

**BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001**

RATE ADJUSTMENT DUE TO)
EXTRAORDINARY OR EXCEPTIONAL) Docket No. R2010-4R
CIRCUMSTANCES)

**MOTION TO STRIKE
OF ALLIANCE OF NONPROFIT MAILERS,
ASSOCIATION FOR POSTAL COMMERCE,
DIRECT MARKETING ASSOCIATION AND
MAGAZINE PUBLISHERS OF AMERICA, INC.
(July 27, 2011)**

The undersigned parties respectfully move to strike the following portions of the initial comments on remand filed by the Postal Service on July 25, 2011: page 2 (sentence beginning “As demonstrated herein . . .”) through page 3 (first sentence of first full paragraph); pages 24-60 (through end of Section V); page 61 (first full paragraph) through page 64; Attachments 1 through 3; and the supporting Excel worksheets filed with the Commission on July 25. These portions contain elaborate new computations and analyses, not previously in the record of this case, purporting to quantify the financial losses that the Postal Service suffered as a result of the 2007-2009 recession.

These materials should be stricken on several grounds. First, the new calculations and spreadsheets submitted by the Postal Service are beyond the scope of the court’s mandate in *USPS v. PRC*, 640 F.3d 1263 (D.C. Cir. 2011) and the

Commission's reopening order (Order No. 757). Second, giving weight to the calculations and spreadsheets at this belated stage would deny other parties adequate notice and opportunity to respond. Third, the Postal Service has no due process right to reopen the evidentiary record. The Postal Service had reasonable grounds for anticipating that it needed to make a strong showing of the causal relationship between the 2007-2009 recession and the above-CPI rate increase proposed by the Postal Service. In any event, the Postal Service always has had, and continues to have, the right to submit any evidence of causation it wishes as part of a new request for an exigent rate increase. We discuss each point in turn.

I. THE POSTAL SERVICE'S NEW COMPUTATIONS AND ANALYSES ARE BEYOND THE SCOPE OF THE COURT'S MANDATE AND THE COMMISSION'S ORDER REOPENING THE CASE.

The analyses and supporting spreadsheets proffered by the Postal Service in its July 25 comments are beyond the scope of both the court's mandate and Order No. 757. The court remanded the case to the Commission to consider a question of law, not to reopen the record for more data, spreadsheets or computations. The legal question is how "close" or exclusive a causal link must the Postal Service establish between the recession and the Postal Service's asserted need for an above-CPI rate increase under the "due to" provision of 39 U.S.C. § 3622(d)(1)(E) when, as here, the Postal Service's revenue shortfall has multiple causes. The subject of the remand is that question alone:

[W]e deny the Postal Service's petition in part, upholding the Commission's Chevron step 1 interpretation of the plain meaning of "due to" in PAEA section 201(d) as requiring a causal connection

between the exigent circumstances and the proposed rate adjustments. We also grant the petition in part, rejecting the Commission's Chevron step 1 interpretation of "due to" as requiring that the Postal Service match the amount of the proposed adjustments precisely to the amount of revenue lost as a result of the exigent circumstances. *Accordingly, we remand to the Commission to address the latter issue at Chevron step 2.*"

USPS v. PRC, 640 F.3d 1263, 1268 (D.C. Cir. 2011) (emphasis added).

Order No. 757, which establishes procedures on remand, recognizes the narrow scope of the Commission's task. The order states that the subject of the parties' comments shall be "the causation standard applicable to exigent rate adjustment requests submitted under 39 U.S.C. 3622(d)(1)(E)." Order No. 757 at 1-2. That is, the purpose of the reopened proceeding is to give interested persons "an opportunity to make their views known regarding *the proper interpretation of 'due to' as the standard of causation* in 39 U.S.C. 3622(d)(1)(E)." *Id.* at 4 (emphasis added). The Commission "hereby provides for submission of initial and reply comments *on this topic.*" *Id.* (emphasis added). "Initial comments addressing the *proper interpretation of 'due to' as a standard of causation* in 39 U.S.C. 3622(d)(1)(E) are due no later than July 25, 2011." *Id.* at 4 (ordering paragraph 3) (emphasis added). Consistent with the limited scope of the remand, the Commission has not reopened the record for testimony or data, but has simply adopted by reference the evidentiary record in Docket No. R2010-4. Order No. 757 at 4.¹

¹ By contrast, when the Commission has reopened the evidentiary record following a remand by a reviewing court, the Commission has done so explicitly, in response to a specific finding by the reviewing court of a defect in the evidentiary record itself. See Order No. 996, Docket No. R90-1, *Postal Rate and Fee Changes, 1990* (issued Dec. 17, 1993).

II. GIVING ANY WEIGHT TO THE POSTAL SERVICE'S NEW COMPUTATIONS AND ANALYSES WOULD DENY OTHER PARTIES ADEQUATE NOTICE AND OPPORTUNITY TO RESPOND.

Failure to strike the data and analyses in the Postal Service's July 25 comments would also deprive interested parties of reasonable notice and opportunity to respond. First, requiring interested parties to analyze and respond by August 1—i.e., within *seven days*—to the mass of tables, calculations and supporting detail filed by the Postal Service on July 25 (including substantial material submitted by the Postal Service in Docket No. N2010-1, the advisory proceeding on five-day delivery) would be a travesty of due process. *Cf. Newsweek, Inc. v. USPS*, 663 F.2d 1186, 1205 (2nd Cir. 1981), remanded on other grounds, *Nat'l Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810 (1983) (overturning an adjustment to the Postal Service's revenue requirement based on briefs and comments solicited after the close of the record); *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 427-430 (D.C. Cir. 1993) (overturning cost findings based on a methodology adopted by the Commission without giving adverse parties an opportunity to scrutinize and challenge the methodology through discovery, cross-examination and rebuttal testimony); *Prometheus Radio Project v. FCC*, Nos. 03-3078 *et al.* (D.C. Cir., July 7, 2011), 2011 U.S. App. LEXIS 13855, *34-40, 51-56 (allowing interested parties only 28 days to comment on new FCC proposal violated due process requirements for notice-and-comment rulemakings).

The Postal Service, apparently recognizing the unfairness of requiring other parties to comment on its new analyses in seven days, has acknowledged that

“certain aspect[s] of matters raised in [the Postal Service’s initial comments may warrant further input from the parties beyond what can be accommodated in reply comments due seven days later.” USPS Opposition to Public Representative Motion To Strike (July 26, 2011) at 3. The Postal Service pronounces itself “sympathetic to the suggestion that” more time is needed, and states that it would not oppose a Commission decision to “make schedule adjustments, including suspension of the August 1 deadline for reply comments.” *Id.* at 3-4.

The notion that just a “few days more” would cure any due process problem, however, is clearly unfounded. *Cf., id.* at 3. While some of the RPW reports and other source documents purportedly underlying the Postal Service’s calculations undoubtedly were “available to the Commission at the time it issued Order No. 547,” those are voluminous documents, and verifying the values purportedly derived from them in the Postal Service’s July 25 spreadsheets and tables will require checking hundreds of cells of data against their purported source documents. The burden has been multiplied because the Postal Service replaced the formulas in many of the spreadsheet cells with numerical values, thereby requiring that any verification of the intermediate calculations that produced the values be performed manually. *See* N2010-1 spreadsheet GCA.1.Sources-of-Change.xls.

More importantly, many of the values offered by the Postal Service on July 25 are based on the subjective judgments of Postal Service employees or consultants, not on data verifiable from public records. One example is the Postal Service’s estimate of the share of volume losses that were caused by the recession rather than

electronic diversion and other causes. USPS Comments at 38-44 & supporting Excel worksheets “SOC Table” and “SOC Approach.” Decomposing the decline in volume between the recession and other causes is a crucial step since, as the Postal Service conceded repeatedly in Docket No. R2010-4, electronic diversion, and the volume and revenue losses that result from it, do not constitute extraordinary or exceptional circumstances under 39 U.S.C. § 3622(d)(1)(E):

Opponents of the Request emphasize that the diversion of mail volume to electronic alternatives is a long-term trend that does not qualify as an “extraordinary or exceptional circumstance.” Both the Postal Service and the Commission agree.

Order No. 547 at 51 & n. 3 (citing USPS Response to Motion to Dismiss at 13, n. 2); *accord*, Order No. 547 at 62 n. 50 (citing USPS Reply Comments at 17) (“The Postal Service is not claiming that either the volume loss attributable to electronic diversion or any statutory provision, including its obligation to prefund the RHBF, qualifies as an extraordinary or exceptional circumstance.”).

The calculations underlying the Postal Service’s attempts in its July 25 comments to decompose the causes of its volume losses during the recession, however, cannot be verified from any observed data. The Postal Service states that its calculations rely on an Excel spreadsheet and narrative response filed by the Postal Service in response to a discovery request in Docket No. N2010-1: to verify the purported split between recession and non-recession factors, “it is necessary to examine the materials filed on May 17, 2010, in the 5-day case in some detail.” USPS Comments at 39. The very first paragraph of the cited discovery response in

Docket No. N2010-1, however, disavows any claim that the resulting estimates are precise or reliable:

While it is a relatively straightforward process to compare one historical year's volume with the next and calculate the observed volume increase or decline with a high degree of confidence, it is a much more daunting proposition to attempt to decompose the absolute difference into constituent parts and determine, for example, a precise and unique reason why individual pieces were *not* mailed. The nature of an econometric time-series demand analysis facilitates attempts to conduct a decomposition exercise, but it is nonetheless important to keep firmly in mind that the resulting outputs are still only estimates, particularly if one is looking at outputs from a single year in isolation.

Docket No. N2010-1, USPS response to GCA/USPS-T2-1 (May 17, 2010) (first paragraph). Further, the econometric results were limited to estimates of *pieces*: “No estimate has been made regarding the relative contribution of macroeconomic factors on Postal Service *revenues*.” *Id.* at 2 (emphasis added).

A closer look at the documentary trail underlying the econometric estimates submitted in Docket No. N2010-1—and relied on by the Postal Service in its July 25 comments in the present docket—underscores the aptness of these disclaimers. The underlying data and methodology of the econometric estimates were submitted by the Postal Service to the Commission on January 20, 2010. *See* Docket No. N2010-1, USPS response to GCA/USPS-T2-1(b) (identifying earlier data filing). And the Postal Service's own description of the regression methodology submitted to the Commission on January 20, 2010 acknowledges that the Postal Service made no direct observations of the volume of mail diverted to the Internet, but rather used a proxy estimate derived from variables for the number of Internet subscribers and

changes in employment levels. *See* Sources of Change data.zip (filed Jan. 20, 2010), “Econometric Demand Equations for Market Dominant Products as of January, 2010” at 2-3, 11.

The subjectivity of the Postal Service’s decomposition analysis is underscored by the competing analysis submitted by the Greeting Card Association in *its* comments. GCA’s analysis, based on similar data, purports to show that the recession had no significant effect on First-Class Mail volume, and that the effect of the recession on mail volume was no worse than an average recession. GCA comments at 2, 13. Resolving the subjective judgments inherent in this duel of econometricians would take the parties and the Commission far beyond the bounds of the legal analysis contemplated by the court’s mandate and Order No. 757.²

III. THE POSTAL SERVICE HAS NO DUE PROCESS RIGHT TO REOPEN THE EVIDENTIARY RECORD.

A. The Postal Service Had Reasonable Notice That It Needed To Prove That Its Need For The Proposed Above-CPI Rate Increase Was Caused By The Recession.

The Postal Service repeatedly defends its belated submission of data on the theory that Commission improperly deprived the Postal Service of adequate notice and opportunity to submit the data in Docket No. R2010-4 last year. USPS Comments at 28, 30, 61; USPS Opposition to Public Representative Motion to Strike

² We agree with the Postal Service that the Commission should determine the admissibility of the two studies consistently. *See* USPS Opposition (July 26, 2011) at 2 n. 1.

(July 26, 2010) at 2. The Commission, however, has already rejected this claim, and correctly so. As the Commission carefully explained in its brief to the D.C. Circuit,

the statutory text and structure makes clear that price adjustments greater than the rate of inflation must be “due to either extraordinary or exceptional circumstances.” 39 U.S.C. § 3622(d)(1)(E). The Commission’s regulations reinforce that requirement. Substantively, the regulations state that exigency-based adjustments are “authorized only when justified by exceptional or extraordinary circumstances.” 39 C.F.R. § 3010.6(a). Procedurally, the regulations require that any request include a “full discussion of the extraordinary or exceptional circumstance(s) giving rise to the request, and a complete explanation of how both the requested overall increase, and the specific rate increases requested, relate to those circumstances.” *Id.* § 3010.61(a)(3). In this proceeding, the Commission simply applied these statutory and regulatory requirements, and there is therefore no merit to the Postal Service’s contention that the Commission’s actions were arbitrary and capricious.

Because the statute and regulations themselves gave sufficient notice of the requirements for an exigency-based adjustment, this Court’s inquiry can stop there. In any event, the Postal Service’s suggestion that the Commission “conjure[d] up a new standard that no party had advocated” is also mistaken. Pet’r Br. 40. As explained in the Commission’s order, the Public Representative—who was designated by the Commission to represent the public in the proceeding, see 39 U.S.C. § 505—argued that “the Postal Service must show that the proposed rate adjustment ‘is somehow related to resolving the effects of the proffered exigent circumstance.’” Order 59 [JA 206] (quoting Public Representative Comments 18 [Supp. App. 237]). Noting that the “Postal Service paint[ed] a fuzzy picture as to what extent the economy, electronic diversion, or ‘any other single factor’ bears responsibility” for the volume declines and resulting financial difficulties, the Public Representative expressed a “view that the Postal Service seeks to temporarily resolve a serious cash flow problem through the filing of its request, and is not addressing a specific extraordinary or exceptional circumstance.” Public Representative Comments 26 & n.14 [Supp. App. 242]. The Postal Service filed a reply purporting to address these comments. See Postal Service Reply Comments 54-56 [Supp. App. 258-60]. Given these proceedings, it was hardly a bolt from the blue when the Commission concluded that although the Postal “experienced a substantial volume decline” and “faces a liquidity problem,” it “conflate[d] the two and, as a consequence, fail[ed] to demonstrate the nexus between the

additional \$3 billion in annual revenues it seeks, and the exigent circumstances that purportedly give rise to the need for it.” Order 58 [JA 205].

The Postal Service thus had ample notice from the statute, the regulations, and the course of proceedings before the Commission that it could not obtain price increases “due to either extraordinary or exceptional circumstances” without demonstrating how those circumstances justified the proposed increases.

PRC Brief (Jan. 14, 2011) at 41-43.

The Commission was correct. The notice required in both on-the-record hearings and informal rulemakings under 5 U.S.C. § 553 is notice sufficient to alert a reasonable person of the matters at issue. *See Dow Jones & Co., Inc. v. USPS*, 110 F.3d 80 (D.C. Cir. 1997) (on-the-record adjudication); *Boston Carrier, Inc. v. ICC*, 746 F.2d 1555, 1559-1560 (D.C. Cir. 1984) (same); *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004) (citations omitted) (in an informal rulemaking, “an agency satisfies the notice requirement, and need not conduct a further round of public comment, as long as its final rule is a ‘logical outgrowth’ of the rule it originally proposed”—*i.e.*, if interested parties “should have anticipated that” the agency action was “possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”).

The USPS reasonably “should have anticipated” that it would be required to show that the rate increases it was proposing were “due to”—*i.e.*, caused by—the “extraordinary or exceptional circumstances” it was claiming. As the D.C. Circuit squarely held, this requirement is compelled by the plain language of the statute, its overall purposes, and its legislative history. *USPS v. PRC*, 640 F.3d at 1267.

Moreover, the Commission's rules implementing section 3622(d)(1)(E) require that a rate request under that section include "[a] full discussion of the extraordinary or exceptional circumstance(s) giving rise to the request, and a complete explanation of how both the requested overall increase, and the specific rate increases requested, relate to those circumstances." 39 C.F.R. § 3010.61(a)(3).

The USPS gains nothing by complaining that this rule should have been more specific. Since proof of proximate or even sole causation is often an element of the burden of proof, 640 F.3d at 648, the Postal Service was reasonably on notice of the need to establish that the recession was the proximate or efficient cause of the Postal Service's alleged need for an above-CPI rate increase, even if the Commission did not spell out in advance the precise contours of the proof requirement.

Moreover, any lack of greater specificity in the proof requirement stated in the Commission's rules was of the Postal Service's own making. When the Commission proposed the rules implementing 39 U.S.C. § 3622(d)(1)(E) in 2007, the Postal Service argued *against* making the rules more specific:

The Postal Service does not believe that it is necessary or prudent to attempt, in this rulemaking, to specify the situations this exigency standard might cover in advance of an actual need to do so, since it would appear to call for a highly fact-intensive analysis.

PRC Docket No. RM2007-1, *Regulations Establishing System of Ratemaking*, USPS Initial Comments (April 6, 2007), at 16, *available at* www.prc.gov/prc-pages/library/dockets.aspx?activeview=DocketView&docketType=Rulemaking). The USPS reiterated in its reply comments that the Commission "should adhere to its

careful approach of establishing a procedural framework . . . without specifying the circumstances in which such [i.e., exigency] filings can be made [or] the specific nature of allowable increases.” PRC Docket No. RM2007-1, USPS Reply Comments (October 9, 2007), at 43-44, 45, *available at* www.prc.gov/prc-pages/library/dockets.aspx?activeview=DocketView&docketType=Rulemaking). The USPS added that “the proposed procedures”—which, with one minor change supported by the USPS, were adopted in that docket as a final rule and under which the proceedings now on appeal were conducted—

seem to be fully consistent with the Act, and with the Commission’s broad discretion concerning how to implement the requirement that parties be accorded ‘notice and opportunity for a public hearing and comment.’

Id. at 45; *see also Order No. 43 - Order Establishing Ratemaking Regulations*, 72 Fed. Reg. 63,662, 63,680-81 (PRC Nov. 9, 2007).

In any event, the USPS clearly received timely actual notice of the causation issue during the proceedings below. During the period between the initial filing of the USPS rate request and the deadlines for filing comments on the request, the Commission held several days of live hearings at which members of the Commission questioned the Postal Service’s rate case witnesses. At these hearings, the Commission repeatedly expressed concern about the Postal Service’s apparent failure to show that the specific increases sought by the USPS were caused by the recession, rather than other factors. See Order at 63 (quoting Tr. 39-40, 82-83, 98-99, 205, 213, 238-239). The USPS thus was clearly on notice that this was an issue,

and could have tried to address the Commission's concerns in its subsequent comments.

The USPS also received actual notice of the issue from the comments of the Commission's Public Representative, the Commission staff members appointed to "represent the interests of the general public" in the case.³ The Public Representative specifically argued that the USPS had failed to establish a causal relationship between the recession and the amount of the proposed increases. Public Representative comments at 11, 18-19, 24-27. The USPS tried to rebut this criticism in its reply comments. USPS Reply Comments at 54-56; *see also* Order at 47-48, 59-60 (discussing Public Representative comments and USPS response). Given this notice, the Postal Service has only itself to blame for its failure of proof.

B. The Proper Vehicle For Submitting New Analyses Of This Kind Is A New Exigent Rate Case.

The Postal Service's belated attempt to stuff the record in this case is improper for the further reason that has always had the opportunity to make a new showing of causation by filing a new exigent rate increase proposal under 39 U.S.C. § 3622(d)(1)(E). As the Commission noted in its brief to the D.C. Circuit:

To the extent the Postal Service believes it can make the required showing, it may file a new request with the Commission without any action by this Court—and, indeed, was free to do so as soon as the Commission issued its order.

³ 39 U.S.C. § 505; *Order No. 485 - Notice and Order Concerning Rate Adjustment for Extraordinary or Exceptional Circumstances*, 75 Fed. Reg. 40,855 (PRC July 14, 2010).

PRC Brief to D.C. Circuit in 10-1343 (Jan. 14, 2011) at 44. “If the Postal Service wishes to perform the appropriate analysis and present a new request, the Commission stands ready to entertain it.” *Id.* at 45. A new exigent rate filing, of course, will need to receive the same level of scrutiny and opportunity for rebuttal that the Postal Service’s proposal received in the initial phase of this case. But that is all the more reason to require the filing of a new request.

CONCLUSION

For the foregoing reasons, the portions of the Postal Service's July 25 comments cited in the first paragraph of this motion should be stricken. The alternative of extending the filing deadline for reply comments is not an adequate remedy. If the Postal Service wants to submit new evidence on the effects of the recession on the Postal Service's finances, the Postal Service should file a new exigent rate case under 39 U.S.C. § 3622(d)(1)(E).

Respectfully submitted,

Ian D. Volner
David M. Levy
Matthew D. Field
VENABLE LLP
575 Seventh Street, N.W.
Washington DC 20004
(202) 344-4800
idvolner@venable.com
dlevy@venable.com
mfield@venable.com

*Counsel for Alliance of Nonprofit
Mailers, Association for Postal
Commerce, and Magazine Publishers
of America, Inc.*

Jerry Cerasale
Senior Vice President for Government
Affairs
DIRECT MARKETING ASSOCIATION, INC.
1615 L Street, N.W., Suite 1100
Washington DC 20036
jcerasale@the-dma.org

*Counsel for Direct Marketing
Association, Inc.*

July 27, 2011