

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

NOTICE OF MARKET-DOMINANT
PRICE ADJUSTMENT

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Docket No. R2015-4

**COMMENTS OF ALLIANCE OF NONPROFIT MAILERS
(February 19, 2015)**

The Alliance of Nonprofit Mailers (“ANM”) respectfully submits these comments pursuant to Order Nos. 2327 and 2340. The comments focus on the proposed price changes for Nonprofit Standard Mail. For the reasons explained here, the proposed rates are unlawful in two respects.

First, the Postal Service has failed to explain why it could not design a nonprofit rate schedule producing projected average revenue per piece that is closer to 60 percentage of projected average revenue per piece for commercial Standard Mail. This violates 39 U.S.C. § 3626(a)(6). Second, the worksharing discounts proposed for Nonprofit Standard Mail diverge in many significant respects from the discounts proposed for commercial Standard Mail. The Postal Service has failed to offer a cogent justification for this discrimination. Hence, the proposed disparities violate 39 U.S.C. § 403(c), 35 years of precedent construing Section 403(c), and the settlement agreement entered into by the Postal Service and ANM and approved by the Commission in ACR2012.

Accordingly, the Commission should reject the proposed rates for Standard Mail without prejudice to filing new rates in this docket, and should order the Postal Service

to submit an alternative schedule of nonprofit rates that (1) are projected to generate, as nearly as practicable, 60 percent of the projected average revenue per piece generated by commercial Standard Mail, and (2) eliminate the noncompliance with 39 U.S.C. § 403(c) found by the Commission.

I. THE PROPOSED NONPROFIT STANDARD MAIL RATES VIOLATE 39 U.S.C. § 3626(a)(6)(B).

39 U.S.C. § 3626(a)(6)(B) requires that rates for Nonprofit Standard Mail “shall be established” so that the “estimated average revenue per piece to be received by the Postal Service from each subclass of [Nonprofit Standard Mail] shall be equal, *as nearly as practicable*, to 60 percent of the estimated average revenue per piece to be received from the most closely corresponding regular-rate subclass of mail.” (Emphasis added.) The rates proposed by the Postal Service in this case, however, are calculated to generate average revenue per piece equal to 60.425 percent of the commercial average revenue per piece.¹

The Postal Service tries to brush off its failure to comply with the 60 percent ratio by asserting that “[p]ast practice by the Commission has indicated that it is acceptable to meet the 60 percent ratio within a few tenths of a percent.” *Id.* at 40 & n. 23 (citing precedent). In none of the cited cases, however, did the proposed ratio deviate from the 60 percent benchmark by more than one or two-tenths of a percentage point. The 60.425 percent ratio proposed by the Postal Service overshoots the 60 percent target

¹ The Postal Service’s Notice of Price Adjustment described the projected nonprofit ratio as 60.4 percent. *Id.* at 40. The Postal Service’s workpapers state the ratio more precisely as 60.425 percent. CAPCALC-STD-R2015-4-CHIR5.xlsx, “Price Change Summary”.

by 0.425 percentage points, or 0.7 percent. This amounts to approximately \$12.7 million in excess revenue per year, hardly a *de minimis* amount for nonprofit mailers.²

More fundamentally, the statutory directive to satisfy a numerical benchmark “as nearly as practicable” may not be considered to establish an arbitrary tolerance range without regard to the feasibility of coming closer to the prescribed numerical target. The Supreme Court has made this clear in the analogous context of the one-man-one-vote apportionment requirement for congressional districts. In *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 18 (1964), the Court held that the Constitution requires that “as nearly as practicable one man’s vote in a congressional election is to be worth as much as another’s.” In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Court clarified that the qualifier “as nearly as practicable” did not give the State of Missouri leeway to draw congressional districts with a 1.06-to-1 ratio of the most populous district to the least populous. The phrase “as nearly as possible,” the Court explained, does not establish any

fixed numerical or percentage . . . variance small enough to be considered *de minimis* and to satisfy without question the “as nearly as practicable standard.” The whole thrust of the “as nearly as practicable” approach is inconsistent with the adoption of fixed numerical standards which excuse . . . variances without regard to the circumstances of each particular case. . . . [T]he “as nearly as practicable” standard requires . . . a *good-faith effort to achieve precise mathematical equality.*”

Id. at 530-32 (emphasis added). In *Karcher v. Daggett*, 462 U.S. 725, 727 (1983), the Court extended *Kirkpatrick* by holding that even “deviations of only one percent could

² Calculated by multiplying Standard Mail Nonprofit revenue at proposed prices from CAPCALC-STD-R2015-4-CHIR5.xlsx by 0.00425 / 0.6.

not be sanctioned where, though small, they “were not the result of a good-faith effort” to achieve the target.

The logic of *Kirkpatrick* and *Karcher* applies with equal force here. The qualifier “as nearly as practicable” in 39 U.S.C. § 3626(a)(6) does not entitle the Postal Service to establish a nonprofit/commercial ratio that exceeds the 60 percent benchmark merely by decreeing the difference small and then resting its case. To justify a departure from the statutory benchmark, the Postal Service must show that achieving a ratio closer to the 60 percent benchmark was *impracticable*.

The Postal Service has offered no explanation why it had no practical alternative to overshooting the statutory mark by nearly \$13 million per year. Nor is this proposition self-evident, particularly given the large number of rate cells within Nonprofit Standard Mail that could have been adjusted slightly downward.³ This failure of proof requires that the projected revenue-per-piece ratio be adjusted before any increases in Nonprofit Standard Mail rates may be approved.⁴

³ Indeed, since there were approximately 13 billion Standard Mail Nonprofit pieces in FY 2014, a simple way to remedy this violation would be to reduce all Standard Mail Nonprofit rates by 0.1 cents.

⁴ *UPS v. USPS*, 184 F.3d 827, 834-36 (D.C. Cir. 1999), is distinguishable on its facts. The case arose under a now-repealed provision of the Postal Reorganization Act which directed that recommended rates be projected to generate revenue that would equal “as nearly as practicable” the Postal Service’s “total estimated costs.” The specific issue before the court was whether the Commission had abused its discretion in declining to reduce the Postal Service’s proposed revenue requirement in light of developments after the filing of the case suggesting that the Postal Service was on track to spend less than assumed in its rate request. The court upheld the Commission on the ground that the Commission’s predictive judgment on such an “inherently” imprecise question was a permissible exercise of the Commission’s discretion. *Id.* By contrast, the issue here involves no such judgment call. ANM does not challenge the Postal Service’s projections of the average revenue per piece that its proposed rates for Nonprofit and Commercial Standard Mail are expected to generate. Once those

II. THE PROPOSED NONPROFIT STANDARD MAIL RATES VIOLATE 39 U.S.C. § 403(c).

The rates proposed by the Postal Service for Nonprofit Standard Mail also violate 39 U.S.C. § 403(c), which prohibits “any undue or unreasonable discrimination among users of the mails.” Many of the worksharing discounts proposed by the Postal Service for Nonprofit Standard Mail are smaller—and smaller by a wide margin—than the corresponding discounts proposed for commercial Standard Mail. The Postal Service has not begun to offer an adequate justification for these disparities. Indeed, the Postal Service appears to have made no effort to even compare many of the nonprofit and commercial discounts before filing this case.

That the issue even arises in this case leaves ANM feeling very much like Bill Murray in the 1993 movie *Groundhog Day*. Thirty-four years after the U.S. Court of Appeals ruled that the Postal Service could not discriminate without good reason against nonprofit mailers in setting worksharing discounts for Standard Mail (then called third-class mail); 18 years after another D.C. Circuit proceeding filed by ANM led to the adoption in Docket No. MC96-2 of nonprofit worksharing discounts that “mirror” commercial discounts; six years after the Commission held in Docket No. R2009-2 that the Postal Service could not establish discriminatory prices for Confirm pricing without an adequate justification; four years after the Commission held in Docket No. R2011-5 that the Postal Service could not, without an adequate justification, exclude nonprofit mailers from promotional discounts without an adequate justification; and two years after USPS agreed to specific safeguards against discrimination at the expense of

projections have been made, however, compliance with the 60 percent standard is a statutory requirement that neither the Postal Service nor the Commission are free to waive.

nonprofit mailers, ANM again finds itself forced to defend nonprofit mailers against the Postal Service's failure to take Section 403(c) seriously.

In Section II.A, we identify the many worksharing categories in which the Postal Service proposes in this case to discriminate against nonprofit mail. In Section II.B, we show that almost 35 years of precedent under 39 U.S.C. § 403(c)—and the settlement agreement that the Postal Service entered into and the Commission approved in Docket No. ACR2012—bar the Postal Service from setting worksharing discounts that discriminate between nonprofit and commercial mail without a reasoned justification. In Section II.C, we demonstrate that the disparities between the worksharing discounts established for nonprofit and commercial mailers have no reasoned justification, and therefore violate Section 403(c).

A. Nearly 35 Years Of Precedent Under 39 U.S.C. § 403(c) Establish That the Postal Service May Not Charge Different Worksharing Discounts For Nonprofit And Commercial Standard Mail Without Good Cause.

39 U.S.C. § 403(c), a provision that has been part of Title 39 since the establishment of the Postal Service and the Postal Rate Commission in 1971, states that the Postal Service, in “providing services and in establishing classifications, rates, and fees under this title . . . 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.” Nearly 35 years of precedent under Section 403(c) establish that it bars the Postal Service from setting unequal worksharing discounts for nonprofit and commercial Standard Mail without a showing of good cause.

1. Docket No. MC78-2 and *National Easter Seal Society* (1978-1981)

The issue of discrimination in worksharing discounts first arose in 1978, when the USPS proposed in Docket No. MC78-2 to begin offering presort discounts for third-class mail, the precursor of Standard Mail. The discounts were initially proposed only for regular (commercial) third-class mail. After several nonprofit mailers objected, the PRC ruled that the discounts should be extended to nonprofit mail as well. The PRC recommended, however, that the Postal Service immediately implement only the commercial discounts; the nonprofit discounts would be phased in over a period of years.

The nonprofit mailers challenged this in the U.S. Court of Appeals for the D.C. Circuit. They argued that phasing in the nonprofit discounts, while immediately implementing the regular-rate discounts, violated Section 403(c). The Court of Appeals agreed. In *National Easter Seal Society v. USPS*, 656 F.2d 754, 760-762 (D.C. Cir. 1981), the court ruled that disparities between the presort discounts offered to commercial vs. nonprofit users of third-class mail violated Section 403(c) “absent some reasonable ground for differential treatment.”

2. Docket Nos. MC95-1 and MC96-2

The *National Easter Seal Society* litigation led shortly afterwards to the founding of ANM by the nonprofit mailers that had pursued the litigation. Although worksharing discounts continued to generate controversy, the added element of undue discrimination between regular and nonprofit mail did not resurface as a major issue until Docket No. MC95-1, *Mail Classification Schedule, 1995—Classification Reform I*. In that case, the Postal Service proposed, and the Commission recommended,

worksharing discounts and other classification reforms for Periodicals and Standard Mail that were limited to the commercial subclasses. ANM's petition for judicial review of this decision in the D.C. Circuit was resolved by a settlement agreement with the USPS under which it proposed, and the PRC approved, worksharing discounts that "mirrored" the Commission's recommendations for the Commercial subclasses. Docket No. MC96-2, *Mail Classification Schedule—Classification Reform II (Nonprofit Mail)*, Op. & Rec. Decis. (June 19, 1996). At that point, the relationship between regular and nonprofit discounts seemed to have been resolved for good.

3. Docket No. R2009-2

The next significant discrimination case involved a special service, not a class of mail. In Docket No. 2009-2, *Notice of Price Adjustment*, the Postal Service proposed, as part of a broad set of market dominant rate adjustments under 39 U.S.C. § 3622(d), to raise the annual subscription price for highest subscription tiers of Confirm service to higher levels for mailing agents than for mail owners, including an annual price of \$250,000 for the Platinum tier, ten times the amount proposed for mail owners. A group of mail services providers challenged the \$250,000 price as both unreasonably high and unduly discriminatory in violation of Section 403(c). The Postal Service defended the price discrimination on the ground that mailing agent subscribers to the Confirm service cause most of its costs. The Commission, after scrutinizing the data offered by the Postal Service, rejected the defense as inadequate and rejected proposed Confirm subscription prices as unlawful. Order No. 191 (March 16, 2009) at 69-73.

4. Docket No. R2011-5

Discrimination reappeared in a related context in 2011, when the Postal Service proposed in Docket No. R2011-5, *Notice of Market Dominant Adjustment for First-Class Mail and Standard Mail*, to offer a temporary postage discount of three percent on mail carrying or containing a mobile barcode and entered in certain categories of First-Class Mail and Standard Mail during a two-month period in 2011. As proposed by the Postal Service, the discounts would have been offered only to commercial Standard Mail, not nonprofit Standard Mail. In response to a Chairman's Information Request, the Postal Service asserted that the discrimination was justified by "the likelihood a [greater] multiplier effect [from mobile barcodes on commercial mail], ease of administration, and the fact that nonprofit rates were already discounted." Order No. 731 (May 17, 2011) at 8.

The Commission rejected these justifications as insufficient to satisfy 39 U.S.C. § 403(c) and *National Easter Seal Society*:

The Commission finds, consistent with the Easter Seal case, that the Postal Service has not articulated a rationale to justify the differential treatment of nonprofit mailers in this promotion. 656 F.2d at 761. The Commission directs the Postal Service to make the discount available to nonprofit mailers that comport with all the other program requirements. The Commission understands that the impact of the inclusion of nonprofit mailers may be negligible, given the short lead time before the promotion, but reiterates the principle that the Postal Service must provide sufficient justification, pursuant to 39 U.S.C. 403(c), to exclude nonprofit mailers from a discount or rate on a product that has a nonprofit rate. *Id.* at 760-61.

Order No. 731 at 8-9.

5. Docket No. R2013-1

Discrimination resurfaced again in late 2012 in Docket No. R2013-1, *Notice of Market-Dominant Price Adjustment*. An employee of the PRC apparently noticed that several of the revised worksharing discounts proposed by the USPS for nonprofit Standard Mail were smaller than the corresponding discounts for commercial mail. The Commission issued a Chairman’s Information Request seeking an explanation for these discrepancies:

Workshare Rate Category	Benchmark Rate Category	Discount		Percent Difference
		Commercial	Nonprofit	
Auto 5D Flats	Auto 3D Flats	\$0.087	\$0.080	-8.0%
Nonauto 3D Flats	Nonauto ADC Flats	\$0.052	\$0.045	-13.5%
High Density Letters	Carrier Route Letters	\$0.077	\$0.074	-3.9%
High Density Plus Letters	Carrier Route Letters	\$0.080	\$0.077	-3.8%
High Density Flats	Carrier Route Flats	\$0.051	\$0.049	-3.9%
High Density Plus Flats	Carrier Route Flats	\$0.055	\$0.053	-3.6%

The USPS admitted in response that “the Nonprofit discounts are generally lower than the Commercial discounts,” but asserted—without any explanation—that making nonprofit discounts shallower than the corresponding discounts for the commercial subclasses “protects against over 100 percent passthroughs for both Commercial and Nonprofit.” USPS Response to Chairman’s Information Request No. 5, Question 8(b) (filed November 5, 2012).

This explanation evidently did not satisfy the Commission. In its November 16, 2012, order remanding the proposed Standard Mail rates to the Postal Service for reconsideration, the Commission directed the Postal Service to either (1) “provide a justification as to why it views the different levels of discounts to Standard Mail” as

“consistent with the PAEA and not contrary to *National Easter Seal Society*” or (2) “revise these discounts.” Order No. 1541 at 51.

The Postal Service responded by proposing a new schedule of worksharing discounts that left the discrimination against nonprofits largely unchanged:

Workshare Rate Category	Benchmark Rate Category	Discount		Percent Difference
		Commercial	Nonprofit	
Auto 5D Flats	Auto 3D Flats	\$0.093	\$0.090	-3.2%
Nonauto 3D Flats	Nonauto ADC Flats	\$0.050	\$0.044	-13.5%
High Density Letters	Carrier Route Letters	\$0.077	\$0.074	-3.9%
High Density Plus Letters	Carrier Route Letters	\$0.080	\$0.077	-3.8%
High Density Flats	Carrier Route Flats	\$0.051	\$0.049	-3.9%
High Density Plus Flats	Carrier Route Flats	\$0.055	\$0.053	-3.6%

Abandoning its previous rationale for the discrimination, the Postal Service offered four new ones:

- (1) *National Easter Seal Society* holds that unequal worksharing discounts are not “discriminatory” if the Postal Service has a “reasonable ground” for the price disparities.
- (2) The requirement of 39 U.S.C. § 3626(a)(6) that the average revenue per piece from Nonprofit “products” equal, as nearly as practicable, 60 percent of the average revenue per piece from the corresponding Commercial “products,” is impractical to satisfy while simultaneously equalizing worksharing discounts between nonprofit and commercial Standard Mail.
- (3) “[I]dentical presort discounts could lead to users of” undiscounted Nonprofit rates “paying considerably more than 60 percent of the

corresponding Commercial” rates, while users of discounted nonprofit rates “would pay considerably less than 60 percent” of discounted commercial rates. “One might argue” that this outcome “would be discriminating between regular Nonprofit mailers and presort Nonprofit mailers.” *Id.*

- (4) The Postal Service has established different worksharing discounts for nonprofit and commercial Standard Mail several times since the enactment of Postal Accountability and Enhancement Act of 2006 (“PAEA”), and the Commission has not objected.

USPS Response to Order No. 1541 (November 26, 2012) at 6-8.

ANM submitted comments rebutting each of the four new Postal Service rationales. Comments of ANM on USPS Compliance Filing (Dec. 4, 2012).

In Order No. 1573, the December 11 final order in R2013-1, the Commission approved the rates set forth in the November 26 compliance filing without modification. The Commission acknowledged that “disparities between commercial and nonprofit discounts are impermissible” under *National Easter Seal Society* “unless supported by a rational justification that the differential treatment is “specifically authorized” by another section of the statute.” Order No. 1573 at 8. The Commission also declined to adopt either the initial or subsequent policy justifications advanced by the Postal Service in support of the disparities. *Id.* at 8-9. Instead, the Commission offered several new rationales of its own:

National Easter Seal Society was decided before the PAEA and 39 U.S.C. 3626(a)(6) were enacted. Section 3626(a)(6) is silent on differing levels of

discounts. However, section 3626(a)(6)(C) provides that “[r]ate differentials within each subclass of mail matter under former sections 4452(b) and (c) shall reflect the policies of this title, including the factors set forth in section 3622(b) of this title.” Section 3622(b)(4) specifically “allow[s] the Postal Service pricing flexibility.” Further, section 3622(b)(8) recognizes that changes in rates may be “of unequal magnitude within” classes of mail.

The Postal Service correctly points out that the National Easter Seal Society case does not forbid a differential between discounts, but it requires a reasonable justification for the disparity. Here, it justifies the differential with an assertion that equalizing the Nonprofit presort discounts with the Commercial presort discounts without setting the Nonprofit base rates higher would be neither more efficient nor preferable from a policy perspective. The Commission finds that the Postal Service may use its pricing flexibility in setting workshare discounts for commercial and nonprofit Standard Mail, and that in the circumstances of this rate adjustment, its justification is reasonable.

In future rate adjustment proceedings, the Postal Service must continue to identify in its workpapers when nonprofit workshare discounts differ from their commercial counterparts and to justify deviations from the discounts applied to commercial mail.

ANM petitioned for review of Order No. 1573 in the U.S. Court of Appeals on January 10, 2013. *Alliance of Nonprofit Mailers v. PRC*, No. 13-1006 (D.C. Cir.).

6. Docket No. ACR2012

The divergence between nonprofit and commercial worksharing discounts also became an issue in ACR2012. This table shows these anomalies for the Standard Mail rates in effect from the beginning of Fiscal Year 2012 through January 21, 2012:⁵

⁵ Source: <http://pe.usps.gov/Archive/HTML/DMMArchive20111107/Notice123.htm>.

Workshare Rate Category	Benchmark Rate Category	Discount	
		Commercial	Nonprofit
Auto 5-Digit Flats	Auto 3-Digit Flats	\$0.079	\$0.076
Nonauto 3-Digit Flats	Nonauto ADC Flats	\$0.052	\$0.047
High Density Letters	Carrier Route Letters	\$0.070	\$0.068

This table shows the corresponding relationships for the Standard Mail rates in effect from January 22, 2012, through the end of Fiscal Year 2012:⁶

Workshare Rate Category	Benchmark Rate Category	Discount	
		Commercial	Nonprofit
Auto 5-Digit Flats	Auto 3-Digit Flats	\$0.085	\$0.076
Nonauto 3-Digit Flats	Nonauto ADC Flats	\$0.058	\$0.048
High Density Letters	Carrier Route Letters	\$0.072	\$0.069

Ten days before ANM's initial brief as petitioner was due in the D.C. Circuit on review of R2013-1, the Postal Service agreed to settle its dispute with ANM in both that case and ACR2012 by stipulating to standards and procedures governing future changes in nonprofit and commercial Standard Mail. By the terms of the settlement, the Postal Service agreed that, in "any future case in which the Postal Service proposes to establish a worksharing discount for nonprofit Standard Mail that differs from the corresponding discount for commercial Standard Mail":

1. The Postal Service's notice of price adjustment shall: (a) identify each instance in which the proposed nonprofit discount differs from the corresponding commercial discount; and (b) provide the Postal Service's justification(s) for each difference.
2. The Commission will review the rates established by the Postal Service in paragraph (1), above, in accordance with 39 U.S.C. § 403(c) and the Court of Appeals' decision in *National Easter Seal Society for Crippled*

⁶ Source: <http://pe.usps.gov/Archive/HTML/DMMArchive20120122/Notice123.htm>.

Children and Adults v. United States Postal Service, 656 F.2d 754 (D.C. Cir. 1981).

3. The Commission's decisions in Docket No. R2013-1 and other post-PAEA price adjustment cases that approved price adjustments with unequal worksharing discounts shall not control the Commission's determination under paragraph (2), above when: (a) the Postal Service fails to comply with paragraph (1); or (b) the Postal Service complies with paragraph (1), but another party files a timely challenge to the lawfulness of the discounts.
4. If the Commission finds, under paragraph (2), above, that there is no reasonable justification for the difference in discounts, the Postal Service shall provide an alternative schedule of nonprofit rates that (1) generates approximately the same total revenue as the rates proposed by the Postal Service, and (2) eliminates the noncompliance with 39 U.S.C. § 403(c) found by the Commission.

Docket No. ACR2012, Joint Motion of ANM and USPS to Adopt Standards Governing Pricing of Worksharing Discounts for Nonprofit Standard Mail (March 13, 2013) at Appendix A. The Commission accepted the settlement agreement in its Annual Compliance Determination for Fiscal Year 2012 (March 28, 2013) at 25. In reliance on the settlement, ANM withdrew its petition for review of R2013-1 in the Court of Appeals.

7. The *GameFly* Discrimination Case

The D.C. Circuit rendered a pair of decisions construing Section 403(c) during the same period. In *GameFly v. PRC*, 704 F.3d 145 (D.C. Cir. 2013) ("*GameFly I*"), the Court of Appeals held that "regardless of whether it adopted the precise remedy sought by the complainant [GameFly, a user of First-Class Mail to send and receive DVDs], the Commission was required either to remedy all discrimination or to explain why any discrimination it left in place was due or reasonable under § 403(c)." *Id.* at 148. "The Commission," the court added, "must either remedy all discrimination or explain why

any residual discrimination is due or reasonable under § 403.” *Id.* at 149. See also *USPS v. PRC*, 747 F.3d 906 (D.C. Cir. 2014) (“*GameFly II*”) (upholding the Commission’s prescription of a more complete remedy on remand).

B. Many Of The Worksharing Discounts Proposed For Nonprofit Standard Mail Are Much Smaller Than The Discounts Proposed For Commercial Standard Mail.

Less than two years after entering into the settlement agreement with ANM in R2013-1 and ACR2012, the Postal Service is back to its habit of discriminating against nonprofit mailers. The rates proposed by the Postal Service for Standard Mail in the present case include many rate cells in which the worksharing discounts for Nonprofit Standard Mail differ from the corresponding worksharing discounts for Commercial Standard Mail. The disparities are most noteworthy in the destination entry and flat sequencing system (“FSS”) discounts. Here are some of the most significant examples:

Destination entry discounts for letters

The proposed DNDC dropship discount (relative to origin entry) for commercial automation letters at each presort letter is 0.1 cents per piece larger than for nonprofit automation letters, and the DSCF dropship discount (relative to origin) for commercial automation letters is 0.2 cents per piece larger than for nonprofit automation letters. USPS-LR-R2015-4/2, CAPCALC-STD-R2015-4.xlsx, tab “L-F-P New Prices”. These disparities are particularly problematic because the majority of Standard Mail Nonprofit volumes are mailed at automation letter rates.

The proposed DNDC dropship discount (relative to origin entry) for saturation letters weighing 3.5 ounces or less is \$0.037 for commercial letters and \$0.033 for nonprofit letters. USPS Notice, Attachment A, Part I, proposed MCS § 1205.6.

FSS discounts

The dropship discounts for FSS Automation Flats also have numerous disparities between the commercial categories and the corresponding nonprofit categories. USPS Response to CHIR No. 6, Questions 8-9.⁷

The Postal Service proposes commercial worksharing discounts for entering Automation Flats on FSS Scheme pallets/containers rather than Automation Flats on FSS Non-Scheme pallets/containers (the benchmark category identified by the USPS) equal to \$0.049 and \$0.034 per piece, respectively, for flats weighing less than and more than 3.3 ounces. For nonprofit mail, the corresponding discounts are \$0.009 and \$0.004. USPS Response to CHIR No. 6, Question 6.

The Postal Service proposes commercial worksharing discounts for entering Automation Flats on FSS Non-Scheme pallets/containers rather than Automated 3-Digit Flats (the benchmark category identified by the USPS) of \$0.130 and \$0.121 per piece, respectively, for flats weighing less than and more than 3.3 ounces. For nonprofit mail, the corresponding discounts are \$0.105 and \$0.091. USPS Response to CHIR No. 6, Question 7.

⁷ In some rate cells, the discounts for nonprofit mail are actually greater. In most instances, however, the opposite is true, often by a wide margin.

The Postal Service proposes a commercial worksharing discount for entering Non-Automation Flats on FSS Scheme pallets/containers rather than Non-Automation Flats on FSS Non-Scheme pallets/containers (the benchmark category identified by the USPS) equal to \$0.005. For nonprofit mail, the corresponding discounts are \$0.005 for pieces weighing less than 3 ounces, and *zero* for pieces weighing more than 3 ounces. USPS Response to CHIR No. 6, Question 10.⁸

The Postal Service proposes commercial worksharing discounts for entering Automation Flats on FSS Non-Scheme pallets/containers rather than Automation 3-Digit Flats (the benchmark category identified by the USPS) of \$0.130 and \$0.121 per piece, respectively, for flats weighing less than and more than 3.3 ounces. For nonprofit mail, the corresponding discounts are \$0.105 and \$0.091. USPS Response to CHIR No. 6, Question 7.

C. The Postal Service Has Failed To Justify This Discrimination

With respect to these disparities, the Postal Service has not come close to satisfying the substantive standards of 39 U.S.C. § 403(c), let alone the disclosure and proof requirements set forth in the March 2013 settlement agreement between the Postal Service and ANM in ACR2012:

The Postal Service's notice of price adjustment shall: (a) identify each instance in which the proposed nonprofit discount differs from the corresponding commercial discount; and (b) provide the Postal Service's justification(s) for each difference.

⁸ For piece-rated Non-Automation Flats entered on FSS Non-Scheme pallets/containers rather than as Non-automation 3-Digit Flats, the nonprofit discounts are actually larger than the commercial discounts. USPS Response to CHIR No. 6, Question 11.

The Postal Service's January 15, 2015 Notice did not even identify most of the instances "in which the proposed nonprofit discount differs from the corresponding discount." The Postal Service did not file a complete list of the nonprofit-vs-commercial differences in Standard Mail worksharing discounts until a series of Chairman's Information Requests forced the Postal Service to provide this information several weeks into the case.⁹

The Postal Service also failed to "provide" in its Notice "the Postal Service's justification(s) for each difference" in worksharing discounts. Indeed, the Postal Service has admitted that many of rate disparities were "largely inadvertent." USPS response to CHIR 8, Question 4(a). For the new worksharing discounts within the FSS rate categories, the Postal Service contends that, because of the "restructuring of FSS prices," "when the nonprofit discounts were aligned with their commercial counterparts, illogical and inefficient pricing relationships between FSS entry points emerged."¹⁰ While asserting that the proposed FSS rate changes were "complex" and the Postal Service wanted to offer lower prices for more elaborate or valuable forms of worksharing, however, the Postal Service has offered no explanation of *why* the offering the same worksharing rate differentials for commercial and nonprofit mail would force the worksharing price tiers out of order for nonprofit mail but not commercial mail.

The only concrete example offered by the Postal Service illustrates this failure of proof:

⁹ USPS response to CHIR 3, Question 5(b), and supporting Excel workpaper CHIR_3Q5b.xlsx (filed February 4, 2015); USPS responses to CHIR 6, Questions 6-15 (filed February 11, 2015).

¹⁰ Notice at 45, 49; USPS response to CHIR 3, Question 5(a); see *also* USPS response to CHIR 2, Question 7(b); USPS Response to CHIR 8, Question 4.

For example, the proposed Commercial Origin price for 5-Digit Automation Flats is \$0.376 and the proposed Commercial Origin price for Non-Scheme FSS is \$0.337. This is a discount of \$0.039. On the nonprofit side, the proposed nonprofit Origin price for 5-Digit automation is \$0.237. The proposed price for nonprofit non-scheme FSS is \$0.039. Increasing the nonprofit discounts up to the commercial discount would move the nonprofit non-scheme origin price to \$0.198. The price of \$0.198 is problematic, because the scheme price is \$0.213 and the Postal Service does not want to have non-scheme prices that are lower than scheme prices. Other adjustments might be possible, but fixing all nonprofit discounts for the 44 newly created nonprofit FSS cells is too constraining for this complex, but economically beneficial, pricing exercise.

USPS Response to CHIR 3, Question 5(a). This explanation begs the obvious question: why not avoid the supposed dilemma by lowering the \$0.213 scheme price and making offsetting increases in the prices of less heavily workshared nonprofit mail? Or, stated more broadly: why not propose the identical worksharing rate differentials that the Postal Service has proposed for commercial mail, but apply those discounts to undiscounted rates set at levels so that the overall average revenue per piece satisfies the 60 percent ratio mandated by 39 U.S.C. § 3626(a)(6)? The supposed “complexity” of the rate design changes required by the introduction of FSS rates did not prevent the Postal Service from developing commercial Standard Mail rates with worksharing rate relationships that satisfy the Postal Service.¹¹

¹¹ The Postal Service has made no showing that importing the commercial price differentials proposed in this docket into the nonprofit rate schedule would make the undiscounted nonprofit rates unacceptably high. Fundamental principles of due process, recognized in the first paragraph of the March 2013 settlement agreement between ANM and the Postal Service, preclude the Commission from crediting such a claim if belatedly asserted by the Postal Service for the first time in its reply comments, after mailers no longer can respond.

III. THE COMMISSION SHOULD REJECT THE PROPOSED STANDARD MAIL RATES, AND ORDER THE POSTAL SERVICE TO FILE REVISED RATES THAT COMPLY WITH 39 U.S.C. §§ 403(c) AND 3626(a)(6).

The Postal Service's failure to (1) provide any explanation for not proposing Standard Mail rates that comply more closely with the 60 percent benchmark prescribed by 39 U.S.C. § 3626(a)(6), (2) identify the discriminatory elements of its proposed worksharing discounts for Standard Mail at the outset of this case, and (3) provide an adequate justification for the discrimination, preclude Commission approval of the proposed price changes for Standard Mail. Instead, the Commission should direct the Postal Service to do what it agreed to do in paragraph 4 of its March 2013 settlement agreement with ANM:

If the Commission finds, under paragraph (2), above, that there is no reasonable justification for the difference in discounts, the Postal Service shall provide an alternative schedule of nonprofit rates that (1) generates approximately the same total revenue as the rates proposed by the Postal Service, and (2) eliminates the noncompliance with 39 U.S.C. § 403(c) found by the Commission.

Docket No. ACR2012, Joint Motion of ANM and USPS to Adopt Standards Governing Pricing of Worksharing Discounts for Nonprofit Standard Mail (March 13, 2013) at Appendix A ¶ 4. The Commission should order the Postal Service to submit a compliance filing establishing the same rate structure proposed for commercial Standard Mail, applied to undiscounted rates set at a level calculated to produce average revenue per piece that equals "as nearly as practicable" 60 percent of the projected average revenue per piece from the Postal Service's proposed rates for commercial Standard Mail. Interested parties should be allowed 14 days to respond to the Postal Service's compliance filing.

Respectfully submitted,

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