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POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Rate Adjustment due to Extraordinary or Exceptional Circumstances	)	Docket No. R2010-4

INITIAL COMMENTS
OF THE
NATIONAL POSTAL MAIL HANDLERS UNION
REGARDING POSTAL SERVICE REQUEST FOR A RATE ADJUSTMENT
DUE TO EXTRAORDINARY OR EXCEPTIONAL CIRCUMSTANCES

The National Postal Mail Handlers Union ("NPMHU") submits these Initial Comments in support of the Postal Service's pending request for a rate adjustment that exceeds the rate of inflation pursuant to Section 3622(d)(1)(E) of the Postal Enhancement and Accountability Act of 2006 ("PAEA"), 39 U.S.C. § 3622(d)(1)(E).[1]

These comments focus on the proper interpretation of the PAEA's requirement that an expedited and above-CPI rate increase under Section 3622(d)(1)(E) be "due to either extraordinary or exceptional circumstances" and be based on a determination by the Postal Regulatory Commission "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

[1] These comments are filed pursuant to 39 C.F.R. § 3010.65(f), and in accordance with the schedule announced in Order No. 485.

services of the kind and quality adapted to the needs of the United States." As we show below, the Commission should interpret Section 3622(d)(1)(E) based on the plain language of that statutory provision, its legislative history, and the purpose underlying its enactment. All of these factors demonstrate that an overly restrictive reading of Section 3622(d)(1)(E) is unjustified, and that the economic circumstances currently faced by the Postal Service fall squarely within the statutory requirements for the rate increase that has been requested.

I. Rather than repeat what already has been presented in prior submissions by the Postal Service, see, e.g., Docket No. R2010-4, Response of the United States Postal Service to Motion of the Affordable Mail Alliance to Dismiss Request (Aug. 2, 2010) (hereinafter "USPS Response of Aug. 2, 2010"), the NPMHU simply notes as follows:

In large part because of the Great Recession that began in 2008, the Postal Service has experienced severe and sudden declines in mail volume that easily satisfy the appropriate interpretation of "either extraordinary or exceptional circumstances." As the USPS has shown, "extraordinary" means "beyond what is usual, ordinary, regular, or established," and "exceptional" means what is "unusual" or what occurs as the "exception or rare instance." See USPS Response of Aug. 2, 2010 at 11-12 (citations omitted). The Postal Service persuasively argues – and the NPMHU concurs – that a sudden drop in mail volume of more than twenty percent, whatever its cause, is sufficient evidence of an "extraordinary or exceptional" circumstance. To argue, as some have, that the Great Recession of 2008 was just like any other economic downturn and part of the normal business cycle is to ignore the severe impact that this

recent recession has had on mail volume, and thus on USPS revenue. As the Postal Service conclusively shows, the volume loss caused by the Great Recession of 2008 substantially exceeds the impact felt by the Postal Service during prior recessions, or following the terrorism on September 11th or the anthrax attacks of 2001. It bears noting, moreover, that even the most vociferous opponents of the proposed rate increase concede that the latter two of these circumstances would allow for an above-CPI increase in rates. See USPS Response of Aug. 2, 2010 at 12-14.[2]

II. That being said, the remainder of these comments will focus on a detailed description of the legislative history of Section 3622(d)(1)(E), and will demonstrate that arguments in favor of a more restrictive reading of Section 3622(d)(1)(E) – including those contained in recent submissions from the Affordable Mail Alliance and Senator Susan Collins – are based on a fundamental misunderstanding of the statute's language and history. Indeed, if the Commission were to adopt the restrictive interpretation of Section 3622(d)(1)(E) urged by these participants, the Commission's decision effectively would read this crucial provision out of the PAEA.

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[2] In its 2007 comments concerning the Commission's regulations implementing the PAEA, the NPMHU noted its agreement with the Commission's determination that it should define when a proposed rate adjustment is justified by "either extraordinary or exceptional circumstances" based on the facts presented in particular cases. See Docket RM2007-1, Comments of the National Postal Mail Handlers Union on Proposed Regulation (Sept. 24, 2007) ("NPMHU 2007 Comments"). Here, based on the Great Recession of 2008 and the severe drop in mail volume that it caused, it is clear that the statutory standard has been satisfied. Once that conclusion is reached, the NPMHU continues to believe that it is preferable to allow the statutory terms to gather additional meaning in the future through additional adjudication in the context of specific factual situations so that each determination can be made on the basis of a concrete factual record. In other words, the NPMHU suggests that general pronouncements about the statutory standards should be avoided to the maximum extent possible.

The plain language and legislative history of the PAEA conclusively show that what is now Section 3622(d)(1)(E) was the result of a legislative compromise reconciling related, but vastly different, provisions contained in the precursor House and Senate bills.[3] As a matter of law, and perhaps of equal importance as a matter of common sense, the terms of this legislative compromise provide the legally binding standard that must be implemented by the Commission. We therefore analyze this compromise in some detail.

When they were initially introduced in the 109th Congress, both the House and Senate postal reform bills included a cap on rate adjustments tied to the Consumer Price Index ("CPI"). Both bills also authorized the Commission to permit rate increases above this cap. The bills differed, however, on the circumstances that would justify such an above-CPI increase.

The original House bill, H.R. 22, was introduced on January 14, 2005 by then-Representative John McHugh. H.R. 22 would have allowed the Commission to permit a rate adjustment exceeding the CPI if the Commission determined that "such [an] increase 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." See H.R. 22, 109th Cong., 1st Sess. (Jan. 4, 2005); see also H. Rep. No. 109-66 (Part I), at 46, 47-48, 86 (ordered to be printed on April 28, 2005). It bears noting, moreover, that this House-backed standard in H.R. 22 substantially mirrored a provision on postal rates previously found in 39 U.S.C. § 3621

[3] The NPMHU previously discussed some of these issues in its comments to the PRC's 2007 Proposed Regulations implementing the PAEA. See NPMHU 2007 Comments, supra n.2.

of the Postal Reorganization Act of 1970 ("[p]ostal rates and fees shall be reasonable, 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"). See USPS Response of Aug. 2, 2010 at 57-58 (discussing PRA Section 3621).

The Senate bill, S. 662, was initially introduced by Senator Susan Collins on March 17, 2005. In direct contrast to the House Bill, S. 662 would have imposed a more restrictive standard on above-CPI rate increases, authorizing the Commission to "establish procedures whereby rates may be adjusted on an expedited basis due to unexpected and extraordinary circumstances." S. 662, 109th Cong., 1st Sess. (Mar. 17, 2005) (emphasis added).

These fundamental differences between H.R. 22 and S. 662 were highlighted in a series of 2005 reports from the Congressional Research Service ("CRS"). For example, in an August 4, 2005 report from the CRS, the analyst noted that "significant differences remain[ed]" between the House and Senate versions of the new ratemaking system, particularly in the standard provided for exceeding the rate cap for market-dominant prices. After describing the two different standards, the report noted that "[t]he Postal Service would like to have [the House] rate-cap escape clause because it believes that staying below the CPI will be 'extremely challenging.'" See Congressional Research Service, Postal Reform Bills: A Side-by-Side Comparison of H.R. 22 and S. 6662 at 3 (updated Aug. 4, 2005) (excerpts attached as Exhibit 1).

During the following months, various groups of stakeholders debated the impact of the differing standards contained in the bills. The Postal Service and labor and

management groups representing Postal Service employees generally urged lawmakers to reject the more restrictive standard contained in S. 662. See, e.g., Letter from USPS Board of Governors to the Honorable Tom Davis, Chairman, House Committee on Government Reform at 3 (Sept. 13, 2005) ("The Postal Service's commitment to a CPI rate cap . . . was made with the understanding that the exigent rate case standard would be 'reasonable and necessary,' rather than 'unexpected and extraordinary.'") (attached as Exhibit 2); Letter from Labor Organizations and Management Associations to Susan Collins, Chairman, Senate Committee on Homeland Security and Governmental Affairs at 2 (March 16, 2006) ("The Senate approach to PRC exigency is far too narrow, limited only to 'unexpected and extraordinary circumstances,' such as biological or chemical attack on the postal system. It would lead to unnecessary and counterproductive service cuts in the face of serious external shocks that fall short of national emergencies.") (attached as Exhibit 3); Letter from Labor Organizations and Management Associations to Tom Davis, Chairman, House Committee on Government Reform at 1 (July 12, 2006) ("We . . . urge you to resist the pressure . . . to accept the exigency language in the Senate postal reform bill. A price indexing system will only work in the postal industry if there is sufficient flexibility for the Postal Service to seek the revenues it needs . . . . The exigency language in Section 3622(e) of your bill, H.R. 22, provides that flexibility. The language in the Senate bill does not.") (attached as Exhibit 4).

Mailing groups representing large postal customers and the White House generally preferred the Senate version. See, e.g., Letter from Coalition for a 21st Century Postal Service to Susan Collins, Chairman, Senate Committee on Homeland

Security and Governmental Affairs at 1 (Apr. 26, 2006) ("We support the Senate provision on the price index for rate setting for market dominant classes of mail, including . . . the exigency clause for exceeding the index.") (attached as Exhibit 5); Executive Office of the President, Office of Management and Budget, Statement of Administration Position on H.R. 22 (July 26, 2005) at 1 (urging adoption of Senate proposal in S. 662 for a "rate cap with a strict exigency requirement") (attached as Exhibit 6).

Ultimately, however, a compromise was reached. The compromise language, which now appears in Section 3622(d)(1)(E), first appeared in an updated and amended version of the Senate bill that was circulated to interested stakeholders by Senator Collins in October 2006 (see Draft of S. ___, excerpts attached as Exhibit 7), and was formally introduced in the House as H.R. 6407.[4] As eventually adopted into law, that provision unequivocally authorizes the Commission to approve an expedited rate increase, above that allowed by the CPI cap, if the adjustment is based on "either extraordinary or exceptional circumstances," and if the Commission finds, after notice and hearing, that the adjustment is "reasonable and equitable and necessary" to enable the Postal Service, operating 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.

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[4] Meetings and discussions between stakeholders continued throughout calendar year 2006. The final bill – including the compromise included in Section 3622(d)(1)(E) – was introduced in the House as H.R. 6407 on December 7, 2006 and passed the House on December 8, 2006. The Senate passed H.R. 6407 on December 9, 2006. The bill was signed into law by President George W. Bush on December 20, 2006.

In short, after almost two years of congressional debate and consideration, this compromise language essentially incorporated the standard originally contained in H.R. 22, and combined that House-initiated standard with a substantially more flexible version of the standard that was originally contained in S. 662. As adopted into law as part of the PAEA, the Commission is now authorized by Section 3622(d)(1)(E) to:

> [E]stablish 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.

The final language contained in this compromise provision is significant in a number of different respects:

First, the compromise language eliminates S. 662's conjunctive requirement – that circumstances be both "unexpected and extraordinary" –and replaces that conjunctive language with explicitly disjunctive language – that circumstances be "either extraordinary or exceptional" (emphasis added). To ensure that there would be no doubt about this change, the statute as finally enacted includes not only the disjunctive "or," but also adds the word "either" at the beginning of this phrase to emphasize that either an extraordinary circumstance or an exceptional circumstance, standing alone, would provide an independent basis for allowing a rate increase above the CPI cap.

Second, although the compromise provision retains the word "extraordinary" from the earlier Senate version in S. 662, it substantially increases the flexibility granted by that term by allowing it to stand on its own as an independent basis for Commission

approval of an above-CPI rate increase, rather than limiting the permissible basis for such a rate increase to circumstances that were both "unexpected and extraordinary."

Third, the compromise language of Section 3622(d)(1)(E) allows for an above-CPI adjustment because of circumstances that may properly be characterized as "exceptional," rather than S. 662's earlier requirement that the circumstance be "unexpected," or more accurately both "unexpected and extraordinary." This one change has at least two significant consequences. To begin with, this change makes clear that even completely foreseeable circumstances properly may form the basis for granting a Postal Service request to increase rates above CPI. By eliminating the word "unexpected," and substituting the word "exceptional," Congress flatly rejected a foreseeability standard by rejecting the requirement that circumstances be "unexpected." Furthermore, even if the substitute "exceptional" standard were to be read to include, in part, some reference to foreseeability, the fact that the statutory provision is now expressly disjunctive – and that circumstances that are either extraordinary or exceptional will justify an increase – means that reliance on the foreseeability of a circumstance as the sole basis for rejecting an above-CPI rate request would be contrary to the statutory language.

Finally, the compromise provision also incorporated H.R. 22's requirement that the Commission find that an 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." As noted above, this standard is essentially the same as the standard that was applied by the former Postal Rate

Commission when it considered rate increases under the PRA, looking to the needs of the Postal Service in future years. This flexible standard also should not be interpreted in isolation, but rather should be used to give appropriate meaning to the circumstances that could qualify as "either extraordinary or exceptional."

All of these conclusions, in turn, have critical implications for the Commission's consideration of the Postal Service's current request for approval of an above-CPI rate increase. First, there is no basis for denying the request on grounds that it is not based on circumstances that are not both extraordinary and exceptional – the Postal Service must satisfy only one of these standards. Second, there is no basis for denying the request because it is based on circumstances that were not unforeseeable – Congress clearly rejected a foreseeability standard by rejecting the requirement that circumstances be "unexpected." Third, in the absence of any explicit definition in the PAEA of the word "extraordinary" or the word "exceptional," these terms must be given their usual (i.e., ordinary or unexceptional) meaning – that is, that circumstances which are unusual, rare, or out of the ordinary may be used by the Postal Service to justify an above-CPI rate increase. And finally, the inclusion of the "reasonable and equitable and necessary" clause should provide guidance as to what type of circumstances qualify as "either extraordinary or exceptional."[5] Reading both clauses together, circumstances

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[5] More broadly, the inclusion of this language echoes the list of objectives contained in the PAEA. While the inclusion of the CPI rate cap promotes rate stability, the "reasonable and equitable and necessary" clause also makes it clear that rate stability should not come at the expense of the Postal Service's ability to "maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States." Similarly, although one objective of the PAEA is "creat[ing] predictability and stability in rates," 39 U.S.C. § 3622(b)(2), the PAEA requires that rules regulating the rates that the Postal Service can charge meet the separate objectives of "maintain[ing] high quality service standards," § 3622(b)(3), "allow[ing] the Postal Service pricing flexibility," § 3622(b)(4), and perhaps of most importance,

that would justify an increase under Section 3622(d)(1)(E) should be out of the ordinary – either in kind (e.g., a natural disaster, a severe spike in costs that is not fully reflected in CPI) or in severity (e.g., a drop in mail volume) – and should have an impact on the Postal Service's finances such that the above-CPI rate increase is "necessary to enable the Postal Service" to apply "best practices of honest, efficient, and economical management" in order to "to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States."

III. As shown above, a restrictive reading of the compromise language in Section 3622(d)(1)(E) would be improper in light of the statutory text and the congressional history that led to its enactment. Such a reading also would be erroneous, because it essentially would read the legislative compromise underlying Section 3622(d)(1)(E) out of the statute. That is the fatal error made in the letter and attachments that were submitted by Senator Collins in an effort to support the Motion to Dismiss filed by the Affordable Mail Alliance. See Docket No. R2010-4, Comments of U.S. Senator Susan Collins (Aug. 9, 2010).

A careful examination of the submission filed by Senator Collins shows that it is based on a misunderstanding of the legislative record. To begin with, each and every citation or quotation contained in Senator Collins' submission is taken from documents or materials that were created prior to the development of the legislative compromise that now appears in the PAEA. Thus, the letter from Senator Collins quotes from the 2003 report of the Presidential Commission on the United States Postal Service, from a 2004 postal reform bill (S. 2468), from 2004 testimony presented by then-PRC

"assur[ing] adequate revenues, including retained earnings, to maintain financial stability," § 3622(b)(5).

Chairman George Omas, from the 2004 Senate Committee Report (rate authority to be used only for "unexpected and extraordinary circumstances" and thus when rapid changes are needed "in the event of a national emergency"), and from 2005 testimony from the Assistant Secretary of the Treasury (in favor of establishing "a very high bar" for above-CPI rate increases, consistent with then-existing Senate language). These citations are relevant – if they are relevant at all – only if the Commission wants to understand or interpret the restrictive standard only contained in the Senate bill, S. 662 (during the period from 2004 through September 2006), before that standard was rejected by the entire Congress which enacted the PAEA in December 2006. Stated another way, the citations and quotations that Senator Collins offers to support her personal recollections of the standard for above-CPI rate increases actually establish precisely the opposite – that is, they establish what was not included in the actual language of the final version of Section 3622(d)(1)(E) that eventually was enacted as part of the PAEA. The Senate version of S. 662 from 2004, 2005, and the first part of 2006 was rejected by Congress, and in its stead Congress adopted the more flexible standard of "either extraordinary or exceptional circumstances."

The submission from Senator Collins also mischaracterizes what occurred during the Congressional debate in 2006, during the 109th Congress. It repeatedly but erroneously states that Congress "adopted the Senate's more stringent . . . standard," and that Congressional action resulted in "the adoption of the Senate exigent rate case standard." Again, with all respect, these descriptions merely reflect the Senator's recollections of the record, and are not accurate. When Congress adopted the PAEA, it adopted compromise language that not only incorporated the House-backed standard,

but also substituted a considerably more lenient version of the Senate-backed requirement, providing for above-CPI rate increases if the circumstances facing the Postal Service were "either extraordinary or exceptional."

At bottom, the letter submitted by Senator Collins asserts that, as the "author of the exigent rate authority," Senator Collins can "attest that the provision was not intended to be used under the current circumstances." With respect, the "exigent" language was the result of a process that included many Members of Congress in both Houses of Congress. For the reasons already explained, the language originally contained in S. 662 and supported by Senator Collins was not adopted by Congress, and does not appear in Section 3622(d)(1)(E) of the PAEA.[6]

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[6] In this regard, it bears emphasis that the personal reading of legislative intent, especially one submitted by an individual Member of Congress, is "post-enactment legislative history" that is entitled to little, if any, weight. See USPS Response of Aug. 2, 2010 at 14-15. See also Bread Political Action Committee v. FEC, 455 U.S. 577 (1982) (giving no probative weight to affidavits submitted by Senator Buckley and his congressional aide, because "[s]uch statements 'represent only the personal views of th[is] legislato[r], since the statements were [made] after passage of the Act'"); Quern v. Mandley, 436 U. S. 725, 736, n.10 (1978) (noting that "post hoc observations by a single member of Congress carry little if any weight"); Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974) ("post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage; such statements "represent only the personal views of these legislators") (quoting National Woodwork Manufacturers Ass'n v. NLRB, 386 U. S. 612, 639 n.34 (1967)).

Also instructive is Lindland v. U.S. Wrestling Ass'n, Inc., 227 F.3d 1000 (7th Cir. 2000), in which the U.S. Court of Appeals for the Seventh Circuit rejected reliance on a letter that the distinguished Senator Ted Stevens wrote to the District Court to provide that court with the Senator's views as to how it should apply part of the Stevens Act to a pending dispute. The court wrote as follows:

> Senator Stevens himself may have a different view about the effect of § 220509(a). At the behest of the [U.S. Olympic Committee], he wrote a letter asking the district judge to vacate its order. Our reading of the letter implies that the USOC misinformed the Senator about the nature of the controversy and the reason the district judge had ordered the USOC to send Lindland's name to the [International Olympic Committee], but no matter. Legislative history is a chancy subject; subsequent legislative history is weaker still, indeed is an oxymoron, and a letter or affidavit written as a form of constituent service is the bottom of the

Respectfully submitted,

/s/

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> pecking order. Letters written after a statute's enactment were not presented in the course of debate and so are not the sort of views that may be credible because other members of the legislature rely on them and may impose penalties on those who misrepresent, or misunderstand, the text.
>
> A letter from a Member of Congress telling a judge how to decide a pending case reflects a misunderstanding of the difference between legislative and judicial functions. Senator Stevens played a leading role in the creation of § 220509, but he has no role in adjudication. Giving weight to such a letter would only invite other litigants to pester Members of Congress for expressions of support – or Members of Congress to pester the courts with their latest views about how laws should be implemented and cases decided. It is best, we think, for each institution to hew to its constitutional function.

227 F.3d at 1008 (citations omitted).