

ORDER NO. 2075

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Mark Acton, Vice Chairman; and
Robert G. Taub

Rate Adjustment Due to Extraordinary
or Exceptional Circumstances

Docket No. R2013-11

ORDER DENYING STAY AND ESTABLISHING
SCHEDULE FOR REPORTING REQUIREMENTS

(Issued May 2, 2014)

I. INTRODUCTION

The Postal Service filed a motion seeking to stay specific reporting requirements established in Order No. 1926, which authorized the Postal Service to collect a 4.3 percent exigent price increase until it had recovered approximately \$3.2 billion in additional revenue.¹ For the reasons discussed below, the Motion is denied.

¹ Motion of the United States Postal Service Requesting the Stay of Certain Reporting Requirements from the Commission's Order Granting Exigent Rate Increase, April 23, 2014 (Motion).

II. BACKGROUND

On December 24, 2013, the Commission issued Order No. 1926 in Docket No. R2013-11.² The Commission in Order No. 1926 approved the exigent price adjustment as a surcharge, set a maximum amount the Postal Service could recover, and ordered the Postal Service to report quarterly on the amount of revenue collected pursuant to the exigent surcharge as well as share its plan to remove the surcharge. See Order No. 1926 at 193.

On January 23, 2014, the Postal Service petitioned the United States Court of Appeals for the District of Columbia Circuit to review Order No. 1926.³

On April 23, 2014, 120 days after the Commission issued Order No. 1926, the Postal Service filed its Motion seeking to stay the reporting requirements of the order. Answers were submitted by the Alliance of Nonprofit Mailers, *et al.* (ANM *et al.*),⁴ and the Public Representative.⁵

III. POSTAL SERVICE MOTION

The Postal Service seeks to stay two reporting requirements of Order No. 1926: (1) the requirement that it report, 30 days after the close of each quarter, on the quarterly and cumulative surcharge revenue collected; and (2) the requirement that it

² Order Granting Exigent Price Increase, December 24, 2013 (Order No. 1926 or Exigent Order).

³ See *U.S. Postal Service v. Postal Regulatory Commission*, No. 14-1010 (D.C. Cir. 2014).

⁴ 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 29, 2014 (ANM *et al.* Answer). ANM *et al.* Answer was originally filed April 28, 2014, but was updated with an additional party and refiled April 29, 2014.

⁵ Public Representative Answer Opposing United States Postal Service Motion to Stay Certain Reporting Requirements, April 29, 2104 (PR Answer).

file a report with the Commission, no later than May 1, 2014, with a plan and complete explanation of the operation of the plan to remove the surcharge rates. Motion at 1.

The Postal Service contends that complying with the reporting requirements is premature and unwarranted because “this action could be overtaken by the court’s decision on appeal.” *Id.* The Postal Service states that the Commission has previously granted stays of certain reporting or remedial requirements during a pending appeal. *Id.* at 2. The Postal Service avers that staying both of the requirements “would not jeopardize the ability of the Postal Service to later comply...” with the requirements since the court is “almost certain to issue an opinion in advance of the time” the Postal Service would collect surcharge revenue that reaches the cap allowed by the Exigent Order. *Id.*

Quarterly reporting. Specific to the quarterly revenue reporting, the Postal Service maintains that it cannot produce the report in the timeframe required by the Exigent Order (30 days after the close of each quarter) because required information would not yet be available. *Id.* The Postal Service refers to rule 39 C.F.R. § 3050.25(e), which provides 40 days after each quarter for the Postal Service to provide updated billing determinants, and states that the billing determinants would be required to prepare the report. *Id.* at 2-3. The Postal Service also claims that the first report is complicated by change in rates occurring during the preceding quarter, both due to the usual inflation-based CPI increase and the exigent surcharge. *Id.* at 3.

Removal report. Specific to the reporting on the plan to remove the exigent surcharge, the Postal Service states that given the complexity of options for removal, and its desire to maintain maximum pricing flexibility, more time is necessary to evaluate options and prepare a report. *Id.* The Postal Service also contends that it would be impractical to prepare a report on removing the surcharge so far in advance of the planned removal because information such as CPI trends and forecasts “will be critical in helping the Postal Service choose the most appropriate method” and will not be available, or will be incomplete as of the May 1, 2014 deadline. *Id.*

IV. ANSWERS

ANM *et al.* and the Public Representative submitted answers in opposition of the Motion. Both argue that the Motion should be denied. ANM *et al.* Answer at 2; PR Answer at 2.

ANM *et al.* ANM *et al.* contend that the Postal Service has not satisfied the four part “preliminary injunction” standard customarily used to resolve a request for a stay, and that the Postal Service’s Motion is untimely. ANM *et al.* Answer at 2.

ANM *et al.* argue that the Postal Service has been on notice regarding the reporting requirements since Order No. 1926 was issued December 24, 2013. *Id.* at 2-3. ANM *et al.* characterize the Postal Service’s filing of the Motion as “11th-hour brinkmanship” and a tactic to avoid compliance with a Commission order. *Id.* at 3.

ANM *et al.* state that a stay of a final agency order pending appellate review is an extraordinary remedy, and that the factors relevant to considering such a remedy include: (1) the likelihood the moving party will prevail on the merits; (2) the extent of any irreparable injury that the moving party would suffer absent the stay; (3) the extent of any irreparable injury other parties may suffer if the stay is granted; and (4) the public interest. *Id.* at 2. ANM *et al.* Answer addresses each of those factors in turn.

First, ANM *et al.* argue that the Postal Service has not established or alleged that it is likely to overturn the contribution cap on appeal. *Id.* at 3. They contend that the presence of the appeal, without more, is not sufficient, especially when taken in concert with the appeal by the ANM *et al.* on the same issue, but for different relief.⁶ *Id.*

Second, they allege that the Postal Service has made no showing of irreparable injury if it is not granted a stay. *Id.* at 4. They state that creating reports on less than ideal data does not constitute an irreparable injury. *Id.* ANM *et al.* contend that the

⁶ See *Alliance of Nonprofit Mailers, et al. v. Postal Regulatory Commission*, No. 14-1009 (D.C. Cir. 2014).

Postal Service's claim of impossibility due to unavailable data should be carefully scrutinized, and found lacking. *Id.* at 5.

Third, the ANM *et al.* identify specific injury that they may suffer should a stay be granted. *Id.* at 6. They identify potential harm if the quarterly reports and removal plan are stayed until close to the time the surcharge revenue cap is met, in which case there may not be "any meaningful comment by other parties (and reasoned consideration of the issues by the Commission)" of the plan to rescind the surcharge. *Id.* at 6-7. Likewise they state that they may be harmed by the stay if it interferes with predictability of rates and their ability to prepare for changes. *Id.* at 7-8.

Fourth, the ANM *et al.* argue that the Postal Service has failed to allege a public interest in granting a stay. *Id.* at 8. They allege that the Commission's order, in implementing laws that are an expression of the "public interest" by Congress, is an expression of the Commission's judgment about how to implement those standards. *Id.* at 8-9. They contend that if the Commission is to serve as an effective regulator of the Postal Service, it must ensure the Postal Service does not decide for itself which orders to obey. *Id.* at 9.

Public Representative. The Public Representative references 5 U.S.C. § 705, which grants the Commission authority to postpone the effective date of an order pending judicial review when justice so requires. PR Answer at 2. He asserts that typically, when an agency considers a stay, it applies the four part test referenced by the ANM *et al.* *Id.*

The Public Representative asserts that the Motion does not support granting a stay. *Id.* He also outlines potential harm that could be inflicted on mailers if the stay were to allow the Postal Service to collect revenues above the surcharge revenue cap set in Order No. 1926. *Id.* at 3. Likewise, the Public Representative believes the quarterly reporting provides visibility for mailers who must make plans based on available information. *Id.* The Public Representative concludes that if modifying the

timing of the quarterly reports would result in more accurate reporting, he is not opposed to such an arrangement. However, he does not support the stay of the quarterly reports during the pendency of appellate review.

The Public Representative also reiterates the importance of transparency as to the operation of the approaching recovery limit, and the plan for the surcharge to be removed. *Id.* at 3-4. The Public Representative states that the plan is yet another limitation of the risk mailers could be harmed by the Postal Service over-collecting the surcharge. *Id.* at 3. The Public Representative asserts that the Postal Service's plan to remove the surcharge should be completed in the original timeframe so that there is adequate time for interested parties to comment on the plan and the Commission to consider the plan before it is finalized. *Id.* at 4. The Public Representative concludes that the Postal Service should be able to formulate a plan to remove the exigent surcharge without such specific information as recent CPI trends and forecasts and that a stay is unnecessary. *Id.*

V. COMMISSION ANALYSIS

Timing of Postal Service Motion. The Commission notes that the Postal Service filed this request for a stay 120 days after the requirements were set in Order No. 1926, and only 7 and 8 days before the respective reports were due from the Postal Service.⁷ The timing of the Motion, including the opportunity for answers, necessitated that this Order would not be issued before the first deadline for quarterly reporting, and the deadline for a report on the plan to remove the surcharge would be due. Moreover, as both the ANM *et al.* and the Public Representative assert, the Motion is untimely. ANM *et al.* Answer at 3; PR Answer at 4. The Postal Service has long been on notice of

⁷ The Motion expressly requests a stay of the reporting requirements. Nothing in it suggests that the Postal Service requests reconsideration of those reporting requirements. Nonetheless, even assuming, *arguendo*, that the Motion could be construed as requesting reconsideration, nothing in the Motion supports the Commission revisiting the merits of the reporting requirements.

these requirements. Under the circumstances, requesting a stay at the 11th hour is problematic.

Standard of review. ANM *et al.* and the Public Representative suggest that the Motion be reviewed pursuant to factors routinely used to evaluate requests for a preliminary injunction. See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The relevant factors include: (1) likelihood of success on the merits; (2) irreparable harm to the requesting party; (3) irreparable harm to other parties if relief is granted; and (4) the public interest. See *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009); *Corning Sav. And Loan Ass'n v. Federal Home Loan Bank BD.*, 562 F.Supp. 279 (E.D. Ark. 1983).

Previously, the Commission declined to explicitly adopt the four-factor “preliminary injunction” test when reviewing a request for a stay of a final Commission order.⁸ However, in every instance the Commission has considered a request for a stay since enactment of the 2006 postal reform, including the Valassis Stay Order, it considered substantially similar or analogous factors as those in the four-part test.⁹

An agency may postpone the effective date of action taken by it, pending judicial review, when justice so requires. See 5 U.S.C. § 705. The same section grants a reviewing court the authority to postpone or otherwise preserve status or rights pending judicial review to prevent irreparable injury.

⁸ See Docket Nos. MC2012-14, R2012-8, Order No. 1455, Order Denying Newspaper Association of America Motion for Stay, August 30, 2012 (Valassis Stay Order).

⁹ See Valassis Stay Order (considering the public interest, harm to the requesting party, and interest of the non-requesting parties); Docket No. MC2008-1 Phase II, Order No. 524, Order Denying Requests for Reconsideration, Addressing Confidentiality Matters, and Granting a Stay, August 24, 2010 (considering harm to the requesting party and the Postal Service); Docket No. ACR2010, Order No. 739, Order Granting Stay, May 27, 2011 (considering the harm to non-requesting parties and public interest); Docket No. C2011-3, Order No. 1012, Order Denying Motion for Renewal and Stay, November 30, 2011 (considering harm to the requesting party); Docket No. C2012-2, Order No. 1387, Order Denying American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, June 29, 2012 (considering all four factors).

The Commission also notes that the four-part preliminary injunction test is the exclusive test used by the courts when determining whether it is appropriate to issue a stay pending judicial review.¹⁰ The factors, though not required, are also widely used by other agencies when determining whether to stay a final agency action pending review.¹¹

The Commission finds that because the four-part preliminary-injunction test articulated in *Virginia Petroleum Jobbers* is consistent and overlaps with the factors the Commission has historically considered when determining whether a stay is appropriate pursuant to 5 U.S.C. § 705, it is appropriate to adopt the *Virginia Petroleum Jobbers* test here. The Commission's previous rulings based on considering harm to the moving party and non-moving parties, and the public interest provided sufficient notice to parties that such factors were relevant to the Commission's determination. The Commission also finds it appropriate to adopt this standard because it provides a useful framework, widely used by other agencies and the courts. Such wide use and familiarity fosters transparency and consistency in the Commission's consideration of requests for stays.

Application of Virginia Jobbers factors. In the instant case, the Postal Service has requested a stay of several reporting requirements of the Commission's Exigent Order.

The first factor the Commission considers is the movant's likelihood of success on the merits of the appeal. The Postal Service contends that the Commission's position is legally erroneous and that it could be overturned on appeal. ANM *et al.* also

¹⁰ See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), *Mohammed v. Reno*, 309 F.3d 95 (2nd Cir. 2002), *Cuomo v. NRC*, 773 F.2d 972 (D.C. Cir. 1985).

¹¹ See, e.g., 16 C.F.R. § 3.56 (FTC requires application for a stay of the effective date of an order address all four factors), *Order Preliminarily Considering Whether to Issue Stay Sua Sponte*, SEC Release No. 33870, File No. SR-MSRB-94-2, 1994 WL 117920 (April 7, 1994) (SEC uses all four factors to determine whether issuance of a stay pending appellate review is appropriate), *Special Counsel v. Starrett*, M.S.P.B. 1985, 28 M.S.P.R. 425 (MSPB considers four factors that movant for a stay must show).

appealed the Exigent Order, and contend that the Postal Service's likelihood of success is not alleged to be any greater than their own.

The second factor the Commission considers is the irreparable harm the movant will suffer without a stay. The Postal Service contends that without a stay it will be required to complete reporting that is premature, and may reduce its pricing flexibility at a future date. ANM *et al.* reply that the Postal Service has not identified a concrete injury, that less accurate reports are not an injury, and that the Postal Service's delay in filing the request for a stay argues against a finding that the Postal Service is harmed because it needs more time.

The third factor the Commission considers is the irreparable harm any non-moving parties will suffer if a stay is granted. The Postal Service avers that time remains after the judicial review process is complete for the Postal Service to comply with the reporting requirements if they remain necessary. ANM *et al.* and the Public Representative discuss irreparable harm that is likely to occur if a stay is granted to an uncertain time in the future possibly close to when the Postal Service's exigent surcharge revenue cap is exhausted. The Public Representative identifies over-collection of the surcharge among all the users of the mail as a concrete and irreparable injury. Both parties also identify uncertainty persisting through the stay as an additional injury.

The fourth and final factor the Commission considers is the public interest. The Postal Service contends that the statutory objective of pricing flexibility is furthered. ANM *et al.* and the Public Representative both argue that the objective of predictable and stable rates weigh in favor of denying a stay. ANM *et al.* state that the Postal Service must follow the orders of its regulator.

On review of these factors, the Commission finds that the Postal Service has not demonstrated that a stay is warranted. It has neither alleged facts nor provided explanation as to how it is likely to prevail on the merits of its appeal. Any speculative

harm of requiring the Postal Service to report on the amount it has collected during the exigent rate surcharge period or file a proposed plan to remove the surcharge is outweighed by the concrete harms of possible over-collection, uncertainty, and lack of transparency in the removal process that are likely to occur if a lengthy stay is set in place. The Postal Service, ANM *et al.*, and the Public Representative have identified competing public policy objectives as articulated in title 39. No party demonstrated an overriding public interest with regard to a stay in this circumstance. On balance, the Commission finds that the Postal Service has not justified its request for a stay in its Motion.

Timing of reporting requirements. The Commission recognizes that as of the date of this Order, the initial reporting deadlines have passed. The Commission must therefore establish dates for the Postal Service to provide the information required in Order No. 1926.

The Commission agrees with the Postal Service that updated billing determinants produce more accurate data for the quarterly reports. Pursuant to 39 C.F.R. § 3050.25(e), billing determinants must be updated by 40 days after the close of each quarter. To give the Postal Service an opportunity to utilize those updated billing determinants, the Commission adjusts the quarterly filing requirement due date to 45 days after the close of each quarter. The first quarterly report from the Postal Service reporting on the amount of revenue produced by the surcharge will be due May 15, 2014. It is incumbent on the Postal Service to file the relevant billing determinants in a timely fashion. Given the limited, but uncertain duration of the surcharge recovery period, it is imperative that mailers and the Commission be timely apprised of the ongoing recovery.

In Order No. 1926, the Commission signaled its intent to provide public notice of the Postal Service's plan to remove the exigent rate surcharge, and provide interested persons an opportunity to comment before the Commission approves or modifies the proposed plan. See Order No. 1926 at 185. Interested parties must be afforded a

meaningful opportunity to comment on the Postal Service's proposal to remove the exigent surcharge. In addition, the Commission must have adequate time to consider that proposal and possible alternatives to it. Removal of the surcharge is likely to raise unique and complex issues and must be resolved sufficiently in advance of the expiration of the surcharge to enable the Postal Service and mailers to plan accordingly. To give the Postal Service time, in addition to the 120 days that have passed since the issuance of Order No. 1926, to finalize its plan to remove the exigent surcharge, the Commission will allow the Postal Service 30 days from the date of this Order to submit its plan to remove the exigent surcharge pursuant.

It is ordered:

1. The Motion of the United States Postal Service Requesting the Stay of Certain Reporting Requirements from the Commission's Order Granting Exigent Rate Increase, filed April 23, 2014, is denied for the reasons discussed in the body of this Order.
2. The Postal Service shall file quarterly reports on the amount of exigent surcharge revenue collected, as required by Order No. 1926, 45 days after the close of each quarter. Its initial report is due May 15, 2014.

3. The Postal Service shall file a report, as required by Order No. 1926, providing a proposed plan for removing the surcharge from postage rates with a complete explanation of how the plan will operate, by June 2, 2014.

By the Commission.

Ruth Ann Abrams
Acting Secretary