation arises with respect to names and addresses used on mailpieces sent by mailers which are under a legal restraint barring them from changing an address without the affirmative consent of the

addressee. Mailers who are legally barred from changing a person's address without that person's consent are required to mail to each addressee for which the USPS has a COA but the mailer doesn't, a letter (1) informing the addressee that the USPS has a COA on file for him, her, it, or them and (2) asking him, her, it or them to confirm that information and allow them to update the address. But, until the mailer receives confirmation of the COA, it cannot change the address. In the past, letters or cards seeking to confirm a USPS COA could be sent at discounted rates. But how can a mailer do that now. If its mail is subjected to a MERLIN PBMUV, it won't know that the letter or card was being sent in fulfillment of the USPS imposed obligation. More importantly, how could a third party that combines mail from several mailers allow such mailpieces to be included in any mail it submits? But even if the letters to USPS COAs are not sent at discounted rates, the mailer is still obligated to send things like monthly statements to the old address pending confirmation of the COA by the addressee. These mailpiece could easily cause an entire mailing to fail.

The problem is exacerbated by the fact that the mailpieces of the customers of the consolidators are not randomly (much less evenly) distributed throughout mailings submitted by consolidators. Instead, individual customer's mailpieces appear in clusters. So consolidators will frequently have a cluster within a cluster. If a cluster of such mailpieces is in the MERLIN sample, the entire mailing could fail.

A similar problem arises with respect to mailers who have and are employing a USPS approved alternative Move Update compliance process based on the fact that the USPS has examined the mailer's list and found the names and addresses to be 99% accurate. It is worth noting the determination of the accuracy of the names and addresses in this situation is based on the ratio of the number of names and address

with what the USPS regards as current addresses versus the total number of names and addresses on the list of names and addresses the mailer provided to the USPS for verification using NCOA^{Link} not MERLIN. So if a mailer has 100,000 names and addresses, then 99,000 must be “current” according to the USPS. The determination is not made using the number of COAs updated by the mailer versus the total number of COAs in the mailers file. The point being simply that the funky fraction is not used to determine the accuracy of the mailer’s list of names and addresses.

The problem is: the USPS is now saying that even if a mailer has a USPS approved alternative Move Update compliance process, because its mailing list is 99% or more accurate, or because it is under a legal restraint and cannot change an address without your customer’s consent, it must still receive a passing score when its mail undergoes a MERLIN PBMUV. Thus the USPS takes away with one hand that which it has given with the other, plus a penalty, of course.

Sixth, the MERLIN PBMUV process involves the USPS in the tort of spoliation (i.e., destroying evidence). If A determines that it has a claim against B, the law requires A to preserve the evidence of the claim. In the case of the USPS’s MERLIN PBMUV, the best evidence of an infraction and the one on which the USPS proposes to act, are the mailpieces in the MERLIN sample that have stale names and addresses. But, instead of preserving this evidence, the USPS distributes it. This effectively destroys the evidence.

How would a member of the Commission respond if the IRS were to send him or her a letter saying that it had reviewed a portion of his or her tax returns and concluded since the portion it examined had understated the tax due (possibly as a result of the

disallowance of a \$300 charitable deduction), it had concluded that the Commissioner understated the total tax owed by \$10,000. The letters would go on to inform the Commissioner that he or she could appeal the decisions to agents of the IRS, but only after he or she had paid the taxes and penalties, of course.² That would be bad enough, but what if the Commissioner then discovered that the IRS had destroyed the tax return on which its determination was allegedly based and then questioned whether the information the Commissioner presented in his or her defense was accurate or consistent with the information on the original, now unavailable, tax return? I think the Commissioner would see that this would be nothing more than a Kangaroo court.

While the process in this hypothetical doesn't pass the straight face test, the USPS apparently doesn't see anything wrong with the process. But the law does, and the law of spoliation requires the claimant -- in this case the USPS -- to preserve the evidence.³ If the claimant doesn't preserve the evidence then the defendant is entitled to an instruction from the court that had the evidence been preserved it would have proven what the defendant claims, not what the claimant asserts.

Even if the Postal Service can assert that because it is under a pre-existing legal obligation to deliver the mail it is not guilty of spoliation, the rule would require the USPS to do the next best thing to keeping the evidence itself and that, it seems, would be to make complete legible copies of every mailpiece bearing an allegedly stale name and address, but that is not what the Postal Service is proposing.

² In fact, of course, taxpayers who do not wish to pay an assessment prior to appealing have the right to go to United States Tax Court. Only if a taxpayer wants to go to a federal district court must the taxpayer pay the taxes first and then sue for a refund.

³ The law probably also requires the Postal Service to provide some sort of administrative appeal before collecting an assessment of additional postage.

CONCLUSION

A determination of compliance with Move Update cannot be made by testing a sample from a mailing. All that a test sample can do is identify potential problems, possible violations, worthy of further investigation, but it cannot support a final determination of non-compliance. In short, Move Update enforcement can't be done quickly on the cheap. It requires a real investigation.

Finally, the NAPM endorses the concerns and augments presented by the Association for Postal Commerce (PostCom) in the comments that it has or will file in this Docket.

Respectfully submitted,

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