

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RATE ADJUSTMENT DUE TO)
EXTRAORDINARY OR EXCEPTIONAL) Docket No. R2013-11
CIRCUMSTANCES)

**OPPOSITION OF
ALLIANCE OF NONPROFIT MAILERS, THE AMERICAN CATALOG MAILERS
ASSOCIATION, INC., AMERICAN FOREST & PAPER ASSOCIATION,
ASSOCIATION FOR POSTAL COMMERCE, ASSOCIATION OF MARKETING
SERVICE PROVIDERS, DIRECT MARKETING ASSOCIATION, INC., THE
GREETING CARD ASSOCIATION, MAJOR MAILERS ASSOCIATION, MPA—THE
ASSOCIATION OF MAGAZINE MEDIA, NATIONAL ASSOCIATION OF PRESORT
MAILERS, NATIONAL NEWSPAPER ASSOCIATION, NATIONAL POSTAL POLICY
COUNCIL, NEWSPAPER ASSOCIATION OF AMERICA, RR DONNELLEY,
SATURATION MAILERS COALITION, VALPAK DIRECT MARKETING SYSTEMS,
INC., AND VALPAK DEALERS' ASSOCIATION, INC. TO USPS MOTION FOR STAY**

**(April 28, 2014)
(refiled April 29, 2014)**

Four months ago, when approving an exigent rate increase for the Postal Service, the Commission ordered the Postal Service to: (1) “report the incremental and cumulative surcharge revenue to the Commission 30 days after the end of each quarter”; and (2) report on or before May 1, 2014, how the Postal Service proposes to remove the exigent rate surcharge when the \$2.8 billion cap on aggregate contribution is reached. Order No. 1926 (December 24, 2013) at 185. On April 23—only a week before the first reports were due—the Postal Service filed a motion to stay the reporting requirements. USPS Motion Requesting the Stay of Certain Reporting Requirements

from the Commission's Order Granting Exigent Rate Increase (filed April 23, 2014).

The motion for stay should be denied.

A stay of a final agency order pending judicial review is an extraordinary remedy, and is not routinely or automatically granted. The standards that an applicant for a stay must satisfy are well settled. The criteria, sometimes referred to as the *Virginia Petroleum Jobbers* standards, include four factors: (1) the likelihood that the moving party will prevail on the merits; (2) the extent of any irreparable injury that the moving party would suffer without a stay or injunctive relief; (3) the extent of any irreparable injury that the opposing party would suffer if a stay or injunctive relief is granted; and (4) the public interest.¹ The Postal Service's four-page motion does not even pretend to satisfy these criteria.

Furthermore, and in any event, the motion is untimely. The Postal Service was on notice four months ago that the compliance reports at issue would be due on April 30 and May 1. The Postal Service also knew from the outset the nature of the purported

¹ Docket No. C2012-2, *Complaint of American Postal Workers Union, AFL-CIO*, Order No. 1387 (June 29, 2012) at 3-4 (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (4th Cir. 1958), and other court precedent); Docket No. MC2012-14, *Valassis NSA*, Order No. 1455 (August 30, 2012) at 5 (first paragraph); *IATA Transpacific Cargo Rates*, 104 C.A.B. 365, 369 & n. 11, 1983 WL 35425 (C.A.B. 1983) (applying four-part criteria of *Virginia Petroleum Jobbers* and *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977), to request for administrative stay of agency decision); *San Joaquin Valley Railroad Co.—Abandonment Exemption—in Tulare and Kern Counties, CA*, 1998 WL 151294 (STB 1998) at *3 (same).

data limitations that it now asserts as a purported justification for its motion. Yet the Postal Service chose to withhold its stay motion until one week before the April 30 and May 1 filing deadlines—too late for the Commission to give reasoned consideration to the motion and any oppositions before the reports are due.

This is not the first time that the Postal Service has engaged in this kind of 11th-hour brinkmanship. The Commission, however, is charged with regulating the Postal Service, and the Postal Service must understand that it cannot pick and choose which of the Commission's orders it will comply with. The Commission should take this opportunity to reassert its regulatory authority.

A. Likelihood Of Prevailing On The Merits

The Postal Service has failed to establish that it is likely to overturn the cap on total contribution on judicial review, let alone in a manner that renders the Commission's reporting requirements moot. The Postal Service notes that it is challenging the contribution cap as overly restrictive in *USPS v. PRC*, No. 14-1010 (D.C. Cir.). But the mailing industry is challenging Order No. 1926 in the opposite direction—i.e., on the ground that the \$2.8 billion in contribution allowed by the order is arbitrary and excessive. *Alliance of Nonprofit Mailers et al. v. PRC*, No. 14-1009 (D.C. Cir.). The Commission can be expected to defend Order No. 1926 in the Court of Appeals against both challenges. None of this establishes that the Postal Service is “likely” to prevail.

B. Irreparable Injury To The USPS Without A Stay

The Postal Service's showing of irreparable injury is equally empty. The Commission, like the courts of appeals, has stated that a stay is unwarranted without a persuasive showing of irreparable injury to the movant without a stay. *Valassis, supra*, at 5-7. The Postal Service, however, identifies no such injury from the reporting requirements. Rather, the Postal Service's objection is that quarterly reports filed 30 days after the end of each quarter will be less accurate, and the compliance plan that is due on May 1 will be less optimal, than they could be when updated "billing determinants," "CPI trends" and "forecasts" become available. The Postal Service also asserts that "[g]iven the variety and complexity of the options for removing the exigent surcharge, and its desire to maintain the maximum pricing flexibility permissible under the law, the Postal Service believes that more time is needed to fully evaluate its options and prepare [the May 1 compliance plan]."

The short answer to the first objection is that the Postal Service should base its quarterly reports on the most current data available; update its calculations in each following report as warranted by new data; and base its May 1 report on the most current information available. The results undoubtedly will not be definitive. But that is hardly a species of irreparable injury.²

² Given the roughly \$150 million in extra contribution that the USPS is pocketing from the exigent rate surcharge each month during the pendency of the mailers' challenge to Order No. 1926 in the D.C. Circuit—amounts that the Postal Service has not offered to refund if the mailers ultimately prevail, and which 39 U.S.C. § 3681 is likely to preclude

The best answer to the second objection comes from Order No. 1787 in the GameFly complaint case. In that case, the Postal Service waited until three weeks after the issuance of the Commission’s rate equalization order—and one week before the compliance deadline—before filing a request for a stay of the deadline.³ As here, the Postal Service tried to justify its belated request on the theory that the “financial implications of” the Commission’s order “must be studied and carefully considered,” and the Postal Service “must analyze the effects in light of available data and assess operational contingencies needed to address potential changes in mailer behavior resulting from the new rates.”⁴ The Commission, in denying the requested stay, noted the obvious:

[T]he Postal Service had ample opportunity to begin investigating the economic, financial, and operational conditions that it now claims must be analyzed. GameFly should not be penalized for the Postal Service’s failure to undertake consideration of these issues earlier.

Order No. 1787 (July 23, 2013) at 3.

The Commission’s refusal to accommodate the Postal Service’s stalling tactic was consistent with settled law. The Commission, like federal courts, “must scrutinize carefully claims of impossibility, and ‘separate justifications grounded in the [substantive

the mailers from ever recovering—the Postal Service’s claim that *it* will suffer irreparable injury if Order No. 1926 remains effective pending judicial review is particularly graceless.

³ Docket No. C2009-1R, *Complaint of GameFly, Inc.*, USPS Motion for Extension of Time in Which to Comply with Order No. 1763 (filed Friday afternoon, July 19, 2013).

⁴ *Id.* at 1-2.

federal law] from the foot-dragging efforts of a delinquent agency.” *Sierra Club v. EPA*, 444 F.Supp.2d 46 (D.D.C. 2006) (quoting *Natural Resources Defense Council v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975)). The Commission, like a court of equity, “can never exclude claims of inability to render absolute performance [with a deadline], but it must scrutinize such claims carefully since officials may seize on a remedy made available for extreme illness and promote it into the daily bread of convenience.” *Id.* Hence, an agency bears “a heavy burden to demonstrate the existence of an impossibility,” and “must demonstrate that it exercised ‘utmost diligence’ in its efforts to comply with the statute.” *Sierra Club*, 444 F.Supp.2d at 53 (citations omitted). “If the administrator could possibly have” met the deadline, “but did not because of competing concerns or other decisions on his part, then he is not acting ‘in good faith.’” *Id.* (quoting *New York v. Gorsuch*, 554 F.Supp. 1060, 1065 n. 4 (S.D.N.Y. 1983)). Nor may an agency be excused from a nondiscretionary deadline on the theory that “additional time is needed” to “improve the quality or soundness of the regulations to be enacted.” *Id.* (quoting *Sierra Club v. Ruckelshaus*, 602 F.Supp. 892, 899 (N.D. Cal. 1984)). The same conclusion is warranted here.

C. Irreparable Injury to Mailers From A Stay

By contrast, a stay of the Commission’s reporting requirements until the D.C. Circuit issues a final decision in 14-1009 and 14-1010 could very well inflict irreparable injury on mailers. This risk arises from the possibility that the \$2.8 billion contribution cap prescribed by the Commission in Order No. 1926, or a smaller contribution cap prescribed by the Commission on remand, may be nearly exhausted by the time that

the lawfulness of the \$2.8 billion cap is resolved. By withholding its contribution reports and proposed surcharge rescission plan until the 11th hour, the Postal Service could foreclose any meaningful comment by other parties (and reasoned consideration of the issues by the Commission).⁵

These are not just theoretical risks. The Postal Service has a history of this kind of delaying tactic. As noted above, in the GameFly complaint case, the Postal Service waited until three weeks after the issuance of the Commission's rate equalization order—and one week before the compliance deadline—before filing a request for a stay of the deadline. The instant motion for stay is even more egregious. The Commission published Order No. 1926 on December 24, 2013—i.e., more than four months ago. The Order put the Postal Service fully on notice of the reporting deadlines at issue. *Id.* at 185. Yet the Postal Service waited until April 23, 2014—*one week* before the first set of reports were due—to seek a stay of the filing requirements.

Delaying the contribution reports and surcharge rescission plan would have practical impacts on mailers and service providers as well. Every price change requires

⁵ The balance of harms from the requested stay distinguishes this case from Order No. 739 in Docket No. ACR2010 (May 27, 2011) and Order No. 524 in Docket No. MC2008-1, which the Postal Service relies on (Motion for Stay at 2 n. 3). Order No. 739 stayed a requirement that the Postal Service file purely informational schedules of future rate increases; no mailers opposed the stay. Order No. 524 stayed an earlier Commission order that would have terminated the license of LePage's 2000 to supply certain nonpostal products to the Postal Service for sale to the public. In neither case did the requested stay threaten mailers or anyone else with material injury.

mailers and vendors to expend considerable resources to update software, plan campaigns, and adjust operations to account for new prices. An exigent increase—or the rescission of such an increase—provides an even greater challenge, as such changes are less predictable than the annual CPI-based increase. The sooner the Postal Service provides its proposed plan for rescission, the sooner the industry can plan and prepare for the changes. Delaying this plan and the additional information provided by the contribution reports would deprive the industry of the information it needs to make sound planning decisions, increase the costs of adjusting to the price changes, and burden the industry with uncertainty regarding when planning for rescission of the exigent increase can begin.

D. The Public Interest

The Postal Service also fails to satisfy the public interest standard. The preconditions for and limitations on exigent rate increases imposed by 39 U.S.C. § 3622(d)(1)(E) reflect a Congressional determination that the public interest warrants limiting rate increases on market-dominant products to the rate of inflation, and allowing exceptions to the CPI cap only when needed to recoup losses that are “due to either extraordinary or exceptional circumstances.” The reporting requirements prescribed by the Commission on page 185 of Order No. 1926 reflect the Commission’s judgment about how to implement those standards most effectively. Those requirements are

legally binding on the Postal Service unless and until they are overturned by the D.C. Circuit.

If the Postal Service is to be governed by the rule of law, the Commission must not allow its orders to be nullified by the filing of untimely and unsupported stay requests. Yielding to this kind of pressure tactic will only encourage the Postal Service to use it again after the D.C. Circuit issues its decision. If the Commission is to serve as an effective regulator of the Postal Service, it must emphatically remind the Postal Service that it does not get to decide for itself which Commission orders to obey.

CONCLUSION

The motion for stay should be denied.

Respectfully submitted,

/s/

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