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POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Annual Compliance Report Docket No. ACR2010

PUBLIC REPRESENTATIVE REPLY COMMENTS
IN RESPONSE TO ORDER NO. 636
(February 17, 2011)

In its order establishing this docket the Commission invited comments on the Commission's authority to raise rates in excess of the price cap in order to bring cost coverage to 100 percent.[1] Two parties filed extensive comments arguing that the Commission does not have authority to exceed the price cap in order to bring a class to full cost coverage.[2] On the contrary, the Commission has authority to pierce the price cap when a class's failure to cover attributable costs has become a systemic and perpetual problem.

The Periodicals class failed to cover attributable costs in FY 2010 by $611 million.[3] In FY 2009 Periodicals lost $642 million.[4] The Periodicals class has not covered costs since the PAEA was enacted. Time Comments at 2. The Postal Service now says that "even if the Postal Service achieves the most optimistic efficiency enhancements possible, it does not foresee that such enhancements, combined with annual rate increases within the statutory price cap, will result in Periodicals, Standard

[1] *See* Order No. 636, January 4, 2011, at 6.

[2] Comments of Magazine Publishers of America, Inc., Alliance of Nonprofit Mailers and American Business Media, February 2, 2011 (MPA et al. Comments); Initial Comments of Time Inc. on USPS FY 2010 Annual Compliance Report, February 2, 2011 (Time Comments).

[3] United States Postal Service FY 2010 Annual Compliance Report, December 29, 2010, at 35 (2010 ACR).

[4] Annual Compliance Determination FY 2009 at 74.

Mail Flats, and Standard Mail NFMs/Parcels reaching full attributable cost coverage."[5] 2010 ACR at 8. Not only has Periodicals lost billions of dollars in the recent past, it is now forecast to lose money into the indefinite future. The PAEA should not be read to condone, much less require, such a result.

Both Time and MPA et al. rely on statements in Commission Order No. 536 for the proposition that the price cap takes precedence over the requirement that classes cover attributable costs. That order dealt with workshare discounts not attributable costs.[6] However, Time and MPA et al. seize on dicta from that order to argue that the Commission has determined that the price cap may never be pierced. Time Comments at 14-15; MPA et al. Comments at 4-5. The Commission stated that

> These differences necessarily lead to differences in how the quantitative and the qualitative standards are to be applied in the modern system of ratemaking. Quantitative pricing standards are at the top of the statutory hierarchy. Next in the hierarchy are the qualitative "objectives" listed in section 3622(b), followed by the qualitative "factors" listed in section 3622(c).

Order 536 at 36. From this statement, MPA et al. infer that the price cap "take[s] precedence over the objectives and factors listed in sections 3622(b) and (c) . . . ." But the Commission granted precedence only over "qualitative" objectives and factors.[7] The attributable cost factor of section 3622(c)(2) is anything but qualitative. Rather, it is quantitative, objective, and mandatory—the very criteria that elevate sections of chapter 36 to the highest level in the hierarchy.

If the attributable-cost floor and the price cap stand on equal footing, the Commission's task becomes one of balancing the two requirements. The Commission should attempt to give effect to all provisions of the PAEA. That is a basic tenet of statutory construction. Here, two statutory provisions are in conflict. Up to now the

[5] 2010 ACR at 8. As the Public Representative noted in its initial comments, Standard Mail Flats can be brought to full cost coverage without piercing the cap, because the class as a whole is profitable. Public Representative Comments in Response to Order No. 636, February 2, 2011, at 6.

[6] Order Adopting Analytical Principles Regarding Workshare Discount Methodology, September 14, 2010 (Order No 536).

[7] Read narrowly, the Commission's order found that the quantitative requirement of section 3622(e) that discounts not exceed avoided cost trumped the qualitative "pricing flexibility" objective of sections 3622(b) and (c).

Commission has given precedence to the price cap. However, at some point the Commission must recognize that the subsidy to Periodicals violates not only the attributable cost floor but also basic postal policy—apportionment of costs "on a fair and equitable basis." 39 U.S.C. 101(d).

MPA et al. argue that the Periodicals class is not subsidized by other classes. They assert that Periodicals covers its short-run marginal costs. MPA et al. Comments at 14-18. They rely on an estimate of short-run costs developed by the Postal Service for use in the "summer sale" cases. Those costs were based on the assumption of excess capacity in the "slow" summer months. But MPA et al.'s short-run costs assume the existence of excess capacity throughout the year. The Postal Service never suggested that it had excess capacity year round. The 114 percent cost coverage calculated by MPA et al. applies only to the summer quarter of FY 2010. The other three quarters presumably did not have excess capacity. Averaging one quarter at 114 percent with three quarters at 75 percent leaves Periodicals substantially under water in FY 2010.

Respectfully submitted,

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