

**BEFORE THE  
POSTAL REGULATORY COMMISSION**

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RATE ADJUSTMENT DUE TO :  
EXTRAORDINARY OR EXCEPTIONAL :  
CIRCUMSTANCES : Docket No. R2010-4  
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**REPLY OF INTERVENOR  
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO  
TO COMMENTS OF AFFORDABLE MAIL ALLIANCE AND SENATOR COLLINS**

Intervenor National Association of Letter Carriers, AFL-CIO (“NALC”) hereby submits the following reply to (1) the July 26, 2010 comment of the Affordable Mail Alliance (“AMA Comment”) and (2) the August 9, 2010 comment of Senator Susan M. Collins (“Collins Comment”).<sup>1</sup>

The AMA argues that the price-cap regulatory system established by the Postal Accountability and Enhancement Act (“PAEA”) will be “dead” if the Commission interprets the exigency clause in 39 U.S.C. §3622(d)(1)(E) to apply to the circumstances currently facing the United States Postal Service (“USPS”). *See* AMA Comment at 5. Senator Collins echoes that position, asserting “unequivocally” that the PAEA “does not provide for an exigent rate case” under the circumstances set forth in USPS’s request. Collins Comment at 3.

These comments misconstrue Congress’ intent when it allowed USPS to seek an exigent rate increase under “extraordinary or exceptional circumstances.” 39 U.S.C. §3622(d)(1)(E).

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<sup>1</sup> Although styled as a motion to dismiss, AMA’s filing is in the nature of a comment.

Although she now opposes USPS's exigent rate request, Senator Collins, in an April 6, 2007 letter to the Commission that she co-authored with Senator Carper (*see* Collins Comment, at Attachment 1), explained that Congress meant the PAEA's exigency exception to apply to "significant and substantial" declines in mail volume caused by events beyond USPS's control:

the "extraordinary and exceptional circumstances" referenced in the language may include terrorist attacks, natural disasters, and other events that may cause *significant and substantial declines in mail volume* or increases in operating costs that the Postal Service cannot reasonably be expected to adjust to in the normal course of business.

Collins Comment, at Attachment 1, at 2 (emphasis added).

The letter cited "terrorist attacks" as an example of an event whose impact on mail volume could qualify under the statute as an exigent circumstance. *See id.* In her comment, Senator Collins now explicitly embraces the idea that "the terrorist attacks of September 11, 2001, or the anthrax attacks later that year could serve as the basis for an exigent rate case." Collins Comment at 3; *see also id.* at Attachment 4, at 11 (S. Rep. 108-318 (2004)) (citing September 11, 2001 and anthrax attacks as examples of exigencies).

The September 11, 2001 and anthrax attacks, as horrific as they were, caused a drop in mail volume of no more than 2.2%. *See* USPS's July 6, 2010 Exigent Request, at 2. The drop in mail volume that USPS has experienced since the onset of the current economic crisis has been nearly *ten times* worse: a 20.1% decline from first quarter FY 2007 through second quarter FY 2010. *See id.* If the September 11, 2001 and anthrax attacks, which caused a 2.2% decline in mail volume, qualify as exigencies, certainly events producing a mail volume decline ten times deeper must qualify as well.

Like the terrorist attacks, the current economic crisis was an “exogenous” factor beyond USPS’s control. Indeed, as with the September 11, 2001 terrorist attacks, Congress has appointed a commission -- the Financial Crisis Inquiry Commission -- to investigate its causes.<sup>2</sup> The precipitating causes of the financial crisis -- complex and spectacular failures in the financial and real estate markets, here and abroad, arguably linked to insufficient regulatory oversight -- are certainly much harder to understand and pinpoint than the brutal murders committed on September 11, 2001. But what matters for determining whether a crisis qualifies as an exigent circumstance is not the salience of its origins but whether it causes “significant and substantial declines in mail volume.” Collins Comment, at Attachment 1, at 2 (emphasis added).

There is no dispute that since 2008, the United States has experienced the worst economic crisis since the Great Depression, *see* July 6, 2010 Statement of Joseph Corbett in Docket No. R2010-4, at 11, and that what has resulted is the largest drop in mail volume in postal history, *see* March 30, 2010 Statement of Joseph Corbett in Docket No. N2010-1, at 3. To interpret the exigency clause as not applying to a crisis of such magnitude would mean that it would likely *never* apply. Such an interpretation -- effectively reading the exigency clause out of the statute -- “would contradict well-established principles of statutory interpretation that require statutes to be construed in a manner that gives effect to all of their provisions.” *United States v. New York*, 129 S.Ct. 2230, 2234 (2009).

The AMA and Senator Collins argue that the PAEA’s exigency clause must be read narrowly and only to apply to unforeseen events. *See* AMA Comment at 12-16; Collins Comment at 3. Even if that were correct, the current circumstances would still apply. That the business cycle will ordinarily produce crests and troughs may be foreseeable, but no one could

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<sup>2</sup> *See* “Staff Losses and Dissent May Hurt Crisis Panel,” *New York Times* (Aug. 31, 2010); *see also* Financial Crisis Inquiry Commission website, [www.fcic.gov](http://www.fcic.gov).

have foreseen the economic tsunami now known as the “Great Recession” and the carnage it would leave in its wake: a contraction of the GDP in 2008-2009 of nearly 4%, a drop in private employment of 7.3%, and a fall in real investment spending of 35.7%; the closure of 228 banks since January 2008; and the *majority* of the American workforce in the 30 months preceding July 2010 having faced unemployment, experienced a cut in pay or a reduction in hours, or been forced into part-time status. *See* July 6, 2010 Statement of Joseph Corbett in Docket No. R2010-4, at 14.<sup>3</sup> That this was no ordinary recession is evidence by Congress having appointed a special commission to investigate its causes. And while some argue that the mail-volume loss was aggravated by a long-term migration of communications to the internet, there is no dispute that the bulk of the loss was due to the macroeconomic nightmare.

In any event, the claim that the PAEA’s exigency clause only applies in the narrowest of circumstances and only to unexpected events is wrong, and based on a misreading of the statute’s text and legislative history. In the original Senate bill, introduced in March 2005, the exigency exception would only have applied to “*unexpected and extraordinary* circumstances.” S. 662, 109<sup>th</sup> Cong. §3622(d)(1)(D) (2005) (emphasis added). But the statute as enacted in December 2006 lacks the requirement that the exigent circumstances be “unexpected.” *See* 39 U.S.C. §3622(d)(1)(E). Congress not only dropped the unforeseeability requirement, but also broadened the exigency clause by replacing the restrictive conjunctive language, marked by the word “and,” with the disjunctive phrase “either ... or.” *Id.* (PAEA referring to “*either extraordinary or exceptional circumstances*”) (emphasis added).

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<sup>3</sup> In fact, recent revisions to Commerce Department data show that the recession, with a 4.1% drop in GDP, was worse than originally thought. *See* “A Deeper Hole,” *The Economist* (Aug. 7, 2010), at 28 (confirming that recession was “the worst of the post-war years”).

The April 2005 congressional testimony quoted by Senator Collins that the exigency clause establishes a ““very high bar,”” Collins Comment at 2-3 (quoting testimony in Attachment 5, at 2) is thus inapt, as it expressly refers to the *Senate bill* that never became law. *See* Collins Comment, Attachment 5, at 2. The April 2004 testimony she quotes that exigent circumstances must be ““unexpected”” came even earlier in the legislative process and was thus even further removed from the actual statutory language. *See id.* at 3 (quoting testimony in Attachment 6, at 20).

The Commission itself has made clear that exigencies under the PAEA can be either foreseen or unforeseen. In its original proposed rules on exigent rate cases, the Commission would have required USPS, when filing for an exigent rate increase, to justify why “the circumstance giving rise to the request was *neither foreseeable* nor avoidable by reasonable prior action.” Order Proposing Regulations to Establish a System of Ratemaking, Docket No. RM2007-1 (Aug. 15, 2007), at Proposed Rule 3100.61(a)(7) (emphasis added). But the Commission changed this language after receiving comments that the assumption behind the proposed rule -- that exigent circumstances must be unforeseen -- was inconsistent with the statutory language. The rule as promulgated by the Commission now only requires USPS to provide an “analysis of the circumstances giving rise to the request, which should, *if applicable*, include a discussion of *whether* the circumstances *were foreseeable* or could have been avoided by reasonable prior action.” Commission Rule 3010.61(a)(7) (emphasis added).

Finally, the AMA devotes much of its comment to arguing that current circumstances cannot qualify as an exigency because, it claims, USPS’s private-sector competitors weathered the economic storm while USPS, burdened by purportedly above-market labor costs and other inefficiencies, has floundered. *See* AMA Comment at 3, 17-34, 39-46.

This argument ignores the fact that, unlike USPS, its private-sector competitors have no universal service obligation nor do they bear the unique burden of having to pre-fund retiree health benefits.<sup>4</sup> Moreover, AMA's argument is based on highly contested assertions that raise issues that are beyond the scope of the instant rate proceeding and unsupported by anything in the evidentiary record in this case. For example, AMA's assertion that USPS pays wages above wages paid for comparable work in the private-sector, *see* AMA Comment at 30-31, raises complex legal and economic issues regarding the meaning and application of the comparability standard in the Postal Reorganization Act ("PRA"). *See* 39 U.S.C. §1003 (a) (providing for postal compensation and benefits "on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector of the economy"). NALC and its economic experts have argued elsewhere that proper application of the comparability standard requires comparing letter carrier pay to the pay of employees in large, comparable firms such as employees of other parcel delivery enterprises -- not, as others have argued, to the pay of all employees throughout the private-sector. In any event, the legislative history makes clear that the comparability standard leaves ample room for differences over how it is to be interpreted and applied and that such differences are to be worked out in collective bargaining between USPS and the postal unions or, failing that, in interest arbitration.<sup>5</sup> That comparability is beyond the

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<sup>4</sup> For a discussion regarding the impact on USPS of the obligation to pre-fund retiree health benefits, *see* Frank Clemente and Tom Kiley, "Congressional Mandates Account For Most Of Postal Service's Recent Losses," Economic Policy Institute, Briefing Paper #268 (June 2010).

<sup>5</sup> *See, e.g.*, Post Office Reorganization: Hearings on Various Proposals to Reform the Postal Establishment Before the House Comm. On Post Office and Civil Service, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess. 221 (Postmaster General testifying that "there is a wide variety of difference as to what comparability might mean" and "that has to be bargained between the parties"); 39 U.S.C. §1207(c) (providing for interest arbitration in the event that collective bargaining fails to produce an agreement). Under the PRA, the compensation of bargaining unit postal employees is to be determined through collective bargaining between USPS and the postal unions in accordance with the applicable principles of the National Labor Relations Act. *See* 39 U.S.C. §§1201-1209.

Commission's purview is only confirmed by Congress' never having considered, let alone enacted into law, the recommendation expressly made in 2003 by the Presidential Commission on USPS that the Postal Regulatory Commission be authorized to determine comparability.<sup>6</sup>

Senator Collins' concession that terrorist attacks qualify as exigent circumstances shows that the issue to be considered by the Commission is the nature and magnitude of the exogenous event, not USPS's financial condition or the cost-efficiency of its operations. No one would argue that such attacks would fail to qualify as exigent events if, at the moment the terrorists struck, USPS had not yet wrung enough inefficiencies out of its operations or if private-sector companies, unconstrained by the obligations of a government service and not required to pre-fund retiree health benefits, reacted more nimbly to the adverse economic fallout.

NALC takes no position on whether the Commission should grant USPS the rate increases it seeks. Our point is simply that the AMA and Senator Collins ignore the intent of Congress when they argue that the worst economic downturn in the postwar era, and the worst falloff in mail volume *ever*, cannot qualify as exigent circumstances under the PAEA.

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All unresolved disputes over wages, including disputes over comparability issues, are to be resolved exclusively through the interest arbitration process. Decisions of the interest arbitration board are "conclusive and binding." 39 U.S.C. §1207(c)(2). The PRA's wage setting scheme reflects one of the paramount goals of postal reorganization: "to bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector. Rank and file postal employees would, for the first time, have a statutory right to organize collectively and to bargain collectively with management on all those matters -- including wages and hours -- which their neighbors in private industry have long been able to bargain for." H.R. Rep. No. 91-1104, 91<sup>st</sup> Cong., 2d Sess. 13-14 (1970). The framers of postal reorganization thus clearly understood that disputes over the meaning and application of the comparability standard were to be addressed through the collective bargaining process.

<sup>6</sup> See Report of the President's Commission on the United States Postal Service, "Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service" (2003), at 177.

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Respectfully submitted,

/s/ Peter D. DeChiara

Peter D. DeChiara

COHEN, WEISS AND SIMON LLP

330 West 42<sup>nd</sup> Street

New York, New York 10036-6976

Attorneys for Intervenor National

Association of Letter Carriers, AFL-CIO