

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Rate Adjustment Due to Extraordinary
Or Exceptional Circumstances : Docket No. R2010-4

INITIAL COMMENTS OF THE GREETING CARD ASSOCIATION

The Greeting Card Association (GCA) files these Initial Comments pursuant to 39 CFR § 3010.65(f) and Order No. 485. In them, GCA presents its views on the Exigent Request filed by the Postal Service on July 6, 2010.¹ Our submission is in two parts: these Comments, and a Detailed Analysis, which sets out in greater detail the analytical procedures, and some of the arguments, presented in the Comments.

I. SUMMARY OF ARGUMENT

GCA's bottom line is (i) that no increase is justified under the reasonableness, equity, and necessity standard of 39 U.S.C. § 3622(d)(1)(E), and (ii) that, even without regard to that standard, only a portion of the effects of the current recession could qualify as an exigent situation – meaning that the entire 5.6 percent request could not lawfully be considered, let alone approved, under the “extraordinary or exceptional” standard.

GCA's Initial Comments fall into two main divisions, corresponding to what seems clearly to be the logic of 39 U.S.C. § 3622(d)(1)(E). Section II, next following,

¹ Exigent Request of the United States Postal Service (July 6, 2010) (“Exigent Request”).

first analyzes the statutory requirement that exigency increases be considered only under “either extraordinary or exceptional circumstances.” This requirement is also reflected in the Commission’s regulations, 39 CFR § 3010.61 et seq. In Section II, we explain the important distinction, which Congress’s phraseology implicitly demands, between “extraordinary” and “exceptional” circumstances and show how it applies in practice. Next, we analyze the current recession, on which the Postal Service lays great emphasis as a cause of the recent collapse of mail volumes, from the standpoint of how far, if at all, it can be considered an “exceptional” circumstance.² Our conclusion, explained in Section III, is that the severity of the current recession sufficiently exceeds that of other recessions with which it can appropriately be compared that some enhancement of revenue – though a smaller one than the total proposed by the Postal Service – can be justified as a potential exigency increase. GCA does not recommend specific rates – most obviously, because we think *no* increase is justifiable. Our analysis does indicate that an overall increase of 3.55 percent or 3.84 percent (depending on the choice between two views of the degree to which the current recession is exceptional) would be the theoretical maximum permissible under *this branch* of the exigency standards.

We use the term “theoretical” advisedly, and in the strongest sense of the word, because, as we show below, once the second branch of § 3621(d)(1)(E) is considered, no increase at all is appropriate.

Section IV discusses another important circumstance affecting Postal Service volumes – diversion of (mostly First Class) mail to the Internet – and concludes that it is neither extraordinary nor exceptional.

² For reasons developed at pp. 4 et seq., below, it cannot qualify as “extraordinary.”

The second main division comprises Section V, which deals with the other legal requirement of § 3621(d)(1)(E): that any increase approved by the Commission be reasonable and equitable, as well as necessary, under best practices of honest, efficient, and economical management, to allow the Postal Service to function adequately. Logically, these questions fall subsequent to a determination that extraordinary or exceptional circumstances exist, since absent such circumstances the particular increase being proposed cannot even be considered.

GCA believes that under this second branch of PAEA's exigency standards, it is neither reasonable nor equitable to raise rates by the Postal Service's proposed 5.6 percent – or, indeed, by the 3.55 or 3.84 percent permissible under PAEA's exigency standards – in the face of level or declining prices elsewhere in the economy.

II. STATUTORY PREREQUISITES

A. Introduction

Analysis of the statutory prerequisites for an exigency request is necessary before the legality of the request can be judged. In this part of the discussion, we focus first on whether the circumstances cited by the Postal Service are such as to make any proposal for an exigent increase lawful. If and to the extent they are, the question whether the increase proposed here also meets the standards of reasonableness, equity, and necessity must then be taken up separately.

B. Qualifying circumstances

Section 3622(d)(1)(E) requires the Commission to create a procedure “whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional

circumstances[.]” If no such circumstances are present, it follows that rates cannot be adjusted under this subparagraph.

“Extraordinary” and “exceptional” as qualifying conditions. GCA believes it is of considerable significance that the legislative standard requires “*either extraordinary or exceptional circumstances*” (italics added). The “either . . . or” expression shows that Congress meant to convey two different meanings: “extraordinary” and “exceptional,” in other words, are *not* synonyms. What these meanings are is to be determined, at least initially, by reference to ordinary correct usage. The Postal Service quite correctly says that the Commission “must start by considering the plain, ordinary meaning of those terms.”³

While dictionary definitions are far from dispositive, and may even imply a degree of overlap⁴, it does seem clear that “extraordinary” better accommodates the idea of a rare or unusual *type* of event, while “exceptional” need mean no more that the event or circumstance, though of a common enough type, is abnormally large, severe, or intense.⁵ Since Congress took pains not only to use two adjectives but to call attention to the fact

³ Response of the United States Postal Service to Motion of the Affordable Mail Alliance to Dismiss Request (August 2, 2010), p. 11. The Service does not, however, go on to consider the distinct meanings these two adjectives convey.

⁴ For example:

Exceptional: “**1**: forming an exception: RARE <an ~ number of rainy days> **2**: better than average: SUPERIOR <~ skill> **3**: deviating from the norm: as **a**: having above or below average intelligence **b**: physically handicapped”

Extraordinary: “**1**: **a**: going beyond what is usual, regular, or customary <~ powers> **b**: exceptional to a very marked extent <~ beauty> **c** of a *financial transaction* NONRECURRING **d** employed for or sent on a special function or service <an ambassador ~>”

Merriam-Webster Collegiate Dictionary, 10th ed., s.vv. “exceptional,” “extraordinary.” Part 1.b. of this dictionary’s definition of “extraordinary” suggests some overlap.

⁵ Thus, for instance, a Saffir-Simpson Category Four hurricane might reasonably be called “exceptional” on the Florida Atlantic coast but “extraordinary” in central Wisconsin.

that it was doing so, it seems incumbent on the Commission to interpret § 3622(d)(1)(E) to give distinct effect to each of them.⁶ The Commission is not at liberty to ignore one of them as mere surplusage; since Congress deliberately used this phraseology, the Commission must accept that “it means something.”⁷ The distinction above, we suggest, recognizes this and thereby allows the statute, and the Commission’s implementing regulations, to accommodate the full range of potential exigency situations.

The importance of observing, and using, the extraordinary/exceptional distinction can be appreciated by supposing, for argument’s sake, what we have said is *not* the case: that the two terms are legitimately considered synonymous. It is still necessary to account for there being two of them; the Commission should not avoidably construe a statute as containing mere surplusage. On this supposition, however, there is no shade of distinction left save one of degree. To put it simplistically: if an “exceptional” circumstance is bad, then an “extraordinary” one is merely *very* bad. Such an interpretation plainly would create an opening for exigent requests in circumstances less severe (and less uncommon) than Congress evidently contemplated. This, we suggest, is not the precedent the Commission should set in this Docket.

“Extraordinary” and “exceptional” in practical use. Building on the distinction explained above, we can see that in preliminarily evaluating an exigent request it is necessary to look, separately, at all the circumstances motivating it. To take a practical example, which seemingly might be accepted even by parties who assert that no exigency has been shown in this Docket: suppose (i) that postal operations were severely disrupted by a very large-scale terrorist attack on a major city, and (ii) that the costs of this event were such as greatly to exceed the Service’s ability to continue functioning

⁶ The disjunction expressed in the statutory standard is of course non-exclusive: the Postal Service can properly cite both “extraordinary” and “exceptional” circumstances in an exigent request. Similarly, we see no reason why a given event could not be called both “extraordinary” and “exceptional,” if it were both of an unusual type and of uncommon magnitude.

⁷ *Potter v. United States*, 155 U.S. 438, 446 (1894).

even after an ordinary price-capped revenue enhancement.⁸ Because of the uncommonness of such attacks, there might be little or no basis on which to assess whether this one was “exceptional” in the sense, suggested above, of an event far larger or more severe than such events normally are. But by the same token, it presumably *would* qualify as “extraordinary.”

The usefulness of the extraordinary/exceptional distinction thus becomes clearer. When the Commission must assess whether a causative factor advanced as justifying an exigent increase is “extraordinary or exceptional” it will, at some point in the analysis, need to decide whether it possibly justifies an exigency filing –

- Because it is of a highly unusual *kind*, in which case there may be no need to determine whether, by reference to such events generally, it is (also) “exceptional,” or
- Because it is of a kind which is common, or at least well-known, but is of “exceptional” magnitude by reference to the generality of such events.

What is a “circumstance” for purposes of § 3622(d)(1)(E)? If the Commission is to make § 3622(d)(1)(E) function as Congress intended, it also needs to take care over defining for itself the “circumstances” being examined as possibly “exceptional” or “extraordinary.” In particular, it should distinguish clearly between the Postal Service statistics advanced to support the exigency filing (e.g., volumetric or financial losses, expressed in billions of pieces or dollars) and the reasons why those statistics are what they are. The statistics by themselves cannot constitute either exceptional or extraordinary *circumstances*, even if, considered in isolation, they appear “exceptional” by com-

⁸ We include this (possibly unrealistic) assumption so as to simplify the example by taking the “necessity” issue off the table.

parison with earlier years' results.⁹ Unfavorable statistics of this kind could, in theory, result from operational or financial mismanagement¹⁰ – clearly not the type of circumstance for which Congress sought to provide an emergency escape route from the price cap. Instead, the Commission must examine the causes of the aberrational statistics, to determine whether those causes constitute extraordinary or exceptional circumstances.

In this case, the Postal Service's deficit has – as it recognizes – multiple causes. Some of these affect its financial position directly, and some via declines in mail volume. The impracticable retiree health care benefit prefunding schedule imposed by PAEA is an example of the first type. The principal causes of the second type are the current recession and the secular diversion of First-Class Mail communications to the Internet. In the following sections of these Comments, we discuss these factors in more detail.

For “[f]ull discussion of the extraordinary and exceptional circumstances giving rise to this Request,” the Service refers us particularly to the Statements of witnesses Masse and Corbett.¹¹ Mr. Corbett provides the clearest short statement of the causes, as the Service sees them, of the current financial crisis:

The critical financial condition of the Postal Service can largely be attributed to a lack of operating flexibility and these factors: the diversion of mail to electronic alternatives; the initial and follow-on effects of the economic recession; and the statutory obligation to pre-fund retiree health benefits at an accelerated pace.^[12]

⁹ The Postal Service at times writes as if the recent volume declines *themselves* counted as extraordinary or exceptional circumstances. See, e.g., Exigent Request, pp. 1, 6. If this is its intent, GCA must disagree strongly.

¹⁰ Such arguments appear in the Motion of the Affordable Mail Alliance to Dismiss Request (July 26, 2010). GCA is not adopting or endorsing them here; the purpose of this discussion is merely to clarify the meaning of § 3622(d)(1)(E).

¹¹ Exigent Request, p. 17.

¹² Statement of Joseph Corbett on Behalf of the United States Postal Service (“Corbett Statement”), p. 5.

In part because Mr. Corbett devotes much more discussion to it, we begin by analyzing the possible status of the economic recession as an exceptional or extraordinary circumstance within the meaning of § 3622(d)(1)(E).

III. THE ECONOMIC RECESSION MAY, IN PART, BE CONSIDERED AN EXCEPTIONAL CIRCUMSTANCE

GCA believes that while economic recessions – as the Postal Service’s own analysis¹³, as well as GCA’s, show clearly – are unfortunately not “extraordinary” events, there is an “exceptional” component to the current one. To just the extent that this recession exceeds what might be called the “normal” or – from a different angle – “predictable” severity of recessions in our economic history, the Commission could reasonably find it an exceptional circumstance making the present Request permissible under § 3622(d)(1)(E).¹⁴ In what follows, we analyze the current recession with a view to determining why, and to what extent, it could be considered “exceptional.”

A. To what extent is this recession “exceptional”?

We address this question fully aware that the answer to it will markedly influence any future decisions by the Commission under § 3622(d)(1)(E). In that spirit, GCA has performed an extensive analysis, including a comparative examination of recessions. A full discussion of the analytical procedures GCA has used can be found in the Detailed Analysis, but an explanation of them, and of the conclusions they point to, will be appropriate here.

¹³ Mr. Corbett, who considers only a limited period of history, lists five recessions since 1974. Corbett Statement, p. 12.

¹⁴ By calling it “permissible” we mean only that it is not foreclosed by the first branch of § 3622(d)(1)(E) – not that it is *also* “reasonable and equitable and necessary,” which is an entirely separate question.

Analyzing the current recession. The most significant difference between GCA's analysis and the Postal Service's is that, unlike the Service, we have undertaken to decompose the current recession into a component which is legitimately "exceptional" and one which is not. The Service, which as noted above makes no use of the statutory distinction between extraordinary and exceptional circumstances, treats the current recession as an unanalyzable unit and compares it with other downturns similarly treated. Outright dismissal of the case likewise would not reflect consideration of whether some proportion of the recession and its effects could be deemed "exceptional."

The appropriate historical comparison. Preliminarily, we should explain a significant difference between GCA's approach to comparing recessions and the Service's. We have analyzed the nature, rather than just the magnitude, of recessions as far back as 1857. One conclusion which emerges from this study is that the current recession, and the macroeconomic environment underlying it, bears more resemblance to those occurring before the development of modern countercyclical mechanisms than to those occurring, say, after World War II. (Our shorthand term for these earlier events is "pre-Keynesian" recessions.) Accordingly, we believe the most appropriate comparison is not with relatively recent recessions, as in the Postal Service's presentation, but with the pre-Keynesian variety.

This conclusion rests on the facts that the current recession reflects a substantial weakening of countercyclical mechanisms through (i) the globalization of many markets (with concomitant lack of international coordination among central banks and other economic policymakers), and (ii) the proliferation of new, essentially unregulated, and in some cases poorly understood financial products, leading to (iii) inability on the part of the Federal Reserve to conduct as effective a countercyclical monetary policy as in the past. In short, therefore, the recent recession is taking place in an environment of weak or nonexistent countercyclical mechanisms. Lack of such mechanisms is well known to result in longer and deeper recessions than those which occur when the countercyclical

machinery is functioning. The Postal Service's comparison, which is limited to the relatively mild postwar recessions during which those countercyclical mechanisms did operate effectively, thus produces a biased result: the current recession looks exceptional because those it is being compared with were moderated by countercyclical forces which are relatively absent or ineffective today.

A detailed explanation of the analytical procedures GCA has used is presented in the Detailed Analysis and its Appendices. A case could easily be made that no part of the 2008-2009 recession is "exigent."¹⁵ However, the conclusion which emerges from the most sophisticated use of those procedures on the best data is that 35 to 45 percent, at most, of the current recession could be considered exceptional. On this basis it is possible to calculate the theoretically permissible (i.e., "exigent" in the legally appropriate sense of the word) increase. If 35 percent of the recession is taken as exceptional, the maximum overall increase theoretically permissible would be 3.55 percent; at 45 percent, that maximum would be 3.84 percent.

IV. DIVERSION OF MAIL TO THE INTERNET IS NEITHER AN EXTRAORDINARY NOR AN EXCEPTIONAL CIRCUMSTANCE

In its Request, the Service places relatively little stress on Internet diversion of mail (mostly First Class) to the Internet. This is a realistic position. Such diversion has been a recognized trend for at least 15 years and is well understood by the Service and observers throughout the mailing community.

The Postal Service has provided useful data on this subject in Docket N2010-1. Its response to GCA/USPS-T2-1(a) contained a tabulation of First-Class Mail losses to Internet diversion from 1988 to 2009. In only one year (1993) was the diversion less than

¹⁵ See pp. 5 et seq. of the Detailed Analysis.

half a billion pieces. Starting in 1994, at least a billion pieces were diverted every year. From 1999, at least two billion pieces were lost annually; in 2007, 2008, and 2009, losses exceeded four billion. These losses, the Postal Service observed, “should . . . be sufficient to alleviate any possible doubts that the volume losses to the Internet are permanent.”

In short, diversion of First-Class Mail to the Internet is not an extraordinary event: it is simply a historical process that has evidently been continuous and growing for 22 years. By the same token, the FY 2008 and 2009 segments of this process are not “exceptional.” To the extent that it may be permissible at all, the proposed increase would have to rest on the effects of the economic recession.

V. NO INCREASE CAN BE CONSIDERED REASONABLE, EQUITABLE, OR NECESSARY UNDER CURRENT CIRCUMSTANCES

The second branch of § 3622(d)(1)(E) requires that an exigency increase be

. . . reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

Under this standard, GCA believes that no increase, under current circumstances, should be found reasonable or equitable.

This is true whether one looks at the effect on consumers – by comparing the proposed increase with CPI-U figures – or the effect on business mail users as reflected by a similar exercise using Producer Price Index statistics for such sectors as transportation and delivery, advertising media, and communications. In the current environ-

ment, such businesses are unable to pass on postal price increases to their customers. These comparisons are shown in Tables Six through Eight of the Detailed Analysis.

“Equitable,” as used in the statute, may be thought to refer only to the structure of rates within a proposed increase – i.e., to the relationships between classes or categories of mail which that structure embodies. Even on this restricted reading, GCA would question the equity of a First-Class rate structure which increases the additional ounce charge for Single-Piece but not for Presorted letters.¹⁶ This disparate treatment may also be unwise from the Service’s financial viewpoint, since household mail users have increasing opportunities to enclose other media in a letter or greeting card. The availability of mini-DVD recording media and consumers’ ability to produce photo prints quickly through retail-store kiosks, on-line photo services, or their own inkjet printers are prominent examples. Ability to take advantage of such opportunities at reasonable cost makes Single-Piece First-Class Letter mail a more attractive medium for consumers. The Service should be pricing to encourage its use, not penalize it.

More centrally, however, the Commission must decide whether an increase at the present time can be thought of as “reasonable.” The stark fact is that, as Table Seven of the Detailed Analysis shows, the Postal Service is already failing to compete, on a near-term pricing basis, with other communications and transportation/delivery media. Considering only the PPI figures, that Table shows that competing advertising media all *reduced* prices in FY 2009, by anywhere from 1.0 to 15.5 percent; for the same period, the Service’s charges as reflected in the PPI *rose* by 3.5 percent. Similar patterns emerge for communications media and transportation/delivery enterprises. This is not the way to preserve or increase mail volume. From the viewpoint of the Postal Service’s declared (and entirely appropriate) financial objectives, it is in the most obvious sense unreasonable.

¹⁶ This disparity is not explained in Postal Service witness Kiefer’s written presentation.

In summary, therefore, GCA urges that the Commission recognize, first, that under the “extraordinary or exceptional” branch of § 3622(d)(1)(E) the Service’s Request is excessive, and no more than a 3.55 or 3.84 percent overall increase could even be lawfully considered, but, second, that no increase at all has been justified under the “reasonable, equitable, and necessary” standard of that section.

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Respectfully submitted

GREETING CARD ASSOCIATION

David F. Stover
2970 S. Columbus St., No. 1B
Arlington, VA 22206-1450
(703) 998-2568
(703) 998-2987 fax
E-mail: postamp@crosslink.net