

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

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

**OPPOSITION OF
ALLIANCE OF NONPROFIT MAILERS,
AMERICAN BUSINESS MEDIA,
DIRECT MARKETING ASSOCIATION, INC., AND
MAGAZINE PUBLISHERS OF AMERICA, INC.,
TO USPS MOTION TO STAY
(October 7, 2011)**

The undersigned parties oppose the October 4 motion of the Postal Service to “stay its request for exigent relief” in this docket.

The motion asks the Commission to extend until December 15—and possibly for an indefinite period after that—the October 4 deadline imposed by Order No. 864 for the Postal Service to file a notice of whether (and how) the Postal Service wished to continue pursuing an actual rate increase in this docket. The Postal Service asserts that the October 4 deadline has become “premature and potentially counterproductive” because several bills concerning the Postal Service are pending in Congress, and “it would be grossly premature to anticipate what, if anything, might come out of these initiatives.” This reasoning is without merit.

First, no stay of the proceedings in this docket is warranted because nothing remains to stay. The court’s mandate to the Commission in *USPS v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011), was to reconsider the Commission’s construction of the “due to” language of 39 U.S.C. § 3622(d)(1)(E) and, in particular, the causal link required between the Postal Service’s asserted need for an above-CPI rate increase and the exigent circumstances that assertedly created that need. 640 F.3d at 1267-68. The Commission completed this assignment with the issuance of Order No. 864.

In Order No. 864, the Commission also gave the Postal Service an opportunity to submit additional argument and evidence that all or part of the proposed increase satisfied the newly clarified standards. This opportunity was not open-ended, however. The Commission conditioned it on the filing by the Postal Service, “no later than October 4, 2011,” of a “statement indicating whether and how [the Postal Service] wishes to pursue its Exigent Request, as described in the body of this Order.” *Id.* at 56. The Commission specified that this filing must include

an explanation for the basis for [the Postal Service’s] claim that the record satisfies the causal nexus of “due to,” as interpreted by the Commission in this Order, as well as the remaining requirements of section 3622(d)(1)(E). The Postal Service shall also identify with particularity those portions of the record as of September 30, 2010 that it believes support its Exigent Request. . . . If the Postal Service wishes to supplement the factual materials in the record in light of this Order, it shall, by separate motion, request leave to supplement. It should indicate the nature and extent of the new materials it intends to add, how it

will sponsor that evidence, and when such evidence will be filed. Persons wishing to respond to any such motion shall respond in accordance with the Commission's rules of practice.

Order No. 864 at 54.

The Postal Service filed none of the required pleadings with the Commission by the October 4 deadline. Hence, the record closed—and Order No. 864 became final—at 4:30 pm on October 4.¹

Nor may the Postal Service's motion be sustained by treating it as a motion to *reopen* the record. The purpose of reopening an administrative record is to allow a party to file additional pleadings, briefs or evidence. The Postal Service, however, proposes to submit nothing of this kind—not now or for the foreseeable future.

Furthermore, holding this docket open is unnecessary to preserve the Postal Service's right to seek an exigent rate increase in the future if the Postal Service decides that changed circumstances warrant. In that event, the Postal Service will be free to file a request for approval of the increase pursuant to the law in effect at the time, based on the best and most current evidence then available.

¹ Although 39 U.S.C. § 3663 provides for judicial review of Commission decisions, the Postal Service's failure to exhaust its administrative remedies effectively bars the Postal Service from challenging the clarified standards. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (explaining exhaustion-of-remedies doctrine); *McKart v. United States*, 395 U.S. 185, 193, 194 (1969) (same).

Finally, the motion also gains nothing from the pendency of proposed legislation to amend various ratemaking provisions of Title 39. None of the postal bills, as currently drafted, would require the Commission to take any further action on the Postal Service's exigent rate request in this docket. Although new or different provisions may emerge, the ultimate outcome of the legislative process can only be speculated about. As the Postal Service concedes, "it would be grossly premature to attempt to anticipate what, if anything, might come out of these initiatives." Motion at 3.

This unknown weighs against, not in favor of, staying the resolution of this proceeding. Courts and agencies decide cases on the basis of the law as it is, not as it might become. The "Commission and participants must act in accordance with the law as it is currently written, not speculate upon possible Congressional intervention into that process." Presiding Officer's Ruling No. R2005-1/84 (Sept. 21, 2005) at 4; *accord*, *Johnson v. United States*, 54 Fed. Cl. 187, 197, 90 A.F.T.R.2d 2002-7013 (2002) ("Pending legislation is not law."). Consistent with this principle, the Commission declined in Docket No. R2005-1 to adjust the Postal Service's revenue requirement to reflect the anticipated effect of legislation that would modify the Postal Service's funding obligations for retiree health benefits, PRC Op. & Rec. Decis. (Nov. 1, 2005) at ¶ 3035), or even to allow discovery on the subject. Presiding Officer's Ruling No. R2005-1/84 at 4 (sustaining USPS objections to OCA interrogatories concerning the financial effect of proposed legislation concerning the funding of the Postal

Service's Retiree Health Benefits Fund). *Accord*, Docket No. R2005-1, USPS Response to OCA Motion to Compel (Sept. 16, 2005) at 2 (“Unless and until actual legislation is passed and analyzed, it is premature and impossible to speculate accurately on its effect on the request in this docket.”).

The same considerations weigh against staying a proceeding merely because pending legislation might change the governing law. *See Brostron v. Advance Metalworking Co.*, Case No. 11-4014 (C.D. Ill., May 24, 2011) (denying motion to “stay this case on the chance that during its pendency Congress might change the governing statute”); *San Francisco Tech., Inc. v. Dial Corp.*, 2011 WL 941152 at *4 (N.D. Cal., March 17, 2011) (denying stay where there is “no indication that legislation is imminent. Moreover, the unpredictability of the legislative process counsel against the imposition of a stay.”); *Fluid Control Products, Inc. v. Aeromotive, Inc.*, Case No. 11-2091-JAR (D. Kans., April 18, 2011) (“Without some evidence that enactment of this legislation is imminent, it is not in the interests of judicial economy and efficiency to stay this case rather than dismiss it without prejudice.”); *Utah Women's Clinic Inc. v. Graham*, 892 F. Supp. 1379, 1381 (D. Utah 1995) (declining to stay case based on pending possible legislation); *Warren v. Oil, Chemical and Atomic Workers Pension Fund*, 779 F. Supp. 563 (E.D. Mich. 1989) (declining to stay case pending outcome of legislative effort to overturn governing case law).

CONCLUSION

This case is over. The rest of the world has moved on, and the time has come for the Postal Service to do the same. The Postal Service, if it wishes, has the right to file a new exigent rate case based on new data at any time. The Postal Service is also entitled to pursue its case for relief on Capitol Hill. Neither option, however, requires “staying” this docket.

Respectfully submitted,

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