

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268

Rate Adjustment Due To Extraordinary	:	Docket No. R2010-4
or Exceptional Circumstances, 2010	:	
	:	
	:	

**INITIAL COMMENTS OF TIME WARNER INC.
ON UNITED STATES POSTAL SERVICE
EXIGENT REQUEST
(August 17, 2010)**

Pursuant to Order No. 485, Notice and Order Concerning Rate Adjustment for Extraordinary or Exceptional Circumstances (issued July 8, 2010), Time Warner Inc. (Time Warner) hereby submits its initial comments in the above-captioned docket.

Interest of Time Warner

Time Warner publishes and distributes books and magazines and is actively engaged in the fields of filmed entertainment, recorded music, music publishing, cable television programming, and cable television systems. As such, Time Warner is a large user of all major classes of mail. Through its wholly owned subsidiary Time Incorporated (Time Inc.), Time Warner is the largest magazine publisher in the United States and the largest user of Periodicals Class mail.¹

¹ See Written Testimony of James O'Brien, Vice President, Distribution and Postal Affairs, Time Inc., before the Committee on Oversight and Government Reform, Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia (May 12, 2010).

Statement of Position and Summary of Argument

For the reasons stated by the Affordable Mail Alliance (AMA), Time Warner urges the Commission to reject the Postal Service's Exigent Request in its entirety.

Under § 3622(d)(1)(E) (the "exigency provision") of the Postal Accountability and Enhancement Act (PAEA), rate increases in excess of the statutory rate caps for underwater products must meet the same statutory standard as any other above-cap increases. In addition to the existence of "extraordinary or exceptional circumstances," § 3622(d)(1)(E) requires a Commission determination

that *such adjustment* [emphasis added] is 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.

The Postal Service has accurately summarized this requirement on a number of occasions. It states, for example, in its Exigent Request (at 4-5 [emphasis added]) that

the requested adjustments must be *not only* reasonable and equitable, *but also* "necessary" to enable the Postal Service to maintain and continue the development of postal services. . . . [T]he existence of extraordinary or exceptional circumstances alone would not be sufficient to justify price adjustments above the price cap limitations, unless *the requested prices* are "necessary." According to this section, the "necessary" standard is met if something less would not "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."

Similarly, the USPS Response to AMA's Motion to Dismiss (at 6 [emphasis added]) states that

the "necessary" clause . . . is directed solely to determining whether a *certain level of above-cap revenues* are [sic] "necessary" going forward

to provide adequate service, assuming that the Postal Service acts in an honest, efficient, and economical manner.

There appears to be unanimity on the point that the "necessary" clause, by its plain terms, applies to the *particular* rate adjustments requested under the authority of § 3622(d)(1)(E). The provision does not authorize above-cap rate increases that are not "necessary" within the meaning of § 3622(d)(1)(E) but that advance the purpose of some *other* statutory provision to be piggy-backed on top of above-cap increases that may be found to be necessary.

Thus, for example, the Postal Service contends that the Periodicals Class has long been underwater and that the Commission has instructed the Postal Service to come forward with a plan for dealing with this situation. But it does not follow automatically from these asserted facts that raising Periodicals Class rates by 8 times more than the statutory cap allows is "necessary to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States."

The Postal Service has provided neither argument nor evidence, as it must, that the above-average exigency increases proposed for Periodicals Class satisfy the necessity requirement of § 3622(d)(1)(E). It has especially not provided any comprehensible explanation of how the *particular* rate increases it proposes meet the necessity standard. Rather, in justifying the *particular* set of price increases that it proposes, the Postal Service generally abandons the subject of necessity and is thrown back on reliance on "the factors set forth in the Commission's rules" for exigency proceedings (Request at 10), which the Postal Service reads as incorporating virtually all other statutory policies of the PAEA. But those rules are

not intended to state or imply a standard for determining whether an exigency proposal satisfies the requirements of § 3622(d)(1)(E) that is different from the standard provided in § 3622(d)(1)(E) itself.

The Postal Service relies particularly on § 3622(c)(2), the cost-attribution factor, to justify its extraordinarily high 8.035% proposed increase for Periodicals Class rates. But failure to satisfy that factor does not itself constitute an exigency under § 3622(d)(1)(E), and satisfaction of that factor does not in itself meet the necessity standard of § 3622(d)(1)(E). The Postal Service's Request for an exigent increase is therefore fatally insufficient with respect to Periodicals Class rates. To allow the Postal Service to use the exigency provision opportunistically to increase rates by more than the statutory caps allow, for purposes unrelated to and unjustifiable under the terms of the exigency provision itself, would traduce the central purpose of the PAEA's regulatory scheme.

Finally, the Comments of Halstein Stralberg in Behalf of Time Warner Inc. (filed this date) demonstrate that the Postal Service is incorrect in believing that an exigent rate increase provides the only realistic way to move the Periodicals Class toward full cost coverage. Stralberg explains again what he has explained on a number of previous occasions and the Commission has accepted and repeatedly urged on the Postal Service's attention: that the apparent deterioration in Periodicals Class cost coverage is a consequence of gross inefficiencies on the part of the Postal Service, which has piled onto the backs of periodicals mailers enormous costs of excess capacity that they neither want nor benefit from, and that the Postal Service has neglected or actively resisted making improvements in flats processing

operational efficiency or incorporating needed incentives for efficient mail preparation in the Periodicals Class rate structure

Discussion

I. THE POSTAL SERVICE'S REQUEST FOR EXIGENT RATE INCREASES DOES NOT MEET THE REQUIREMENTS OF § 3622(d)(1)(E) OF THE PAEA AND SHOULD THEREFORE BE REJECTED

A. Time Warner Joins the Arguments of the Affordable Mail Alliance

For the reasons stated in the Motion of the Affordable Mail Alliance to Dismiss Request (filed July 26, 2010) and the initial comments of the Affordable Mail Alliance in this docket (filed this date), Time Warner, whose subsidiary Time Inc. is a member of AMA, believes that: (1) "exceptional or extraordinary circumstances," as required to support a Postal Service request for exigent rate increases by § 3622(d)(1)(E) (the "exigency provision") of the PAEA, do not exist; and (2) none of the rate increases requested by the Postal Service is, as the exigency provision also requires, "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." Time Warner therefore urges the Commission to reject the Postal Service's Exigent Request in its entirety.

B. The Postal Service's Reliance on Previous Comments of Time Warner in its Response to AMA's Motion to Dismiss this Case Mischaracterizes the Positions of Time Warner and the AMA and Misstates the Conclusions of the Commission in Order No. 43

According to the Postal Service,

Neither the ordinary meaning of “extraordinary” nor “exceptional” dictates that a circumstance must be “unforeseeable” in order to qualify. The AMA argues to the contrary, asserting that the standard “*implies...unforeseeability.*”

Response of the United States Postal Service to Motion of the Affordable Mail Alliance to Dismiss Request (filed August 2, 2010), at 15-16 (USPS Response) (*quoting* Motion of the Affordable Mail Alliance to Dismiss Request [filed July 26, 2010], at 14 [AMA Motion] [emphasis added by USPS]).

"[T]he only support mustered for this assertion," the Postal Service continues,

is a citation to Order No. 26, in which the Commission characterized the exigency clause as dealing with "unforeseeable emergencies." This overlooks the fact that, after several parties pointed out that this characterization was inconsistent with the statutory language and the legislative history of the exigency provision, the Commission retracted the statement. . . .

Id. at 16.

The party that the Postal Service chooses to identify as having made "the point that the Commission had incorrectly characterized the nature of the exigency standard in Order No. 26" is Time Warner. *Id.* (*citing* Docket No. RM2007-1, Reply Comments of Time Warner Inc. to Initial Comments on Commission Order No. 26 [October 9, 2007], at 5).

The Postal Service wittily associates AMA's argument on this point with the character of Humpty Dumpty in Lewis Carroll's *Through the Looking Glass* ("When I use a word," Humpty Dumpty said in a rather scornful tone, 'it means what I choose it to mean—neither more nor less"). But it is in fact the Postal Service's understanding

of the English language and its account of the documentary record that evoke Carroll's imperishable character, by being so fractured, so incorrect in every particular, that they cannot be made to resemble their purported original no matter how one attempts to put them together.

To begin with, the statement that the phrase "exceptional or extraordinary" *implies* unforeseeability, and the statement that the same phrase *does not dictate* that a circumstance *must be* unforeseeable, are not mutually contradictory. If one were to have said in May of 1944, for example, "The Allies are going to have to do something extraordinary to drive Hitler's armies from occupied Europe," it would not have been the case that "something extraordinary"--i.e., the largest amphibious invasion in history--was also something unforeseeable or unforeseen. That example, however, is sufficiently singular to bring home the fact that things which are "extraordinary or exceptional" are only in rare instances foreseeable or foreseen.

Second, Time Warner did not state, in the comments cited by the Postal Service or elsewhere, that the Commission's characterization was "inconsistent with the statutory language," but rather that "a rule which elevated this general expectation [of unforeseeability] into *an inflexible requirement*" (emphasis added) would be inconsistent with the statutory language. Indeed, Time Warner expressed its *agreement* with the Commission's characterization of the exigency provision as intended to deal with unforeseeable emergencies. It interpreted that characterization as meaning that the exigency provision *implies*, but does not

absolutely or invariably require (i.e., "dictate"), that exigent circumstances will be unforeseeable.²

Third, the Commission did not "retract" its characterization of the exigency provision but merely revised an earlier proposed rule to remove any implication that

² Following are Time Warner's arguments and recommendations to the Commission in the comments cited by USPS:

If it is the purpose of the Commission to put the Postal Service and other parties on notice that it does not intend to interpret or apply the statutory standard of "extraordinary or exceptional circumstances" in a lax or permissive fashion--to indicate, for instance, that it interprets the exigent circumstances provision as requiring circumstances that are "truly exceptional" rather than exceptional in some trivial sense--then, in Time Warner's view, its purpose is legitimate, laudable, and fully consistent with Congressional intention. Moreover, a statement by the Commission that it would *ordinarily* expect exigent circumstances to involve circumstances that were unforeseeable or, if foreseeable, impossible to prevent or provide for through reasonable prior action, would not entail the dangers of being found to have misinterpreted the statutory standard that would be entailed in a rule which elevated this general expectation into an inflexible requirement.

Making such an adjustment would not require extensive revision of the Proposed Rule. It could be accomplished by two changes. First, the Commission should clarify that its reference to "the clear import of the PAEA's overarching ratesetting philosophy that exigent requests are meant to be a safety net for dealing with unforeseeable emergencies" is indeed intended as a characterization of the Act's "overarching ratesetting philosophy" and *not* as a restatement of the requirements of § 3622(d)(1)(E). Second, the Commission should revise proposed subsection (7) in order to remove any implication that it describes threshold or definitional requirements for coming within the terms of § 3622(d)(1)(E). Proposed subsection (7) of rule 3010.61 requires the Postal Service to provide:

(7) A justification for exigent treatment which analyzes why the circumstance giving rise to the request was neither foreseeable nor avoidable by reasonable prior action. . . .

An alternative version might require:

(7) An analysis of whether the circumstance giving rise to the request was foreseeable or could have been avoided by reasonable prior action. . . .

unforeseeability is an absolute or invariable statutory requirement. In doing so, it stated:

the Commission continues to believe that it is reasonable to require the Postal Service to address these considerations, as the discussion is likely to shed light on matters of considerable concern to mailers. To accommodate this interest and to recognize the commenters' point, the Commission revises rule 3010.61(a)(7) essentially along the lines suggested by Time Warner to read as follows:

An analysis of the circumstances giving rise to the request, which should, where applicable, include a discussion of whether the circumstances were foreseeable or could have been avoided by reasonable prior action[.]

Docket No. RM2007-1, Order No. 43 at 69.

Contrary to the Postal Service's representations, therefore, both Time Warner's comments to the Commission and the Commission's final rule in Docket No. RM2007-1 are entirely consistent with the AMA's statement that the concept of "exceptional or extraordinary circumstances" in § 3622(d)(1)(E) of the PAEA "implies . . . unforeseeability."

II. IRRESPECTIVE OF THE MERITS OF ANY OTHER PART OF THE POSTAL SERVICE'S EXIGENT REQUEST, ITS REQUEST FOR AN 8.035% INCREASE IN PERIODICALS CLASS RATES IS NOT JUSTIFIED, AND DOES NOT EVEN PURPORT TO BE JUSTIFIED, UNDER THE STANDARDS OF § 3622(d)(1)(E)

A. § 3622(d)(1)(E) Applies to Each Class of Mail Separately and Individually and Imposes Two Distinct Requirements: (1) the Existence of "Extraordinary or Exceptional Circumstances"; and (2) that the Requested Increase be "Necessary . . . to Maintain and Continue the Development of Postal Services of the Kind and Quality Adapted to the Needs of the United States"

- 1. The rate cap imposed by § 3622(d)(1)(A) and (C) applies to each class of mail separately and individually; it follows that § 3622(d)(1)(E), which waives the application of § 3622(d)(1)(A) and (C) in specified circumstances, applies to each class of mail separately and individually**

By its plain language, the PAEA makes the "annual limitation" (rate cap) of § 3622(d)(1)(A) and (C) applicable to individual classes of mail. Section 3622(d)(1)(A) provides:

(d) Requirements.—

(1) In general.—The system for regulating rates and classes for market-dominant products shall—

(A) include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal variation over the most recent available 12-month period preceding the date the Postal Service files notice of its intention to increase rates.

Section 3622(d)(2)(A) states:

(2) Limitations.—

(A) Classes of mail.—Except as provided under subparagraph (C) [the "banking" provision], the annual limitations under paragraph (1)(A) shall apply to a class of mail, as defined in the Domestic Mail Classification Schedule as in effect on the date of enactment of the Postal

Accountability and Enhancement Act.

Section 3622(d)(1)(E) in turn is a quite orthodox "waiver" or "notwithstanding" provision that, under specified circumstances, renders § 3622(d)(1)(A) and (C) inoperable. It provides that "the system for regulating rates and classes of market-dominant products shall":

(E) Notwithstanding any limitation set under subparagraphs (A) and (C) [the price caps], and provided there is not sufficient unused rate authority under paragraph 2(C) [the banking provision], establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances, provided that the Commission determines, after notice and opportunity for a public hearing and comment, and within 90 days after any request by the Postal Service, that such adjustment is 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.

Logic alone would counsel that the scope of a waiver provision must be congruent with the scope of the provision it waives. In the case of § 3622(d)(1)(E), that logic is reinforced by the inclusion of the proviso, "and provided there is not sufficient unused rate authority under paragraph 2(C)." Paragraph 2(C), the so-called banking provision, permits the Postal Service to forgo the use of rate adjustment authority under § 3622(d)(1)(A) in a given year for a given "class or service," "bank" that authority, and use it in a later year. The exigency provision's inclusion of the clause "provided there is not sufficient unused rate authority under paragraph 2(C)" can only be read as a prohibition on using the exigency provision as a basis for raising the rates for any class above the otherwise applicable rate cap if there is sufficient banked authority to raise the rate to a level that meets the purposes of the exigency provision--i.e., the level "necessary . . . to maintain and

continue . . . postal services of the kind and quality adapted to the needs of the United States."³

2. In circumstances where § 3622(d)(1)(E) waives the application of § 3622(d)(1)(A) and (C) to a class of mail, it imposes a new upper limit on rate increases for that class, defined by the amount "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"

The notion that there may exist "sufficient" rate adjustment authority under the banking provision to foreclose resort to the exigency provision raises an obvious question: "sufficient" for what? The answer is equally obvious: sufficient to produce the amount of revenue that is "necessary to enable the Postal Service, under best

³ Section 3622(d)(2)(C) (the "banking" provision), in full, provides as follows:

(C) Use of unused rate authority.—

(i) Definition.—In this subparagraph, the term "unused rate adjustment authority" means the difference between—

(I) the maximum amount of a rate adjustment that the Postal Service is authorized to make in any year subject to the annual limitation under paragraph (1); and

(II) the amount of the rate adjustment the Postal Service actually makes in that year.

(ii) Authority.—Subject to clause (iii), the Postal Service may use any unused rate adjustment authority for any of the 5 years following the year such authority occurred.

(iii) Limitations.—In exercising the authority under clause (ii) in any year, the Postal Service—

(I) may use unused rate adjustment authority from more than 1 year;

(II) may use any part of the unused rate adjustment authority from any year;

(III) shall use the unused rate adjustment authority from the earliest year such authority first occurred and then each following year; and

(IV) for any class or service, may not exceed the annual limitation under paragraph (1) by more than 2 percentage points.

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." From the fact that some particular amount of revenue in excess of what is permitted under the rate cap may be deemed "sufficient" to rule out resort to the exigency provision, it follows that the existence of an exigency—i.e., "extraordinary or exceptional circumstances"—does not trigger an authority to raise rates to *unlimited* levels above the caps. Rather, the exigency provision provides authority to raise rates only to a particular limit, which is embodied in the necessity clause's requirement that "such adjustment" as the Postal Service requests must be "necessary to enable the Postal Service . . . to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States."

It is instructive in this regard to compare the exigency provision of the PAEA to § 3621 of the Postal Reorganization Act of 1970, which provided for a cost-of-service regulatory regime under which the Postal Service was entitled to recover sufficient revenues to equal its total costs. Section 3621 provided, in relevant part:

Postal rates and fees shall be reasonable and equitable and *sufficient* to enable the Postal Service, under 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. Postal rates and fees shall provide *sufficient* revenues so that total estimated income and appropriations to the Postal Service will equal as nearly practicable total estimated costs of the Postal Service.
[Emphasis added.]

The first sentence quoted from § 3621 uses language almost identical to that of the PAEA's exigency provision, with two notable differences: (1) whereas the PRA authorized the Postal Service to charge rates and fees "sufficient" to "maintain . . .

postal services of the kind and quality adapted to the needs of the United States," the PAEA's exigency provision authorizes only rate adjustments that are "necessary" to that purpose; and (2) whereas the PRA made revenue recovery conditional on "honest, efficient and economical management," the PAEA makes it conditional on "*best practices* of honest efficient and economical management" (emphasis added). The second sentence quoted from § 3621 of the PRA, which authorizes rates that are high enough ("sufficient") to recover the Postal Service's costs--whatever they may be-- is notable for the absence of any corresponding language in the exigency provision (or anywhere else) in the PAEA.

Even in the case of a genuine exigency, that is to say, the PAEA does not authorize the Postal Service to charge rates that will recover all of its costs, however excessive they may be. It authorizes instead rates that are no higher than is "*necessary . . . to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.*" And in order to make clear that the amount of revenue that is "necessary" does not automatically rise to equal whatever amount the Postal Service chooses to spend, the PAEA defines necessity as that which is consistent with "*best practices* of honest, efficient, and economical management."⁴

⁴ The addition of the words "best practices of" in the PAEA may have been intended as an intensifier, or it may have been thought by the drafters of the PAEA that the additional phrase would help to distinguish the PAEA's exigency provision from the PRA's § 3621 and in particular from the decision in *Newsweek, Inc. v. USPS*, 663 F.2d 1186, 1203-06 (2nd Cir. 1981), *aff'd on other grounds, Nat'l Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810 (1983) (holding that Postal Rate Commission reductions of the Postal Service's revenue requirements on the grounds that certain expenditures were "not in accord with the honest, efficient, and economical standard of management" "was an unlawful intrusion into the policy-making domain of the [Postal Service] Board [of Governors]," *id.* at 1204, 1205). In any event, the inapplicability of *Newsweek* to the exigency

[footnote continues]

To put the matter more simply, the exigency provision authorizes, in the event of exceptional or extraordinary circumstances, the adjustment of rates to levels that are necessary to maintaining postal services, but not to levels necessary to recover costs that the Postal Service ought to be able to avoid through economical and efficient management.

The Postal Service has conceded repeatedly—and there is apparently unanimity among all interested parties, including the Postal Service and the Commission, on the point—that the exigency provision imposes two separate and distinct requirements: the existence of exigent circumstances; and the necessity of the proposed rate adjustments in order "to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States."

Most notably, the Postal Service states in its Request in this docket:

The statute sets forth two basic prerequisites for a Postal Service Request made under this section. First, there must be "extraordinary or exceptional circumstances." Second, the requested adjustments must be not only reasonable and equitable, but also "necessary" to enable the Postal Service to maintain and continue the development of postal services. . . . No matter how these terms are defined, however, the existence of extraordinary or exceptional circumstances alone would not be sufficient to justify price adjustments above the price cap limitations, unless the requested prices are "necessary." According to this section, *the "necessary" standard is met if something less would not "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."*

provision of the PAEA could not be more clear. Section 3621 of the PRA authorized "*the Governors*" (emphasis added) *of the Postal Service* to establish rates of postage, subject to the "honest, efficient, and economical management" standard, whereas the exigency provision of the PAEA authorizes rate adjustments "provided that *the Commission* determines . . . that such adjustment is . . . necessary . . . under best practices of honest, efficient, and economical management" (emphasis added).

USPS Request at 4-5 (emphasis added).⁵

Plainly, to show that rate increases *allowable* under the CPI-U cap would be *insufficient* "to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States" is not the same thing as showing that a *proposed* increase to some *particular* level in excess of the cap is *necessary* to that purpose. Such a showing of insufficiency of rate increases within the cap, assuming *arguendo* that the Postal Service were able to make it, would not in itself establish that nothing less than a rate increase for Periodicals of over 8 percent "would . . . '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.'"

⁵ See also the USPS Response to Motion of the Affordable Mail Alliance to Dismiss Request, at 6: "the necessary clause . . . is directed solely to determining whether *a certain level of above-cap revenues* are 'necessary' going forward to provide adequate service, assuming that the Postal Service acts in an honest, efficient and economical manner" (emphasis added).

The same understanding is reflected in the Commission's Rules of Practice, which, in § 3010.61(a)(4), require the Postal Service to provide as a part of an exigency request "[a] full discussion of why the requested increases are 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."

At least one of the authors of the PAEA has recently and emphatically restated this understanding. See letter from Sen. Susan Collins to Ms. Shoshana Grove, Secretary, Postal Regulatory Commission, August 9, 2010, at 2 ("The exigent rate case authority could *only* be used under 'extraordinary or exceptional circumstances.' Moreover, even if the strict standard were met, the proposed rate increases also must be 'reasonable and equitable and necessary to enable the Postal Service ... to maintain and continue the development of postal services to the kind of quality adapted to the needs of the United States'") and 3 ("even if the Postal Service had the authority to pursue its exigent rate case (authority it lacks under these circumstances), the PRC is still required to consider whether the proposed exigent rate increases are 'reasonable and equitable and necessary'").

III. THE POSTAL SERVICE HAS NOT ASSERTED THAT ITS PROPOSED 8.035% RATE INCREASE SATISFIES THE NECESSITY PRONG OF § 3622(d)(1)(E), BUT HAS SOUGHT TO JUSTIFY ITS PROPOSAL BY REFERENCE TO STATUTORY POLICIES THAT ARE UNRELATED TO § 3622(d)(1)(E)

A. In Discussing Class-Specific Rate Increase Proposals, the Postal Service Disregards the Necessity Prong of the Exigency Provision

In its Exigent Request and in the supporting statements of its witnesses concerning its proposed rate increase for the Periodicals Class, the Postal Service repeatedly seeks to evade the distinction made in the last paragraph of the previous section, a distinction which is the plain consequence of its own interpretation of the term "necessary." It does so by, first, attempting unobtrusively to substitute the incorrect standard—whether rate increases within the CPI-U cap would be *sufficient*—for the correct standard: whether the proposed rate increase of 8.035% is *necessary*,⁶ and second, by taking refuge in the Commission's regulations governing the *procedures* for an exigent rate request and incorrectly construing those regulations as nullifying the statutory requirement of necessity.

In its Request describing how it went about developing class-specific rate proposals, the Postal Service appears to forget entirely the necessity requirement of the exigency provision and to view the exigency provision as nothing more than a reprieve from the limitations imposed by the price caps:

The concept is to identify the available price caps by class,

⁶ See also Request at 9: "The concept is to identify the available price caps by class, explain why the total revenue generated from increases limited by those price caps *would be inadequate*, and propose *an alternative set* of higher-percentage price increases" [emphasis added]. It is true that there is no basis for an exigency increase unless the rates permissible under the price cap are insufficient; but that is simply a logical consequence of § 3622(d)(1)(E)'s requirement that the *particular* higher levels proposed be *necessary*. It is not the dog but the tail.

explain why the total revenue generated from increases limited by those price caps would be inadequate, and propose an alternative set of higher-percentage price increases. . . . In this structure, the Commission goes through the same steps to review specific proposed prices, except that the conventionally calculated percentage price increases by class are no longer evaluated against the CPI-U cap. . . . By filing an exigent case seeking specific higher-price increases by class, the Postal Service is affirmatively stating that current CPI-U price cap limitations are insufficient given circumstances such as prevailing cost and revenue trends.

Request at 9-10, 10-11.

This description suggests that the class-specific rate increase proposals were not evaluated with reference to the necessity prong of the exigency provision, but rather were viewed as an opportunity to adjust the base rates for each class.

Expressing its reliance on the Commission's regulations governing the procedures for presenting an exigent rate request, the Postal Service appears to adopt the position that, once it is established that "total revenue generated from increases limited by [the applicable] price caps would be inadequate," it may propose and the Commission may adopt *any* "alternative set of higher-percentage price increases" that could have been proposed and adopted in "normal" annual rate adjustment *but for the existence of the rate cap*.⁷

The Postal Service relies in particular on subsection (8) of Rule 3010.61(a) (see Request at 10), which is the last among a series of information requirements

⁷ See Subpart E (§ 3010.60 *et. seq.*) of the Commission's Rules of Practice (adopted in Docket No. RM2007-1, Order No. 43 [issued October 29, 2007]). Oddly, the Postal Service remarks, at 8, that "the Commission's Rules are somewhat more extensive than the statute," but it does not pursue the implications of that statement. Had it done so, it might have discovered that the Commission did not intend its rules to supersede or displace the requirements imposed in the text of the PAEA. See following note.

imposed on the Postal Service when it files a request for an exigent rate increase:

(8) Such other information as the Postal Service believes will assist the Commission to issue a timely determination of whether the requested increases are consistent with applicable statutory policies.

Neither subsection (8) nor anything else in the Commission's rules purports to add to or subtract from the requirements for an exigent increase imposed by § 3622(d)(1)(E) itself. The Postal Service, however, treats this catchall provision from the *information requirements* imposed by the Commission as if it constituted an independent, substantive legal standard authorizing rate increases in excess of the amounts permissible under the applicable rate caps.⁸

Time Warner does not wish its argument respecting policies of the PAEA that are expressed elsewhere than in the exigency provision to be misunderstood. If a proposed exigent rate increase is based on "extraordinary or exceptional circumstances" and is "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," it is entirely proper to give due consideration to other applicable statutory policies in structuring the increase. But no appeal to other "applicable statutory factors" can render legitimate a proposed

⁸ In Order No. 43, the final rule that adopted these regulations, the Commission disavowed any implication that the rules amounted to statements of policy or interpretations of the legal requirements for an exigency increase. Acknowledging "the interest some commenters express in resolution of several issues related to interpretation and administration of the PAEA's provision for an exigent increase[]," the Commission stated that "[i]t declines at this time to adopt . . . either policy statements or specific regulations on these points." It stated that its reason for adopting the particular regulations to which the Postal Service refers was its belief "that it is reasonable to require the Postal Service to address these considerations, as the discussion is likely to shed light on matters of considerable concern to mailers." Docket No. RM2007-1, Order No. 43 (issued October 29, 2007), at 72-73, 69.

exigent increase that *exceeds* the amount "necessary to enable the Postal Service . . . to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States."

B. The Postal Service Does Not Even Assert that the Above-Average Proposed Rate Increase for Periodicals Class Is Justified by Necessity but Instead Cites the Cost-Attribution Factor of § 3622(c)(2) as Its Sole Justification for that Proposal

As stated in Section I of these comments, Time Warner does not believe that the Postal Service has demonstrated the existence of an exigency or the necessity of an exigency rate increase for any class or in any amount. However, as a mailer chiefly of magazines at Periodicals Class rates, we must also raise the question: assuming *arguendo* that an exigency did exist and that some exigent rate increase were justified by necessity, what justifies the extremely high 8.035% increase proposed for Periodicals Class rates?

A careful review of the Postal Service's submissions in this docket shows that its sole justification for the size of its proposed Periodicals Class rate increase is to bring Periodicals Class closer to compliance with the attributable-cost factor of § 3622(c)(2). That justification, we think, is not legitimate under the terms of the exigency provision. There are two reasons for reaching this conclusion. First, the fulfillment of the cost-coverage factor, which the Postal Service appears to rely on exclusively, in place of rather than as supplementary to the necessity requirement of the exigency provision, does not in itself amount to a necessity as that term is used in the exigency provision. (Nor, of course, does failure to achieve full cost coverage amount in itself to "extraordinary or exceptional circumstances"--i.e., an exigency--

as those terms are used in the exigency provision.) Exclusive reliance on the cost-coverage justification therefore leaves the express requirements of the exigency provision unfulfilled. Second, reliance on the exigency provision as justification for increasing rates above the price caps without limit in order to satisfy the cost-coverage factor would turn the exigency provision into a mechanism for evading the central purpose of the regulatory scheme created by the PAEA: namely, to bring to an end the Postal Service's nearly exclusive reliance on rate increases as a solution to its endemic inefficiency and to force the Postal Service to place greater reliance on restraining its costs and increasing the efficiency of its operations.

Nowhere on the record of this proceeding does the Postal Service even suggest that the above-average portion of the proposed Periodicals increase is "necessary" as that term is used in the exigency provision. Rather, the Postal Service repeatedly makes clear that, for Periodicals Class, it viewed the exigency case purely as an opportunity to address matters that are not themselves within the terms or purposes of the exigency provision.

Thus, for example, witness Corbett testified as follows regarding the nature of the alleged exigency and the relation of the proposed rate increases to that exigency:

The critical fiscal 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.

The moderate level of increase proposed is consistent with the result of the circumstances that have given rise to the exigent situation: the volume loss.

Statement of Joseph Corbett at 5, 17.

Only after those statements about the proposed exigent rate increases in general does he turn to the subject of Periodicals Class rates, and in doing so he makes it abundantly clear that the proposed Periodicals Class increase has nothing to do with the nature of the alleged exigency and finds its sole justification outside the terms of the exigency provision:

Related to the need for a price increase is the fact that some products do not cover their costs. . . . As described in Dr. Kiefer's statement, the levels of the price increases reflect this cost coverage concern. . . . [I]t is important to start taking these steps; *aside from addressing the overall financial need*, the exigent filing is an opportunity to begin resolving the cost coverage issues with dispatch.

Id. at 17-18.

During the hearing on his statement, Dr. Kiefer was even more frank in acknowledging that the proposed Periodicals Class rate increase has nothing to do with the existence of any exigency and is not necessary in order to deal with any exigency, but is a wholly opportunistic exploitation of an exigency proceeding for purposes unrelated to those of the exigency provision:

[W]e were also aware that under the current law that the only opportunity that we have to increase periodicals, or the overall increase of periodicals prices above the general rate of inflation would be with an exigent price change. . . .

Once this exigent price change case is closed, periodicals is going to be subject to a price cap with whatever the change in the CPI is. And so this was our opportunity where we adjustment that we thought we could make. . . .

[T]his was an opportunity -- and was sort of a unique opportunity to be able to make this change for periodicals.

Tr. 419, 420.

C. The Postal Service's Argument that Use of the Exigency Provision to Bring Periodicals Class into Compliance with § 3622(c)(2) Is Justified Because the Exigency Provision Provides the Only Opportunity to Achieve this Goal Traduces the PAEA's Central Purpose of Ending the Postal Service's Nearly Exclusive Reliance on Rate Increases Rather Than Cost Reductions or Efficiency Improvements to Solve Its Problems

The exigency provision makes clear by its plain language that it was not intended to be a blank check enabling the Postal Service to do anything and everything that the price caps would otherwise prevent it from doing. Its purpose is to enable the Postal Service to raise rates above the caps *when and to the extent* that it is necessary to do so to deal with genuine exigencies. It is not that a more permissive exceptions clause, one that would allow the Postal Service to adjust base rates whenever its revenues failed to keep up with its costs, was never considered. But such a clause was not included in the PAEA, and the evidence as to why it was not included is prolific.

A very limited selection of that evidence might begin with the views of the President's Commission on Postal Service:

A well-designed rate ceiling could produce a Postal Service much more aligned with the interests of ratepayers, who would prefer that the Postal Service aggressively tackle unnecessary costs before asking them to pay more for stamps.

Far more emphasis must be placed on restoring fiscal stability not by ratcheting up rates or scaling back services, but by aggressively rooting out inefficiencies throughout the Postal Service.

Embracing the Future: Report of the President's Commission on the United States Postal Service (2003), at xiii, viii.

The same view was stated by Postal Rate Commission Chairman Omas during the period leading up to the adoption of the PAEA:

Incentive-based ratemaking, and the management discipline it is

intended to enforce, have been central to the vision of a reformed Postal Service. A mechanism for regularly exceeding the rate levels around which postal management is expected to make its operational plans could completely undermine this central objective.

United States Senate, Committee on Government Affairs, Testimony of George Omas (April 7, 2004), at 19.

President Bush, who signed the PAEA into law, held the same view:

The Administration strongly believes that the final legislation must adopt the Senate's postal reform proposal in S. 662 regarding the following issues:

Pricing flexibility within a firm annual Consumer Price Index (CPI) rate cap with a strict exigency requirement. . . . By strictly limiting the circumstances in which rate increases can exceed the CPI rate, ratepayers can be assured that USPS management will work hard to keep costs under control.

Executive Office of the President, Statement of Administration Policy (July 26, 2005).

Most recently, Senator Susan M. Collins, a primary author and proponent of the PAEA, has taken the unusual step of filing comments in the instant docket. Sen.

Collins states:

The purpose of this letter is to comment on the circumstances under which an exigent rate case is authorized under current law. As the author of the Postal Accountability and Enhancement Act of 2006 (PAEA), which grants the Postal Service the limited authority to file an exigent rate case, I want to make the congressional intent regarding the provision completely unambiguous as the Postal Regulatory Commission considers the pending Postal Service request. Neither the language nor the legislative history of the PAEA authorizes the United States Postal Service to file an exigent rate case under the current circumstances.

Letter from Sen. Susan Collins to Ms. Shoshana Grove, Secretary, Postal Regulatory Commission: RE: Docket No. 2010-4 (August 9, 2010), at 1.

D. The Postal Service's Argument that Use of the Exigency Provision Provides the Only Opportunity to Bring Periodicals Class into Compliance with § 3622(c)(2) Rests on False Factual Assumptions

Beginning long before the alleged exigency on which the Postal Service bases its request in this docket, Halstein Stralberg demonstrated in a series of presentations to the Postal Rate Commission and the Postal Regulatory Commission that there are alternatives to rate increases as ways of moving Periodicals Class mail toward full cost coverage: namely, eliminating excessive costs and creating incentives for more efficient mail preparation. Despite strong Commission encouragement to do so,⁹ the Postal Service has not seriously pursued these opportunities and does not seriously pursue them in its announced plans or its proposed rates for Periodicals Class in this case.

In his separate comments in behalf of Time Warner in this docket (filed this date), Stralberg updates his analysis of conditions affecting Periodicals costs and rates and considers the current state of the facts in the context of the Postal Service's request for an exigent Periodicals Class rate increase. He concludes that the Postal Service's request is manifestly unjustified, in light of: (1) the Postal Service's attribution to the Periodicals Class of substantial costs that are either fixed or not caused by or of benefit to periodicals; and (2) the existence of substantial continuing opportunities to effect major improvements in Periodicals cost coverage through more efficient flats mail-processing operations and a more efficient Periodicals rate structure.

⁹ See, e.g. Docket N. C2004-1, Complaint of Time Warner Inc. *et al.*, Order No. 1466 (October 21, 2005), *passim.*; and Fiscal Year Annual Determination of Compliance (March 29, 2010), at 82.

In light of Stralberg's previous work, the Commission's repeated acceptance of his conclusions and directions to the Postal Service to act on them, and his comments in this docket, the Commission should give no credence to the Postal Service's assertions than an exigent increase is the only available means of dealing with the continuing problems of the Periodicals Class.

Respectfully submitted,

s/ _____
John M. Burzio
Timothy L. Keegan

COUNSEL FOR
TIME WARNER INC.

Burzio McLaughlin & Keegan
Canal Square, Suite 540
1054 31st Street, N. W.
Washington, D. C. 20007-4403
Telephone: (202) 965-4555
Fax: (202) 965-4432
E-mail: bmklaw@verizon.net
timothy.keegan@verizon.net