

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

Annual Compliance Report, FY 2014

Docket No. ACR 2014

INITIAL COMMENTS OF
AMERICAN POSTAL WORKERS UNION, AFL-CIO
(February 2, 2015)

On December 29, 2014, the United States Postal Service (USPS) filed its Annual Compliance Report (ACR) for Fiscal Year 2014. The Postal Regulatory Commission subsequently issued a Request for Public Comment (December 31, 2014) and established Docket No. ACR 2014 in accordance with 39 U.S.C. § 3653.

In response to the Request for Public Comment, the American Postal Workers Union, AFL-CIO (APWU) respectfully submits the following Comments:

1) Disproportionate effects of service reductions on rural communities

The Commission should require the Postal Service to document the extent to which rural customers have been disproportionately affected by changing mail processing and service patterns in FY 2014. The Commission should also order an independent study of service differentials in rural areas, by analyzing service data for FY 2014 on a zip-code-by-zip-code basis. The Commission conducted such a study of rural mail service in 2011 to document the benefits of Postal Service compared to private delivery. It needs to order a follow-up study to determine whether these benefits have survived the Phase I consolidation of mail facilities.

2) Discriminatory benchmark for commercial discounts

The Postal Service continues to use a benchmark for commercial discounts that incorporates a discount for metered mail compared to non-metered mail. The Commission's past acceptance of this metered-mail discount depended on its refusal to characterize it as a workshare governed by 39 U.S.C. § 3622(e). But if the differential is not justified by worksharing, it now runs afoul of the § 403(c) non-discrimination principle recently enforced in *GameFly, Inc. v. Postal Regulatory Com'n*, 704 F.3d 145, 148-149 (D.C. Cir. 2013) and *U.S. Postal Service v. Postal Regulatory Com'n*, 747 F.3d 906, 910-911 (D.C. Cir. 2014). The Commission should revisit the legitimacy of the metered-mail discount in light of the D.C. Circuit's *GameFly* decisions.

COMMENTS

I. Disproportionate Effect of Service Changes on Rural Customers

A. Recent Changes in Mail Service Require an Updated Study of Effects on Rural Communities.

The Commission has historically been sensitive to the unique challenges and benefits of postal service in rural communities. In 2011, the PRC commissioned a *Report on Measuring the Benefits of Rural Postal Service for the Postal Regulatory Commission* (SJ Consulting Group, August 2011)¹ to quantify the benefit of postal service in rural areas where UPS and FedEx charge a surcharge. The study conducted a zip-code-by-zip-code analysis of the benefits of USPS rural service compared to private delivery.

¹ http://www.prc.gov/%28S%28vkjhd2fiywtopq55xq5xidfx%29%29/prc-docs/library/archived/Rural_Service_Report.pdf

The Commission should order an equally rigorous follow-up study to determine whether the benefits found in the 2011 study have survived the massive changes in service related to mail-processing consolidation in the intervening years. If these benefits to rural communities were important enough to warrant a commissioned study in 2011, they are important enough to study after the significant changes in the intervening years. The Commission should also direct the Postal Service to document whether intervening service changes have disproportionately affected rural communities, as Congressional leaders currently charge.

B. There Are Important Reasons to Investigate the Differential Impact on Rural Customers.

1. Congressional concern

The Commission does not operate in a vacuum. It is responsible to investigate the concerns raised in Congress about the disproportionate impact on rural service.

The House is now considering a bipartisan bill, H. Res. 54 (114th Cong., 1st Sess., introduced Jan. 27, 2015) to express the sense of the House that “delayed mail negatively impacts businesses, hurts residents, rural communities and the economy,” and “that the United States Postal Service should take all appropriate measures to restore service standards in effect as of July 1, 2012.”

On January 29, 2015, Sen. Jon Tester (D-MT, a member of the Senate's Governmental Affairs Committee that oversees the Postal Service) issued a press release² about the need to improve delivery standards in rural states like Montana.

² Sen. Tester press release, Jan. 29, 2015
http://www.testersenate.gov/?p=press_release&id=3766

Tester emphasized “the Postal Service's delivery standards have become a disaster for USPS and for the Montana families that rely on the Postal Service to deliver medication, election ballots and ultimately, to stay connected.”

On January 27, 2015, Sens. Tester, Carper and Heitkamp asked Postmaster General Brennan to provide the Committee with follow-up data to evaluate deficiencies in “the apparent gaps that exist in its delivery performance data for bulk First-Class, Standard Mail, Periodicals, and market-dominant Package Services.”³

Rep. David McKinley (R-WV) publicly announced on January 28, 2015 : "We've heard from hundreds of West Virginians - newspapers, businesses and individual postal customers negatively impacted by these delivery changes. By restoring prompt and reliable service, we can rebuild trust in the postal service and give rural Americans peace of mind . . . This postal slowdown is causing real harm across West Virginia as credit card bills are delayed, consumers cancel unreliable newspapers, and timely medicine deliveries are threatened. The Post Office should reconsider these changes and work with Congress to develop an alternative model."⁴

On January 26, 2015, Sen. Claire McCaskill (D-MO) used a Homeland Security and Governmental Affairs Committee meeting to discuss the urgent need to help

³Sens. Tester, Carper and Heitkamp's January 27, 2015 letter to Postmaster General Brennan is archived from Sen. Tester's press release at <http://www.scribd.com/doc/254132330/Tester-s-letter-to-Incoming-Postmaster-General-Megan-Brennan>

⁴Rep. McKinley press release, Jan. 28, 2015 <http://mckinley.house.gov/in-the-news/mckinley-introduces-resolution-to-return-usps-to-prior-service-standards/>

protect delivery service for Missourians in rural communities.⁵ “It is essential to rural America. If we allow this to go to the lowest common denominator, once again, rural America will get the short shrift. . . I’m going to have a hard time explaining that to my rural constituency why we weren’t there for them at this incredibly important time in the history of the postal service.”

The Commission should not abdicate its statutory responsibility by leaving the investigation of service disparities to Congressional committees. The Commission has the responsibility to oversee Postal Service operations, with a specific mandate to prevent invidious discrimination in mail service. 39 U.S.C. §§ 501-505; 3662. The Commission should do its job, by investigating the disparity that Congressional leaders are currently trying to address.

2. The Postal Service’s Network Rationalization Service Standard Impacts study shows a rural-urban disparity.

The pending concern in Congress is not limited to the effects of service reductions implemented in 2015. A cursory review of the Postal Service’s performance figures covering FY 2014 gives reason to investigate further.

The Postal Service posts its Network Rationalization Service Standard Impacts on its website <https://ribbs.usps.gov>, which provides technical information for mailers. It evaluates volume data from the ODIS for the period of time of January 1, 2012 (prior to consolidations) compared to those anticipated on Oct. 1, 2015. It assumes all consolidations will be completed. The percentages shown for each facility consolidation

⁵Sen McCaskill press release, Jan. 26, 2015
<http://www.mccaskill.senate.gov/media-center/news-releases/mccaskill-to-senate-colleagues-postal-service-essential-to-rural-america>

represent the estimated volume of First Class mail for which the service standard either is unchanged or upgraded. For purposes of a quick overview, the Commission can focus on the lowest performing facilities operating at 35% or below (the percentage of First Class mail that has the same service standard or better after the consolidations, indicating 65% or more of the First Class mail has seen a downgrade of its service standards.) By classifying each facility based on the 2010 census, the facilities can be divided between those serving urbanized areas (with 50,000 in population and above), and those serving “urban clusters” with populations in the 2,500-50,000 range.

Of the facilities that have experienced Phase I consolidations in FY 2014 or before, there are 18 at 35% rating or below. Of these 18 underperforming facilities, 11 (or 61.1%) are in smaller, more rural “urban clusters” and 7 are in urbanized areas. However, of the 96 total facilities, 50 are in urban areas and 46 in more rural urban clusters. In other words, 52% of the Phase I facilities serve urban areas, compared to 48% that serve “urban clusters.” But of the facilities falling below the 35% service threshold, only 38.9% (7 of 18) are located in urban areas and 61.1% (11 of 18) are in more rural urban clusters.

This is a statistically significant disparity that bears closer study. If the PRC considered it important in 2011 to document the benefits of USPS service to rural communities, it should demand a clear picture of how the intervening service and consolidation changes have affected those benefits.

C. The Commission Should Demand the Same Detailed Information That It Demands about Commercial Service Disparities.

Of course, this aggregate comparison is no substitute for the zip-code-by-zip-code comparison of performance conducted in the 2011 study. The Commission should order such a follow-up, either from the Postal Service or an independent consultant (as in 2011) or both.

The Chairman has already made searching demands of the Postal Service for comprehensive documentation of performance and service on international and commercial mail. See Chairman's Information Request No.1, ACR 2014 (Jan. 9, 2015) (requesting final monthly and annual quality of service measurement results for Inbound post, and inbound Express Mail Service). For example, the Chairman required: "Please provide all reports (fiscal year, calendar year, and quarterly reports) that measure the service performance of inbound EMS from KPG member posts during FY 2014 with respect to late deliveries, penalties, and any other service performance metrics."

The Commission should be at least as vigilant about investigating differentials in service affecting rural customers. This is particularly important in light of the relative inaccessibility to alternatives in rural areas, documented in the 2011 study. If it was worthwhile to study the benefits of rural Postal Service in 2011, it is worthwhile to demand follow-up now to determine if those benefits still exist.

The Commission has a responsibility to determine whether the U.S. Mails now serve urban businesses more faithfully than it serves rural Americans.

II. The Metered Mail Discount Is An Unsupportable Discrimination In Favor Of Business Users Over the General Public.

A. The Pre-GameFly Approval of Price Discrimination

The metered-mail rate is the benchmark piece being used to calculate all commercial discounts. This has been the Postal Service's apparent basis for discounts since FY 2012. See ACR 2014 pp. 9 (QBRM), 10 (automation AADC), 11 (mixed AADC automation cards), 11 (Automation AADC Cards), 12 (5-digit Automation Cards).

In the past, the Postal Service has disclaimed any justification for this discount based on worksharing. See Order 1890, Docket No. R2013-10, *Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes*, November 21, 2013 at 48-50. The Postal Service is thereby avoiding any need for worksharing review under § 3922(e). The Commission has apparently accepted this rationale in the past, allowing the Postal Service to avoid the need to justify the differential under the mandatory procedures of § 3922(e). See *id.*

At the same time, the Commission apparently dismissed the Greeting Card Association's objection in 2013 that the differential rate for metered mail failed to meet the requirements of 39 C.F.R. § 3010.12(b)(7) for classification changes. See Order 1890 at 46-47. Even now, the Postal Service apparently does not contend that it has instituted a new, separate classification for metered mail - simply a different rate for a preferred category of First Class Mail customers.

While § 3622(b)(8) of the Act requires that any classification distinction be “just and reasonable,” the prevailing justification in past years was simply that the discount

benefitted business users. The Commission accepted the Postal Service's projection, based on the experience of foreign posts, that "a lowered metered rate provides customer convenience, operational savings, lower risk from stamp theft and more cross-selling opportunities." *Id.* at 46. This reflects the Commission's conclusion in past years that there is no legal bar to a discount for metered mail customers unconnected to worksharing. See Order No. 1320, Docket No. RM2010-13, *Order Resolving Technical Issues Concerning The Calculation Of Workshare Discounts*, April 12, 2012 p.11 n.22 ("...there does not appear to be any obvious legal barrier to the Postal Service exercising its pricing flexibility by setting the rate for the metered mail Base Group at a different level than the remainder of single-piece First-Class letters.")

This reasoning is no longer defensible after *U.S. Postal Service v. Postal Regulatory Com'n*, 747 F.3d 906, 910-911 (D.C. Cir. 2014) and *GameFly, Inc. v. Postal Regulatory Com'n*, 704 F.3d 145, 148-149 (D.C. Cir. 2013), where the Court held that the Postal Service's similarly conclusory excuses were not adequate to justify differential treatment among users.

B. Foreign Posts' Business Discounts Are Not Governed by the Anti-Discrimination Mandate of §§ 403(c) and 404(c).

To begin with, the Commission's and the Postal Service's reliance on the "experience of foreign posts" ignores that, in the United States, the Postal Service operates under a statutory command to keep "the rate for each such class shall be uniform throughout the United States, its territories, and possessions." 39 U.S.C. § 404(c). "In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make

any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.” 39 U.S.C. § 403(c). Foreign posts that are not subject to this law may well experience benefits of unequal treatment, but that conduct is simply not lawful here.

C. If the Postal Service Disclaims a Worksharing Rationale, It has Nothing to Justify the Preference for Businesses.

At first blush, the Postal Service's reference to the “operational savings” of metered mail seems to indicate a worksharing rationale. But once it disclaims a worksharing rationale (to avoid a § 3922(e) proceeding), the Postal Service cannot continue to rely on “operational savings” as the explanation for the discount.

What remains is nothing but the Postal Service's apparent preference for business customers over the general public, untethered to any technological efficiency. A bare statement that businesses with postage meters are to be preferred over citizens using stamps is not sufficient, where the Postal Service disclaims any justification based on worksharing. The mere fact that a discount to some users might be beneficial to the preferred user cannot be enough. If it were, the anti-discrimination principle of §§ 403(c) and 404(c) would mean nothing. Any preference among users would be justified solely because the discount might induce the preferred user to use the Postal Service.

This is remarkably similar to the Commission's conclusory justification rejected in *GameFly*, 704 F.3d at 148-149. In *GameFly*, both the Postal Service and the Commission had relied on a similar circular rationale: “The difference in the rates that will be paid by Netflix and GameFly under the remedy is justified by cost differences and by general pricing differences between the First-Class Mail flat and letter products.

Additional rate differences may arise between users depending on whether a given mailer presorts its outbound pieces. Such differences are the result of reasonable pricing differences that exist between the various single-piece and presort rates applicable to First-Class Mail letters and flats.” *Id.* The D.C. Circuit held where the alleged differential stemmed from the Postal Service’s own decision to treat NetFlix differently than GameFly, the *ipse dixit* that the Postal Service preferred the differential could not justify the discrimination under § 403(c).

Sections 403(c) and 404(c) do not give the Commission and the Postal Service the kind of deference due legislatures under the Equal Protection Clause. That is, they may not satisfy §§ 403(c) and 404 (c) simply by announcing a policy to reward business customers over residential customers. If that satisfies §§ 403(c) and 404(c), then those provisions are meaningless -- the Postal Service and the Commission could justify unequal treatment in every case, simply by saying that they desire it as a matter of pricing policy.

Nor may the Commission and the Postal Service rely on the experience of foreign posts that engage in this price discrimination, where foreign law does not insist on equal treatment within classes and non-discrimination in services.

The Commission should revisit the basis for price discrimination in favor of metered mail in light of the *GameFly* decisions.

CONCLUSION

The Commission should order an independent study, similar to its 2011 study of service to rural zip codes, to quantify the extent to which service to rural communities has been disproportionately affected by consolidation and service changes in FY 2014.

The Commission should revisit the basis for price discrimination in favor of metered mail in light of the *GameFly* decisions.

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Respectfully submitted,

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