

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Rate Adjustment Due to :
Extraordinary or Exceptional : Docket No. R2013-11
Circumstances :

INITIAL COMMENTS OF THE GREETING CARD ASSOCIATION
ON EXIGENCY RESCISSION PLAN

The Greeting Card Association (GCA) files these comments pursuant to Order No. 2089 (June 11, 2014). GCA participated in the exigency increase litigation which gave rise to that Order, and is among the mailer parties in the proceedings before United States Court of Appeals for the District of Columbia Circuit (No. 14-1010 as an intervenor respondent and No. 14-1009 as a petitioner).

For reasons explained below, GCA believes that the Commission should approve a plan for exigency surcharge rescission which maintains complete separation between that process and the annual CPI-based rate adjustments authorized by 39 U.S.C. sec. 3622(d)(1)(A)-(D).

I. INTRODUCTION

The issues raised by the Postal Service's filing of June 2, 2014¹, in response to the Commission's direction that it file a plan for rescission of the exigency increase, are not mere bookkeeping details. They affect the basic

¹ Report of the United States Postal Service in Response to Order No. 1926 Regarding Surcharge Removal Plan ("June 2 Report").

character of the increase and the integrity of the Commission's decision in Order No, 1926.

In disposing of the first-ever request for an exigency increase, the Commission made detailed findings on how the increase it did grant was to be structured. It explained fully why it was rejecting various features of the increase requested by the Postal Service. After hearing vigorous debate among the parties, the Commission decided that the increase must have certain important characteristics in order to gain approval. A number of these characteristics, however, could be nullified under some of the alternative treatments suggested in the Postal Service's June 2 filing.

The Postal Service has proposed two alternative general approaches: (i) simply removing the surcharge when the \$3.2 billion recovery authorized by Order No. 1926 is clearly within reach ("first option"), and (ii) combining the surcharge rescission with an annual CPI-based rate adjustment under sec. 3622(d)(1)(A) ("second option"). GCA submits that the first of these general approaches is the only one the Commission should consider.

II. RESCISSION OF THE SURCHARGE SHOULD BE CARRIED OUT INDEPENDENT OF ANY OTHER RATE ADJUSTMENTS

A. Basic features of the exigency surcharge approved by the Commission

Introduction. Docket No. R2013-11 proceeded on the established premise that the financial impact of the 2008-09 recession was an exigency within the meaning of sec. 3622(d)(1)(E). The "extraordinary or exceptional circumstances" branch of the test having been met, the remaining questions were whether an exigency increase was necessary, and if so, whether it, as proposed, was reasonable and equitable.

The Commission found that some features of the increase proposed by the Service satisfied these tests, and some did not. One characteristic of the requested rate change which the Commission did approve – over the objections of several parties – was that the increase be imposed across-the-board. The Commission specifically found that this approach was equitable.² This finding is critically important in deciding how to remove the exigency surcharge when it has served its purpose.

The Postal Service's argument for an across-the-board increase. The Service presented its case for an across-the-board increase through witness Taufique.³ As summarized by the Commission,

Taufique explains that the Postal Service has chosen an across-the-board price increase for all classes of mail, products within each class (subject to rounding) and, to the extent possible, all price cells within each product.^[4]

Exceptions to this approach were narrowly defined and supported by specific considerations such as avoidance of adverse changes in workshare discount passthroughs, equalization of dropship discounts across presort levels, equalization of commercial and nonprofit discounts, and the effect of UPU-mandated pricing.⁵

That the exceptions just described did not significantly dilute the across-the-board nature of the increase, proposed and approved by the Commission as equitable within the meaning of sec. 3622(d)(1)(E), is demonstrated clearly by the Commission's treatment of a much broader issue, characterized by those who raised it as a question of equity. The Service chose not to impose higher

² Order No. 1926, pp. 166 et seq.

³ See Docket No. R2010-4R [i.e., R2013-11], *Statement of Altaf Taufique on Behalf of the United States Postal Service*, pp. 3 et seq.

⁴ Order No. 1926, p. 158.

⁵ These exceptions are explained in detail at Order No. 1926, pp. 159-161.

increases on products currently failing to recover attributable costs, and the Commission approved its approach.

The question of underwater products. The principal objections to a structure which did not impose a greater increase on non-compensatory (underwater) products came from the Public Representative and Valpak. The Postal Service, MPA, and Time Inc. defended it. Mr. Taufique's argument on this point had been that (i) imposing disproportionate increases would drive eventually profitable mail out of the system, and (ii) the Service would address the coverage issue in future CPI cases. MPA emphasized that the "due to" requirement of sec. 3622(d)(1)(E) means that only recession-induced losses could be recovered, and that these products' failure to cover costs was both long-standing and unrelated to the recession; the Service made a similar point.

Whether an across-the-board increase would be statutorily "equitable" was thus an actively contested issue. The Commission found that it met the test. The explanation in Order No. 1926 is worth quoting *in extenso*:

As with the requirements of reasonableness and necessity, considerations of equity must be made in a case-by-case basis in the context of all relevant circumstances. In the instant case, relevant factors include the concurrent increases proposed in Docket No. R2013-10, which address rate design issue, as well as the temporary nature of the exigent rate adjustments. Consistent with that, the Commission observes that under other circumstances, differentiated price increases may be warranted under section 3622(d)(1)(E).

Here, the Commission determines that the Postal Service's across-the-board pricing strategy is equitable. . . . The Postal Service has made a sufficient showing that the particular circumstances surrounding the Great Recession do not necessitate differentiated price increases for various classes of mail.

Commenters have alleged that the rates resulting from the Postal Service's across-the-board approach are inequitable. They assert differentiated rate increases reflecting considerations such as product cost coverage, price elasticity and ECP pricing are necessary to produce the optimal pricing outcome for each product. *However, the statute does not*

require the Postal Service to produce an optimal pricing result in the face of extraordinary or exceptional circumstances, but rather prices that are equitable.

The Postal Service asserts that the Request “was not meant to fix all the real and perceived problems in rate relationships, cost coverages, or passthroughs. The principal purpose of this filing was to recover some of the contribution lost because of unprecedented volume declines caused by the Great Recession.” See Response to POIR No. 11, question 2(b). *It has represented to the Commission that these other issues will be addressed, going forward, in future CPI cases. See Tr. 1/17.*

* * * *

An across-the-board approach maintains predictability and stability of rates pursuant to section 3622(b)(2) by tempering the effects of an exigent rate adjustment, spreading the percentage increase equally over all classes of mail instead of giving disproportionate increases. Because of the temporary nature of the proposed rates, products given significantly higher increases would experience large fluctuations in rates.

Sections 3622(b)(4) and (c)(7) afford the Postal Service pricing flexibility to design rates that balance its own needs with the operational realities of the mailing communities it serves. *Moreover, the Postal Service acknowledges the need to continue to address rate design issues in future CPI cases. The Postal Service’s representation is an important consideration in the Commission finding that the across-the-board approach is equitable.*^{6]}

Underpinning this determination are two significant conclusions: (i) that in an exigency case the Postal Service is not required to achieve a price set which would qualify as “optimal” under sec. 3622(b) and (c)⁷, and (ii) in this case, the

⁶ Order No. 1926, pp. 166-168; italics added.

⁷ It could be plausibly argued that this principle alone might be enough to justify the across-the-board approach in this case. Sec. 3622(d)(1)(E) is unlike some other provisions in that it does not invoke all the sec. 3622(b) and (c) criteria; it requires only that the increase be linked to “extraordinary or exceptional circumstances” and that it be reasonable, equitable and necessary. Rate questions arising in annual compliance reviews under sec. 3653 or complaint cases under sec. 3662 are to be decided in accordance with “applicable provisions of this chapter (or regulations promulgated thereunder)” (sec. 3653(b) (1)), or “sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations promulgated under any of those provisions)” (sec. 3662(a)). This is understandable, since it might easily be the case that exigency rates well adapted to the particular emergency concerned might be subject to question under the broad range of sec. 3622(b) and (c) criteria. The question need not be decided, however, since the Commission did

across-the-board approach the Service proposed does not violate those provisions, especially in light of the fact that (as the Commission noted on p. 167) the statutory criteria “are at times competing.”

B. Independent rescission of the surcharge is the only course compatible with the Commission’s decision on the nature of the permissible exigency recovery

Implications of the finding that the across-the-board approach to recovering a definite dollar total is equitable. Having decided the contested issue of across-the-board vs. differentiated treatment favorably to the former approach, the Commission allowed a 4.3 percent increase based on it. But at least equally relevant to the question raised by the June 2 Report is the Commission’s decision to authorize an increase limited in dollar amount to the total contribution loss properly associated with the recession, and therefore necessarily limited in duration as well.⁸ This was likewise a contested issue, with the Postal Service in particular insisting that both the losses and the extra revenue to recoup them should be thought of as unlimited in duration.

Now if the increase is limited to a total dollar recovery, and qualifies as equitable within the meaning of sec. 3622(d)(1)(E) when (or, perhaps, because) it is applied across-the-board, it follows that any mechanism for removing the increase when it has served its purpose must preserve these features. Otherwise the basic nature of the increase authorized by Order No. 1926 could be substantially changed, and the surcharge structure the Commission found statutorily equitable could cease to be so.

For example, suppose that the Commission had allowed (i) a surcharge rescission fully combined with a CPI rate adjustment and (ii) – to use the

consider the sec. 3622(b) and (c) standards and decided that the Service’s approach satisfied them.

⁸ Order No. 1926, Ch. IV, particularly pp. 101-106; Ch. VII, particularly pp. 174-185.

phraseology of the June 2 Report – a rescission mechanism which allowed the Service to “use available pricing authority to fold in the exigent surcharge into the basic rate structure of some products, while adjusting the prices of other products to come out at the cap.”⁹

Recall that the Service presented its planned increase as equal for “all classes of mail, products within each class (subject to rounding) and, to the extent possible, all price cells within each product.” That is the structure the Commission accepted in Order No. 1926. But under the hypothetical scenario quoted in the previous paragraph, the surcharge could be continued longer – with a correspondingly larger dollar recovery – for some products within a class, while others paid less than the original across-the-board structure would entail. In this way, a basic feature of the increase approved in Order No. 1926 would be abolished and replaced with one in which some products were taxed much more heavily than others.¹⁰

The Commission should not allow this to happen. First, GCA submits that the Commission should take appropriate steps to protect the integrity of its own order. In this situation, it could do so by requiring the surcharge rescission to be carried out separately from any future price-cap increases. (In this connection, the question at the top of p. 4 of Order No. 2089 – whether, in a hypothetical combined CPI and surcharge removal proceeding, the Service should be required to make two separate filings – clearly should be answered “yes.”)

⁹ June 2 Report, p. 4.

¹⁰ It may be worth considering whether the Commission is in a position to make, or at least create the conditions for, such a change. The normal rule is that an administrative agency whose order is before a reviewing court is without jurisdiction to change that order in any substantial way. Order No. 1926 is before the Court of Appeals for the District of Columbia Circuit in Nos. 14-1009, 14-1010. Would adopting a rescission mechanism which would allow the Service to do away with the across-the-board character of the exigency surcharge – given that in a price-cap case the Commission is essentially limited to determining compliance with the cap on a class basis – raise questions under this rule?

Second, it would be particularly inappropriate for the Postal Service, which proposed an across-the-board treatment in the first instance and (along with some other participants) successfully defended it against substantial challenges, to subvert its own creation retrospectively in the process of terminating it when it has done its job. It is true that the Service did not expect to have to remove the surcharge, and still objects (before the Court of Appeals) to having to do so. This should not make a difference. That an unanticipated surcharge rescission mechanism is now necessary does not invalidate the arguments the Service advanced, and the Commission accepted, in favor of an across-the-board structure.

Finally, it remains true that the standards for a legitimate exigency increase differ from those the Service is expected to observe in the general course of establishing rates. While the Commission's adoption of an across-the-board structure did not depend entirely on this fact (see p. 5, above), it is still relevant. If it was proper in authorizing the increase for the Commission to agree that the Service was not bound to propose an "optimal" structure, there is no justification for tampering, or allowing the Service to tamper, with the authorized surcharge design in order to pursue (what it considers to be) one.

The exigency surcharge as a temporary imposition. It is also relevant that the Commission allowed a 4.3 percent increase, applied across-the-board, in part because, as finally approved, it was a *temporary* price change. The Commission observed that "the temporary nature of the proposed rates mitigates ill effects on mailers as a whole."¹¹ The Postal Service's second option of combining the surcharge rescission with a CPI-based increase has the potential, and may indeed have been designed, to allow the increase for some products to be permanent rather than temporary. To "fold in the exigent surcharge into the basic rate structure" of some products is indistinguishable from making it a

¹¹ Order No. 1926, p. 169.

permanent burden on mailers using those products. Since future annual rate changes will simply add to that basic rate some percentage consistent with class-wide cap compliance, the affected mailers will effectively pay the surcharge as long as they remain in the system. That this result runs counter to one of the Commission's stated reasons for accepting the Postal Service's proposed increase structure further demonstrates the inconsistency of the "second option" with Order No. 1926.

Order No. 1926 limited the surcharge to recovering a defined total dollar amount. The Commission's most significant single departure from the Postal Service's proposed exigency increase is the limitation of the change to recovery of a defined dollar total, which entails an increase limited in duration – and thus some rescission mechanism – as well. The reasoning behind this limitation and the calculation of the dollar total to be recovered are detailed at pp. 181 et seq. of Order No. 1926.

This limitation of the total exigency recovery to \$3.238 billion¹² makes it impossible to adopt the Service's second option. If, as that option apparently contemplates, the surcharge could be continued indefinitely ("fold[ed] . . . into the basic rate structure") for some products, the obvious result would be over-recovery. It is true that the Service contemplates rate adjustments that would, each year, achieve cap compliance for the class while continuing the surcharge for some products within the class. This does not negate the possibility of over-recovery, however.

It might be argued that, as long as future rates complied with the cap, the downward adjustments in prices for products for which the surcharge was removed would, or at least could, balance out the continuance of the surcharge for others. On a snapshot basis, this might appear to be so. It remains true, however, that the surcharge, once folded into a product's basic rate structure,

¹² Order No. 1926, Table VII-2.

would *never* be removed. Clearly, continuance of the surcharge indefinitely could result in recovery exceeding the dollar total the Commission approved.

The idea that the second option could avoid this result seems to rest on the assumption that, once “folded into” a product’s basic rate, the exigency surcharge somehow ceases to be a surcharge. This notion promotes form over substance.

First, the mailer of the product in question continues to pay an added rate component representing the surcharge, and can expect that in future annual adjustments the total burden (incorporating this component) will increase as dictated by the change in the CPI-U and the Postal Service’s rate design choices. The basic theory of sec. 3622(d)(1)(E), however, is that it is an *exception* to the price cap. The annual adjustment process provided by sec. 3622(d)(1)(A) is the only other way in which the Service can change market-dominant rates. Even if the increase entailed by “folding in” the surcharge can be accommodated under the price cap in the particular adjustment which corresponds, in time, to the surcharge rescission¹³, it remains true that the surcharge component will continue to be charged, possibly forever. Whether it was ever removed would depend not on whether the authorized \$3.238 billion total loss had been recouped, but on the Postal Service’s rate design choices in annual CPI adjustments. This outcome is plainly incompatible with limitation of the surcharge to recovery of a definite dollar amount, and thus with the established principle¹⁴ that a permissible exigency increase is delimited by the dollar loss the Postal Service demonstrates it sustained as a result of the exigency.

¹³ The June 2 Report raises this as a possibility. It is far from clear, however, that it is a realistic scenario. The increase in the CPI-U has not reached such levels (4.3 to 4.5 percent) since August, September, and October of 2008. The most recent moving average calculated by the Commission (June 2014 figures) is 1.562 percent.

¹⁴ See Order No. 1926, pp. 13 et seq., and authorities cited there.

C. Independent rescission of the surcharge avoids the problems inherent in the second option

Surcharge rescission independent of the CPI increase mechanism – the Postal Service’s first option – avoids the problems described above. It would preserve, better than any other approach, the across-the-board character of the increase approved in Order No. 1926, and would help insure against over-recovery of the recession-induced losses.

How it would work. When the Postal Service was satisfied that the \$3.2 billion recovery was safely within reach, all that would be needed would be a rate adjustment removing the already known exigency surcharges from all the affected rates. The precise timing of this action might entail estimation of its effect on volumes so as to eliminate or minimize the possibility of over- or under-recovery of the \$3.2 billion, but the problems inherent in preserving the surcharge on some products and removing it from others simply could not arise.¹⁵

One important policy of PAEA is predictability and stability of rates. If surcharge rescission is defined as literally just that, the amount of the change in each rate is already known; in that respect, the statutory interest in predictability is more than adequately served. The timing of the change would of course be less certain, but might be estimated reasonably well from the Service’s already-required progress reports. The only realistic possibility for disruption would occur if the surcharge rescission had to be carried out at a time materially different from the annual CPI adjustment. The result might be “yo-yo-ing” of rates; the surcharge rescission would cause a price decrease, and the CPI increase – perhaps only a month or two later – would send rates up again. This difficulty could be readily alleviated, however, by (i) postponing the effective date of the “surcharge-free” rates to coincide with the effectiveness of the next CPI-based

¹⁵ This approach is also, of course, the only one consistent with the Commission’s finding (Order No. 1926, p. 181) that a fixed dollar recovery was desirable because it permitted “rates subject to the price cap to be administered independently.”

rate schedule, and (ii) requiring the product-by-product revenue differences to be banked and applied (again, product by product) as unused rate authority in the next annual adjustment before any CPI increases were imposed.

The Postal Service, in its June 2 Report, and the Commission, in Order No. 2089, treated the first option as a process in which the surcharge would be removed from all mail “[when] the surcharge revenue limit is reached” (Order No. 2089, p. 3). This is consistent with the approach taken in Order No. 1926, where the Commission developed “new normal” dates for the respective classes and used their implications, in terms of lost contribution, to arrive at a total surcharge revenue allowance, which was thereafter treated as a single unit.¹⁶ This treatment likewise subserves the objective of predictability.

III. THE COMMISSION’S QUESTIONS

Section IV of Order No. 2089 requests commenters to offer views on several questions. GCA submits the following comments in response:

[1] How far does 39 U.S.C. § 3622 apply? While the running title of this question refers generally to sec. 3622, the first part of the question itself inquires about the applicability *vel non* of subsection (e). GCA’s general view – consistent with what we have said above – is that the surcharge should be removed without simultaneous attempts to adjust rates as might be done in an annual CPI proceeding. So far as concerns worksharing discounts under subsection (e), we recognize that the Postal Service, with Commission approval, made some exceptions to the across-the-board structure of its request in order to avoid adverse passthrough consequences. If such (relatively limited) deviations were acceptable in instituting the across-the-board increase, it would seem reasonable to permit them again, if necessary, in removing it. The Postal Service should show, as it did originally, what the adverse passthrough consequences

¹⁶ See, e.g., Order No. 1926, pp. 105-106 and Table IV-8, 183-185 and Table VII-2.

would be and how its adjustments to the simple removal of the surcharge correct them.

GCA's affirmative answer to the second branch of the question – whether, under the Service's second option, two filings rather than one should be required – appears above at pp. 7 et seq. If the Commission allows the second option (which we believe it should not), then it should at least preserve the ability to revert to a simple removal of the surcharge without other rate adjustments. For this to be possible, two filings seem to be a prerequisite.

The third branch of the question hypothesizes a CPI-based filing before the exigency recovery limit has been reached; the issue is whether the CPI filing should address the total rate burden (i.e., base rate + exigency surcharge + CPI increase), or only the first and third of these components.

GCA believes that limiting the CPI adjustment to consideration of the base rate and the proposed inflationary increase would be the appropriate course. That a rate comprising the existing base figure plus the exigency adjustment plus an increment limited by the change in the CPI-U might exceed the cap seems obvious. The exigency provision, however, is an *exception* to the cap.¹⁷ The Commission has cogently explained the differing roles of the price cap and the exigency provision¹⁸, and to attempt to cram both the surcharge and a permissible CPI increase under a limit designed to accommodate only the latter would be both mistaken in principle and, very likely, infeasible in practice. But it would be equally inconsistent with the purposes of both the price cap and the exigency provision, and with the Commission's determination that losses from the recession cannot be recovered in perpetuity, simply to ignore the circumstance that part of the price mailers are paying immediately before the CPI increase is a (time-limited) exigency surcharge. Any CPI adjustment occurring

¹⁷ Order No. 864, pp. 4-5, 6-7, 34, 36, 37, citing Order No. 547.

¹⁸ See, e.g., Order No. 1926, pp. 14-15, 29, 85.

while the surcharge is in effect should use only the base rate and the inflation-based cap.

[2] Notice. The Commission also asks for comment on whether 45 days' notice of the removal of the surcharge is adequate, and whether the answer to this question "depend[s] upon the details of the removal plan the Commission approves[.]"

GCA suggests that the answer to the second branch of this question is almost certainly "yes." Forty-five days' notice for an ordinary price-cap adjustment may be adequate, but one involving possible interactions between the exigency surcharge and the CPI-based cap – should the Commission (mistakenly, in GCA's view) approve a "second option" plan – would clearly be more complex. The Commission's rules allow participants in a CPI case to raise issues other than cap compliance, although without an expectation that they will be finally decided in that docket. A realistic opportunity to do so on the basis of adequate analysis and preparation would require materially more than 45 days. If the Commission approves a removal plan which deals only with the surcharge, and requires sufficient documentation of the details of the rescission, 45 days' notice is probably adequate.

IV. CONCLUSION

For the reasons discussed above, GCA urges the Commission to approve only a rescission plan which deals only with the exigency surcharge and is in no way combined with CPI-based rate adjustments – that is, a plan corresponding to the "first option" in the Postal Service's June 2 Report.

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Respectfully submitted,

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