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POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Notice of Price Adjustment, Technology Credit Promotion	Docket No. R2013-6

PUBLIC REPRESENTATIVE COMMENTS

(May 6, 2013)

I. INTRODUCTION

The Technology Credit Promotion (Tech Credit) is an innovative approach by the Postal Service to an important issue. While, procedurally, comments are not due until May 17, 2013, the Public Representative files these comments in line with Commission Rule 3010.13(a)(5) so the Commission can give careful consideration to the novel issues raised by the Postal Service's Notice.[1] The Public Representative is also concerned with allowing the Postal Service and other participants in this docket the opportunity to consider, and contribute to the issues raised in these comments.[2]

The Public Representative agrees that the extra time to prepare comments granted by the Commission is needed to evaluate the Postal Service's full proposal, which has not been provided at this juncture. However, the Public Representative is concerned that waiting until the revised May 17, 2013 deadline to file these comments

[1] United States Postal Service Notice of Market-Dominant Price Adjustment (Technology Credit Promotion), April 16, 2013 (Notice).

[2] The Postal Service often files "Reply Comments" in market dominant price adjustments. *See, e.g.*, Docket No. R2013-1, Reply Comments of the United States Postal Service, November 9, 2012.

will not provide the Commission with adequate time to carefully consider the unprecedented issues raised by the Postal Service's Notice and these comments. Accordingly, the Public Representative believes it is more prudent to file these comments in accordance with the Commission's regulatory deadline rather than await responses to CHIR No. 1, particularly since the statutory and regulatory deadlines for the Commission's decision and the effective date of the Tech Credit have not been similarly extended. Unless the such deadlines for the Commission's decision and the effective date of the Tech Credit are extended, the urgency of final Commission action is not alleviated.[3] Below, these due process concerns are discussed first.

The Public Representative supports the Tech Credit in principle. However, in addition to due process issues, the Public Representative has significant concerns with the implementation and design of Tech Credit itself. As discussed in the Postal Service's Notice, in January 2014 a Full Service Intelligent Mail barcode (IMb) will be required for mailers to be eligible for automation postal prices. In order for mailers to implement Full Service IMb, significant upgrades in technology are required. The Public Representative commends the Postal Service for considering the cost to mailers of implementing this new technology. The Public Representative also commends the Postal Service for proposing a program to help mailers offset this new cost of automation discount compliance.

The Postal Service is requesting additional price cap authority based on this promotion to be used when it files its next market dominant price adjustment. It is troubling that the Postal Service has not provided sufficient information to determine the

[3] The Postal Service's pretext for requesting an extension of the comment deadline is because it anticipates its responses to CHIR No. 1, question 6 "will be extensive" and "more time may be appropriate for parties to prepare comments." Postal Service Response to Order Extending Deadline for Comments, May 2, 2013. The Public Representative believes that the Postal Service's forthcoming response to CHIR No. 1, question 6 should provide valuable insight as to the Postal Service's price cap calculations and its justification for filing this proceeding as either a Type 1-A, Type 1-B, Type 2, or Type 3 rate adjustment – information that may be necessary for the Commission to complete its review and calculate price cap implications. However, this information is not expected to alter the fundamental, larger issues raised in this case. If the Postal Service's responses to CHIR No. 1 raise additional issues that affect the interests of the general public, the Public Representative will supplement these comments.

price cap authority impact of the proposal in line with Commission precedent and regulations. The Postal Service is attempting to gain price cap authority by introducing a new, negative price. However, the Postal Service is, by barcode eligibility rules, effectively forcing mailers to pay higher prices without a corresponding decrease in price cap authority associated with an increase in prices. The Commission should not provide the Postal Service with additional price cap authority requested in this docket until the important issues raised by the Postal Service's Federal Register Notice are resolved.[4]

After addressing the due process issues first, below, the Public Representative next discusses how the Tech Credit is effectively a mail classification change proposing a new price. As such, available methods for calculating any price cap authority are detailed. Third, any price cap authority created by the temporary promotion should also be similarly temporary. Fourth, if the Tech Credit has price cap implications, the related change in barcode standards from POSTNET to Full-Service IMb must also have price cap implications that need to be taken into account. Fifth, if the Tech Credit is not a mail classification change proposing a new price, it should be considered a Negotiated Service Agreement or Market Test for price cap calculation purposes. Finally, the Tech Credit may not achieve its stated objectives.

II. DUE PROCESS CONCERNS

This case highlights a procedural due process issue that has been brewing for some time. It is not uncommon in Commission "MC," "CP," and "R" cases for the Postal Service to file bare bones initial pleadings and rely on the Commission to fill in gaps through Commission/Chairman information requests. The Commission's review period "start-the-clock" begins on the date of the Postal Service's bare bones filings. Typically, participant comments are due some period of time later based on the date of that initial

[4] 78 FR 23137 (April 18, 2013).

bare bones filing. A Commission/Chairman information request is then issued to address the gaps left by the Postal Service's initial bare bones filings. The deadline for the Postal Service's response to Commission/Chairman information requests is usually due a few days before or a few days after the comment deadline. This leaves participants with only a few days to review and comment on the Postal Service's entire case rather than the period of time anticipated by the Commission's original scheduling order or regulation.

Perversely, this system encourages the Postal Service to file such initial pleadings because it expects the Commission to supplement and complete the record through information requests. There is no incentive for the Postal Service to make complete filings in its initial pleadings for fear of the Commission dismissing filings as incomplete and requiring the Postal Service to refile its case anew.

These due process concerns are amplified in this case. Here, the Postal Service filed its initial filing on April 16, 2013. Because the Postal Service suggests this case has price cap implications invoking the price cap regulations, the Commission has to decide the case in 34 days, and comments are due on day 20.[5] At the outset of this case, the Postal Service filed bare bones initial filings without the data necessary to evaluate its request as required by Commission regulations. To remedy this deficiency, the Commission issued an information request on day 15, requiring a Postal Service response by day 21.[6] The comment deadline was initially extended to day 23, providing participants with 2 days to review a complete Postal Service filing.[7] The comment deadline was then extended again to day 31[8] – 3 days before the Commission's deadline for issuing its decision.[9] It will be extremely difficult for the Commission to give careful consideration to comments filed 3 days before the deadline for issuing a

[5] 39 CFR 3010.13(c), 3010.13(a)(5).

[6] Chairman's Information Request No. 1, May 1, 2013.

[7] Order No. 1708 - Order Extending Deadline for Comments, May 1, 2013.

[8] Order No. 1710 - Order Extending Deadline for Comments, May 3, 2013.

decision, particularly since the statutory and regulatory deadlines for the Commission's decision and the effective date of the Tech Credit have not been similarly extended.

To ensure that participants are provided with appropriate due process as intended by the statute and by the Commission's regulations, the Commission needs to provide the proper incentives to the Postal Service to encourage complete filings at the outset of the case. This should include dismissing cases that contain incomplete filings and requiring the Postal Service to file such cases anew.

III. THE TECH CREDIT PROMOTION IS A MAIL CLASSIFICATION CHANGE PROPOSING A NEW PRICE

The Postal Service believes it should "be permitted to treat the Technology Credit Promotion as a decrease in prices, resulting in price authority, and delay the use of that price authority until its next market-dominant price change." Notice at 5. The Tech Credit is not a decrease in prices, as no prices in effect in the prior year will change as a result of the credit. Instead, the Tech Credit is a classification change creating a new (negative) price, at which no volume was mailed in the previous year.[10] There are regulations for how the Postal Service should treat the addition of new categories to the Mail Classification Schedule (MCS).[11]

When the Postal Service proposes the addition of a new rate category to the MCS, Commission rules require that it make "reasonable" adjustments to the previous year's billing determinants to account for the new price. *Id.* The Tech Credit will be paid on a per CRID basis, based on FY 2012 volume of the CRID. The number of

[9] Even if the Commission does not comply with the deadline in 39 CFR 3010.13 for issuing a decision, it still must issue a final decision shortly thereafter. *See* 39 U.S.C. 3622(d)(1)(C).

[10] Rather than being paid on a per mailpiece basis, the Tech Credit is assigned to particular mailer IDs, known as CRIDs.

[11] 39 CFR 3010.23(d).

CRIDs by volume tier and class was not provided in the FY 2012 billing determinants.[12] However, in order to accommodate the Postal Service's proposal, the Public Representative proposes a straightforward mechanism for calculating the price cap impact of the new price. Table 1 details how the price cap impact of the Tech Credit can be calculated:

Table 1 Hypothetical Billing Determinant Method for First Class CRIDs

FY 2012 CRID Volume	First Class Volume	FY 2012 Price	FY 2012 Revenue	FY 2013 Price (Technology Credit)	FY 2013 Revenue
125,001 to 500,000	6004	$ -	$ -	$ (2,000)	$ (12,008,000)
500,001 to 2,000,000	3008	$ -	$ -	$ (3,000)	$ (9,024,000)
2,000,001 and above	660	$ -	$ -	$ (5,000)	$ (3,300,000)
Change in Revenue					$ (24,332,000)

In this example, 9,672 First-Class mailing locations are eligible for the Tech Credit.[13] In its original filing, the Postal Service has used volume as a proxy for determining the potential price cap impact by class. Given that the credit will be paid on a per CRID basis, CRIDs should be used as the "volume" billing determinant.

The Commission's implementation of the price cap regulations utilizes a backward weighted volume index. The mathematical process of calculating a percentage change in prices is more difficult when no historical volume exists for new prices. Using accepted Commission methodology, the Postal Service has two paths for estimating the new volume for a new price. The first method is to use available information to determine how much volume would have qualified for the new prices if they had been offered the previous year. An example of this first method is the promotions for First-Class and Standard Mail in Docket No. R2013-1. The second method is for the Postal Service to estimate mailer response to the new price offering. An example of this second method is the introduction of Full-Service IMb in Docket No.

[12] It is possible that the number of permits provides an insight into the number of CRIDs. However, the permit data is not linked to volume data.

[13] This hypothetical example is intended to align with the $24,332,242 estimated by the Postal Service in the file "PriceCapAnalysis042613.xls."

R2009-2. Generally speaking, the Commission has stated a preference for using historical information over projections in price cap calculations.[14]

These two methods differ in their impact on calculating the effect on price cap authority. When historical information has been used, the mailer response to a new price has been underestimated. When the Postal Service has projected mailer response, the response has been overestimated.[15] These methods are addressed in more detail below.

A. Using Historical Volume of Eligible and Qualifying CRIDs Will Likely Understate the Price Cap Authority Impact of the Promotion

If the Commission uses historical CRID volumes that would have qualified for the Tech Credit to estimate impact on the price cap, such methodology will likely understate the actual mailer response to the Tech Credit promotion. An example of this phenomenon was discussed in Docket No. R2013-1. In Order No. 1541, the Commission approved promotional prices for First-Class and Standard Mail. As part of the Docket No. R2013-1 market dominant price adjustment, the Postal Service included revenue reductions from those promotional prices. The Commission noted:

> Generally, the concern with including promotions in the cap calculation is that if the volume weights used in the cap calculation are overstated, the price authority created would be overstated as well. In Docket No. R2011-1, classification and price adjustments for First-Class and Standard Mail Initiatives, the Commission concluded that expected new volume should not be considered in the price cap calculation. Specifically, the Commission stated: "[a]djustments to the volume weights [used to measure the percentage change in rates]…should not attempt to anticipate changes in mailers' behavior in response to changes in prices or classifications. In the instant docket, the Postal Service seeks to recover the forgone revenue resulting from the promotions being offered in calendar year 2013 where historical volumes are available for the

[14] *See, e.g.*, Order No. 1541 at 17.

[15] See FY2010 ACD at 154 (detailing how the Postal Service's projection of Full-Service IMb volume overstated the actual amount of IMb discounts provided).

> calculation of the effect of the price change resulting from the promotions on the price cap. Thus, the Postal Service does not rely on forecasts of expected volume to establish the volume weights in the cap calculation.

Order 1541 at 17.

In this docket, this Postal Service appears to have made adjustments to the historical billing determinants to determine how mailers will respond to the Tech Credit, without detailing how the adjustments were made. The accepted analytical principle used in Docket No. R2013-1 requires that no change in mailer behavior is to be assumed. As such, using the accepted analytical principle, price cap authority could be based on eligible CRIDs with at least one mailing that would have qualified for the Tech Credit in FY 2012. The Postal Service has not provided the information needed to analyze the historical use of Full Service IMb by mailers across all classes. In order to assess FY 2012 use of Full Service IMb by CRID, one would need the number of CRIDs by class, the volume for those CRIDs and the Full Service IMb volume by CRID. None of this information has been provided to date by the Postal Service.

The "Monthly Progress Report on Full-Service Intelligent Mail Participation and Compliance by Commercial First-Class Mail and Standard Mail Customers" provided by the Postal Service gives some indication of the number of mailers that would have qualified for the discount in FY 2012.[16] In the August 29, 2012 Monthly Report, the Postal Service stated that there were 628 active Full Service IMb customers between June 1, 2012 and August 17, 2012. The number of active customers increased to 752 by the end of calendar year 2012.[17] A calculation of additional price cap authority created by the Tech Credit promotion using historical billing determinants is contained in Table 2.

[16] *See* http://www.prc.gov/Docs/85/85042/Monthly%20Report.pdf.

[17] *See* http://www.prc.gov/Docs/85/85757/Monthly%20Report.pdf.

Table 2 Actual Qualifying First Class CRIDs					
CRID Volume	First Class Volume	FY 2012 Price	FY 2012 Revenue	FY 2013 Price (Technology Credit)	FY 2013 Revenue
125,001 to 500,000		$ -	$ -	$ (2,000)	$ -
500,001 to 2,000,000		$ -	$ -	$ (3,000)	$ -
2,000,001 and above	752	$ -	$ -	$ (5,000)	$ (3,760,000)
Change in Revenue					$ (3,760,000)

This table demonstrates that using historical billing determinants, the Postal Service would obtain approximately $3.8 million in additional price adjustment authority for First-Class Mail. However, the Postal Service projects it will provide over $24 million in Technology Credits for First-Class Mail pursuant to the promotion. Thus, using historical information will likely understate the mailer response to the change in prices caused by the Tech Credit promotion.

B. Estimating Mailer Response to the Tech Credit Promotion May Overstate the Price Cap Authority Impact; However, Such Overstatement Can be Corrected by Actual Experience

On the other hand, using estimated mailer response to the Tech Credit promotion may overstate the additional price cap authority created by the promotion. However, this overstatement can be avoided by correcting for actual experience. Table 3 details the eligibility for the Tech Credit by class.

Table 3: Postal Service Distribution of Eligible Volume by Class			
Class / Product	Eligible Pieces	Total FY 2012 Pieces	Percent of Pieces Eligible for Tech Credit
First-Class Presort Mail	42,255,728,206	42,733,615,899	98.88%
Periodicals	5,005,009,694	6,741,350,951	74.24%
Standard Mail	66,658,137,434	79,496,105,354	83.85%
Package Services	227,068,255	330,943,622	68.61%
Total	114,145,943,589	129,302,015,826	88.28%

As estimated by the Postal Service, 98.88 percent of First-Class Presort mail will be eligible for the credit. Based on the calculations in the file

"PriceCapAnalysis042613.xls," it appears that the Postal Service intends to create price cap authority for all credits it projects it will provide to First-Class Presort mailers.

In FY 2012, roughly 60 percent of First-Class Presort mail earned a Full-Service IMb discount.[18] A significant number of mailers must change their behavior if 98.88 percent of the First Class Presort mail sent while the promotion is active will qualify for the discounts.

The Public Representative submits that if the Postal Service is requesting increased price cap authority for every dollar paid in technology credit, the price cap calculation should be done using actual data. The Postal Service stated that it intends to use the price cap authority created from this Tech Credit promotion in its next market dominant price adjustment.[19] The Postal Service expects that it will file such a price adjustment after the Tech Credit has begun. *See id.* At that juncture, the Postal Service can provide the actual credits paid to date. If the Postal Service believes additional credits will be paid before the end of the program, it can separate actual and predicted credits at that time, for example, as shown in Table 4.

Table 4: Actual and Predicted Credits

FY 2012 CRID Volume	First Class Volume - Actual	Actual Credits	First Class Volume - Additional Predicted	Additional Predicted Credits	Total Change in Revenue
125,001 to 500,000	3002	$ (6,004,000)	3002	$ (6,004,000)	
500,001 to 2,000,000	1504	$ (4,512,000)	1504	$ (4,512,000)	
2,000,001 and above	660	$ (3,300,000)	0	$ -	
		$ (13,816,000)		**$ (10,516,000)**	**$ (24,332,000)**

If the Postal Service requests additional price cap authority through forecasting additional Tech Credits to be paid, a subsequent data collection report can verify the accuracy of the payments when the promotion concludes. If the final numbers for the program differ from the projection, the actual price cap authority can then be adjusted in a subsequent Postal Service market dominant price adjustment proceeding.

[18] *See* Docket No. ACR2012, Library Reference USPS-LR-FY12-4, file "FY2012 FCM.xls."

[19] Notice at 4-6.

IV. ANY ADDITIONAL PRICE CAP AUTHORITY CREATED BY THE TECH CREDIT PROMOTION IS TEMPORARY SINCE THE TECH CREDIT PROMOTION ITSELF IS TEMPORARY

The Commission should make clear that any additional price cap authority created by a credit in the MCS will be removed when the credit is removed. The Postal Service has stated that the Tech Credit promotion will be a "one-time credit." Notice at 1. Table 1, above, contains an example of how temporary price cap authority created by the Tech Credit can be calculated. Similarly, Table 5, below, contains an example of how the removal of temporary price cap authority can be calculated.

Table 5: Hypothetical Billing Determinant Method for the Removal of the Technology Credit Program

FY 2012 CRID Volume	First Class Volume	FY 2013 Price (Technology Credit)	FY 2013 Revenue	FY 2014 Price (NO Technology Credit)	FY 2014 Revenue
125,001 to 500,000	6004	$ (2,000)	$ (12,008,000)	$ -	$ -
500,001 to 2,000,000	3008	$ (3,000)	$ (9,024,000)	$ -	$ -
2,000,001 and above	660	$ (5,000)	$ (3,300,000)	$ -	$ -
Total			$ (24,332,000)		$ -
Change in Revenue					**$ 24,332,000**

In short, the $24.3 million in negative revenue added to the 2013 First-Class Mail price cap calculation will be offset by a positive $24.3 million in revenue added to the 2014 price cap calculation. Any temporary prices must create temporary price cap authority in order to comply with the price cap. A simple hypothetical illustrates the danger of creating permanent price cap authority from temporary price reductions.

Imagine a promotion by the Postal Service called "First-Class Free Mail Week," where for one week, the Postal Service would allow all mailers to enter First-Class Mail for free. In an average week, mailers enter over $585 million in First-Class Mail.[20] Using historical billing determinants, First-Class Free Mail Week would create $585

[20] In FY 2012, revenue for First-Class Mail was $30.433 billion. $30,433 million/52= $585.44 million. *See* Docket No. ACR2012, Library Reference USPS-LR-4, file "FY2012 FCM.xls."

million in additional price cap authority. After First-Class Free Mail Week, the Postal Service would have sufficient price cap authority to increase the First-Class Mail single piece stamp price by 2 cents, from 46 to 48 cents.[21] If the Postal Service were allowed to continue the 48 cent price in perpetuity while no longer offering "First-Class Free Mail Week," single piece mailers would be trading a one-time, 2 percent, reduction in prices for a permanent 4.3 percent increase in prices. If such price cap avoidance tactics are allowed, the goals of the price cap system will be frustrated.

V. AS THE TECH CREDIT IMB PROMOTION HAS PRICE CAP IMPLICATIONS, CHANGING BARCODING STANDARDS SUCH THAT MAILERS MUST USE BASIC AND FULL-SERVICE IMB ALSO HAS PRICE CAP IMPLICATIONS

As a related matter, as the Postal Service is arguing that the Tech Credit IMb promotion has price cap implications, then changing barcoding standards in such a manner that requires mailers to use Basic or Full Service IMb to retain qualification for their current rate categories is also a price increase with price cap implications.

The POSTNET barcode has been in use since the early 1980s. There has never been a transition in barcoding technology equivalent to the two year shift from POSTNET to Basic IMb to Full-Service IMb. As such, there is little precedent to guide Postal Service and Commission action regarding this matter. What is clear is that in 2014, many mailers will face higher prices if they do not upgrade their barcoding technology.

In FY 2012, 58.8 percent of First-Class Presorted mail qualified for the Full-Service IMb discount.[22] The percentage of presorted mail that included a POSTNET or Basic IMb barcode is not readily discernible from the billing determinant data provided by the Postal Service, but those two barcoding technologies accounted for nearly 20

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[21] In Docket No. R2013-1, increasing the First-Class single piece price from 45 cents to 46 cents accounted for $213 million of the calculated First-Class Mail revenue increase.

[22] Docket No. ACR2012, Library Reference USPS-LR-FY12-4, file "FY2012 FCM.xls."

billion First-Class Mail pieces in FY 2012. Since January 28, 2013, mailpieces including a POSTNET barcode are no longer eligible for automation (pre-barcoded) prices.

Because the breakdown of volume by barcoding technology is not available, it is not clear how many mailers faced price increases beginning January 28, 2013 for their POSTNET barcoded pieces. However, the price increases that such mailers faced are clear. For First-Class Mail, there are no prices for non-automation mailpieces, as there are for Standard Mail and Periodicals mailpieces. A First-Class mailer entering a 5-digit mailing after the implementation of the Docket No. R2013-1 prices would have been charged 36 cents per piece with a POSTNET barcode. However, due to the discontinuance of POSTNET barcodes, the same pieces are no longer eligible for the 36 cent per piece price. Rather, such pieces must now pay the "presort letters" price of 43.3 cents per piece.[23]

In Standard Mail and Periodicals, the Postal Service provides a significant discount for mail that is presorted, and an additional 1-3 cent discount for including a barcode. Standard and Periodicals mailers who entered POSTNET barcoded mail on January 28, 2013 were no longer eligible for an automation discount, but they were still eligible for a presort discount.

Due to data limitations, the Public Representative cannot provide information as to the impact of the rule change requiring Basic IMb instead of a POSTNET barcode to qualify for automation prices. However, the impact of the change in barcode rules requiring the Full-Service IMb can be calculated. Table 6 details the price change to mailers of implementing the Full-Service IMb rule change.

[23] There is no 5-digit presort rate in First-Class Mail, simply a general price for all non-barcoded presort mail, regardless of presort depth.

Table 6 : Impact of Barcode Regulation Change		
First Class R2013-1 Automation IMb Participation		
R2013-1 First Class Automation Volume		43,815,944
R2013-1 First Class Full-Service IMb Volume		25,760,934
Percent Full Service IMb		58.8%
First Class R2013-1 Automation and IMb Compliance		
R2013-1 First Class Revenue		$31,372,977
Increased Revenue from Full Service IMb Requirement		$ 1,130,839
Price Increase		3.60%

If First-Class presort mailers do not adopt Full-Service IMb by January 26, 2014, they will face a $1.1 billion price increase, nearly 20 times the price cap impact of the Tech Credit. This is especially problematic because these mailers will have done the same work for the Postal Service, and the Postal Service will incur no additional expenses in processing these mailpieces.

The Public Representative is a firm believer in the benefits to the Postal Service of Full-Service IMb. However, the “carrot” of a $24 million “credit” (which all First-Class mailers will have to pay back in the form of higher prices) pales in comparison to the $1.1 billion “stick” that may not count against the price cap.

The Postal Service has wide latitude to alter the Domestic Mail Manual (DMM) to conform to its operations without facing price cap implications.[24] For example, if the Postal Service cannot run certain mailpieces on its processing equipment, it is reasonable for that mail not to pay machinable prices. Here, however, the required switch to Full-Service IMb does not change how the Postal Service processes the mail.

Analogous to the required switch to Full-Service IMb is the “Move Update” case in Docket No. R2009-2. The Postal Service’s move update rules define how “clean” a mailing has to be to qualify for presort discounts. In Docket No. R2009-2, the Postal Service proposed a change to the move update rules. In that case, the Commission found that the change in the Postal Service’s move update rules had price cap authority implications. The Commission stated:

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[24] An example of such an operational DMM change is “the bend test,” which defines the tailpieces that can be run on machines, and thus qualify for machinable rates.

> In its Original Notice, the Postal Service announced a planned 7-cent surcharge for Standard Mail that fails to comply with Move Update requirements. Original Notice at 18. The Commission approved this change by operation of Order No. 191. In its Amended Notice, the Postal Service announced, on its own accord, that it plans to postpone implementation of the new surcharge from May 11, 2009 to January 4, 2010. Amended Notice at 2. It says this will provide Standard Mail customers with additional feedback from new postage verification systems and will reduce the overall percent increase for the Standard Mail class from 3.781 percent to 3.759 percent. *Id.* Related calculations appear in an accompanying spreadsheet.

Order No. 201 at 3.

The changes in the Postal Service's move update rules are similar to the impending changes in barcoding standards. Both rule changes do not directly impact Postal Service operations and both require changes in mailer technology. Accordingly, the Commission should require the Postal Service to provide detailed volume history, by class, by barcode technology (POSTNET, Basic IMb, and Full-Service IMb) for FY 2012 and FY 2013 to determine the impending impact on the price cap of changing barcode technology eligibility requirements.

VI. ALTERNATIVELY, THE TECH CREDIT PROMOTION SHOULD BE TREATED AS A NEGOTIATED SERVICE AGREEMENT OR MARKET TEST FOR PRICE CAP CALCULATION PURPOSES

Alternatively, because the Tech Credit promotion is temporary, it is more akin to a Negotiated Service Agreement (NSA) or experimental product rather than a Type 1-A or Type 1-B rate adjustment. Accordingly, the Tech Credit should be treated as an NSA or market test for price cap purposes and excluded from price cap calculations.

A. The Tech Credit as a Negotiated Service Agreement

Due to the Tech Credit promotion's temporary nature, it is more akin to a NSA rather than a Type 1-A or Type 1-B rate adjustment. Applicable Commission regulations define NSAs as follows:

> *Negotiated service agreement* means a written contract, to be in effect for a defined period of time, between the Postal Service and a mailer, that provides for customer-specific rates or fees and/or terms of service in accordance with the terms and conditions of the contract….

39 CFR 3001.5(r) (emphasis in original). The Tech Credit could qualify under this definition. First, it is for a defined period of time; it is not permanent. The Tech Credit is scheduled to run from June 1, 2013 to May 31, 2014. Second, it provides for special customer-specific rates or fees and/or terms of service. The Tech Credit provides a $2,000 to $5,000 credit for mailers with qualifying CRIDs who sent certain mailpieces in FY 2012 and agree to send mailings containing 90 percent Full Service IMb during the promotion period. Finally, for Tech Credit to be appropriately classified as an NSA, the mailer and the Postal Service must provide the stated special customer-specific price or fee and/or terms of service "in accordance with the terms and conditions of the contract." Contracts generally do not need to be signed to be enforceable.[25] Along the same lines, the mailer does not have to formally agree ahead of time to the action the Postal Service is requesting the mailer to take. The mere act of a mailer taking the requested action is enough to create a contract.[26] Here, the Postal Service has told

[25] *See, e.g.*, *Operating Engineers Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645 (7th Cir. 2001)("Nothing in the law of contracts requires that a contract, whether original or modified, must be signed to be enforceable ... provided there's other evidence of acceptance, for example (a very pertinent example) by performance.").

[26] *See, e.g.*, *Patel v. American Bd. of Psychiatry and Neurology, Inc.*, 975 F.2d 1312 (7th Cir. 1992). (noting that in a unilateral contract the offeror waives formal acceptance; it is enough that the offeree performs as specified in the offer); Restatement Second, Contracts § 96 (stating that no communication or notice of acceptance is necessary if the offer is to do something in exchange for an act; compliance with the conditions of the offer by performing the act in the prescribed manner is generally sufficient evidence of the offeree's acceptance).

certain mailers in writing that if they meet certain terms and conditions, the Postal Service will give them a $2,000 to $5,000 credit per CRID. The Postal Service has not requested the mailers to formally agree to fulfill these terms and conditions. Rather, the Postal Service has told them that if they satisfy these terms and conditions, it will provide them with the Tech Credit. Accordingly, the Tech Credit could be appropriately classified as an NSA under the Commission's price cap rules.[27]

As such, under the Commission's rules, there should be no effect on the Postal Service's price cap authority. *See* 39 CFR 3010.24. In promulgating Commission rule 3010.24 in this manner, the Commission agreed with Pitney Bowes and Advo who were concerned that "including negotiated service agreements in the test for compliance with the rate cap may lead to rates for non-participating mailers that exceed the rate cap. This would undermine the rationale for permitting negotiated service agreements." Docket No. RM2007-1, Order No. 26 ¶ 2080. This rationale would also apply even if the Tech Credit were not considered an NSA. As Advo and Pitney Bowes argued in the context of NSAs but equally applicable to the Tech Credit, "the lower rates offered to negotiated service agreement partners will allow for offsetting larger increases for non-negotiated service agreement mail, thus undermining the price cap protection afforded to non-participating mailers." *Id.* ¶ 2078.

B. The Tech Credit as a Market Test

Because the Tech Credit promotion is temporary, it is more akin to a market test of an experimental product rather than a Type 1-A or Type 1-B rate adjustment. Accordingly, the Tech Credit should be treated as a market test for price cap purposes and excluded from price cap calculations.

The Postal Service may conduct a market test of experimental products provided the following conditions are satisfied:

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[27] Additionally, the Tech Credit should comply with 39 U.S.C. 3622(c)(10)(A)(ii) since it is designed encourages IMb which is related to "enhanc[ing] the performance of mail preparation [and] processing."

> (1) **Significantly different product.**— The product is, from the viewpoint of the mail users, significantly different from all products offered by the Postal Service within the 2-year period preceding the start of the test.
> (2) **Market disruption.**— The introduction or continued offering of the product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns (as defined under subsection (h)).
> (3) **Correct categorization.**— The Postal Service identifies the product, for the purpose of a test under this section, as either market-dominant or competitive, consistent with the criteria under section 3642 (b)(1).

39 U.S.C. 3641(b) (emphasis in original).[28] Further, the market test must be temporary. It generally cannot be in effect for more than 24 months.[29]

The Tech Credit might satisfy these conditions. First, the Tech Credit is not something that the Postal Service has ever offered before, so it would qualify as a "significantly different product." Second, the Tech Credit likely does not appear to create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer since the Tech Credit's is based on the use of products covered by the postal monopoly.[30] Third, it is likely categorized as market dominant because it relates to market dominant products. Finally, it is limited in duration to less than 24 months. Accordingly, the Tech Credit could be appropriately classified as a market test of an experimental product. As such, the Postal Accountability and Enhancement Act requires that the Tech Credit not have any effect on the Postal Service's price cap authority. *See* 39 U.S.C. 3641(a)(2).

[28] The statute also sets dollar amount limits that are adjusted for inflation. 39 US.C. 3641(e),(g). The Tech Credit decreases revenue. As such, the positive dollar amount cap is not relevant for a market test that is expected to decrease revenue.

[29] 39 U.S.C. 3641(d). In certain circumstances, the Commission may extend the duration of a market test for an additional 12 months. 39 U.S.C. 3641(d)(2).

[30] However, among other things, the Commission could find that volume minimums or the fact that amount of the Tech Credit is based on prior year's volume creates an unfair or otherwise inappropriate competitive advantage for the Postal Service or certain mailers.

VII. THE TECH CREDIT PROMOTION MAY NOT ACHIEVE ITS STATED OBJECTIVES

The Postal Service has stated that the objectives of this program are to encourage mailers to adopt Full-Service IMb and to reward early adopters so they become early adopters again in the future.[31] However, the Tech Credit may be insufficient to justify adoption of Full-Service IMb for some mailers and its incentives completely absent for other mailers.

The Postal Service has not provided a comparison of how the Tech Credit aligns with the cost of implementing Full-Service IMb. In a 2011 Postal Service Office of Inspector General (USPS-OIG) report entitled, “Effects of Compliance Rules on Mailers,” the USPS-OIG reported that IMb adoption would cost a “large mailer between $400,000 and $3.25 million.”[32] The USPS-OIG also reported that the Postal Service said it will “incorporate qualitative estimates of compliance costs” into its evaluation of the benefits of new initiatives. *Id.* at 8. Because the Full-Service IMb requirement may be costly for a large number of mailers, the Postal Service should show that it has provided fair incentives to avoid rate shock when implementing the new rules.

Additionally, while the Tech Credit may be insufficient to justify adoption of Full-Service IMb for some mailers, its incentives are altogether absent for other mailers. As detailed in the Postal Service’s proposal, only 74 percent of Periodicals mail volume, and 69 percent of BPM mail volume was mailed by those eligible for the Tech Credit. It appears as though the 26 percent of Periodicals mail volume (likely a much higher percentage of Periodicals mailers, given the Periodicals’ distribution of volume per mailer) will be ineligible to participate in this promotion. Ironically, however, these ineligible mailers will still be required to adopt Full-Service IMb, or pay higher prices.

[31] Notice at 1, 3; Order No. 1702 - Notice and Order on Market Dominant Price Adjustment for Technology Credit Promotion, April 18, 2013, at 1.

[32] USPS-OIG, Report Number MS-AR-11-006, Effects of Compliance Rules on Mailers, August 24, 2011, at 3.

The Postal Service has demonstrated that, thus far, only the largest mailers have adopted IMb.[33] This is likely because the small per-piece discounts currently available necessitate large volumes to incentivize the requisite fixed cost investments. But all mailers, including those ineligible to participate in this promotion, will be subject to these new requirements, many without the ability to comply.

The Public Representative supports the Postal Service's attempt to help mailers comply with the new rules through the introduction of the Tech Credit and similar incentives. However, the specifics of this proposal do not appear to meet their stated objectives. Large mailers, who are already participating in Full-Service IMb mailings may not need additional incentives. The program could be designed to provide more help to smaller mailers (including those mailing less than 125,000 pieces per CRID) who would not otherwise be able to overcome the significant fixed cost investment required for participation. Furthermore, by providing large mailers with technology credits, the Postal Service will gain cap authority, which will allow it to raise everyone's prices. As such, the smallest mailers will lose thrice – (1) by not being eligible to participate in the Tech Credit, (2) through higher prices with the Postal Service's proposed new-found price cap authority as a result of this docket, and (3) when the Full-Service IMb regulations go into full force in early FY 2014.

The Postal Service should examine how the Full-Service IMb regulations will impact mailers ineligible for the Technology Credit and provide qualitative and quantitative analyses of how it is encouraging adoption by those mailers.

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[33] *See* http://www.prc.gov/Docs/85/85042/Monthly%20Report.pdf. From June 1 to August 17, 2012, 1.7 billion Full-Service IMb First-Class Mail pieces were mailed by 628 customers. This 47 day period is 12.8 percent of a calendar year. If this 47 day period is representative of an entire year, these 628 mailers would account for 13.2 billion First-Class Mail presort pieces, as 1.7 billion / 12.8 percent is 13.2 billion. 13.2 billion is 30 percent of all First Class volume for FY 2012.

VIII. CONCLUSION

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully Submitted,[34]

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[34] The arguments made and views expressed in these comments are those of the interests of the general public. They do not necessarily represent those of the Public Representative, his staff, the Commission, the individual Commissioners, or the Commission's staff, individually or collectively.