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

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

**RESPONSE OF ASSOCIATION FOR POSTAL COMMERCE, MPA—THE ASSOCIATION OF MAGAZINE MEDIA, ALLIANCE OF NONPROFIT MAILERS, DIRECT MARKETING ASSOCIATION, INC., AMERICAN CATALOG MAILERS ASSOCIATION, ENVELOPE MANUFACTURERS ASSOCIATION, EPICOMM, IDEALLIANCE, MAJOR MAILERS ASSOCIATION, NATIONAL NEWSPAPER ASSOCIATION, AND SATURATION MAILERS COALITION TO THE MOTION OF THE UNITED STATE POSTAL SERVICE TO SUSPEND EXIGENT SURCHARGE REMOVAL PROVISIONS OF ORDER NO. 1926 AND TO ESTABLISH REMAND PROCEEDINGS**

**(JUNE 11, 2015)**

The undersigned mailer parties submit this response to the June 8 motion of the United States Postal Service ("USPS" or "Postal Service") to suspend the exigent surcharge removal provisions of Order No. 1926 and to establish remand proceedings. The motion should be denied.

The Postal Service has grossly misstated the proper scope of the case on remand. The court has remanded the case for the Commission to perform a single task: recalculate the exigent rate surcharge without the "count once" limitation. Slip op. at 15-17, 20. The Commission has no obligation to reopen the record for relitigation of any

other issues, and nothing in the court's opinion suggests otherwise. Indeed, if the Commission were to reconsider any of the other aspects of Order No. 1926 raised in the Postal Service motion, constitutional and administrative due process would require that the record be reopened to consider still other issues that support *reducing* the maximum allowed contribution from the exigent surcharge. The Postal Service should not be allowed to cherry-pick the issues for reopening. The resulting proceeding would likely be more protracted and costly, and ultimately less profitable for the Postal Service, than a remand proceeding limited to the "count once" issue.

It is unclear whether the Commission can complete its consideration of the "count once" issue on remand before the Postal Service reaches the cap on the surcharge that the Commission adopted and the Court of Appeals carefully reviewed and emphatically affirmed. It is equally unclear whether reconsideration of the "count once" limitation would justify an increase in the total allowed surcharge revenue (and, if so, by how much) even if the Commission ultimately decided to abrogate the limitation. What is clear, however, is that the Commission must take steps to assure that the Postal Service does not gain an unjustified windfall if the surcharge is temporarily extended pending remand and all or part of an extended surcharge is ultimately found unwarranted. The balance of equities requires this. If the surcharge is not extended pending remand and the USPS ultimately prevails, the Commission can make the USPS whole by authorizing a renewed surcharge. By contrast, if the surcharge is extended and the mailers ultimately prevail, they can never recover any surcharge payments later found unwarranted. If, therefore, the Commission grants the requested extension, it must condition the extension on the Postal Service's agreement that, if the Commission ultimately finds that some or all of the additional surcharge revenue was unjustified, the Postal Service will make the mailers whole by

making an offsetting reduction in the increases otherwise authorized by the CPI-based rate adjustment mechanism.

## I. THE SCOPE OF REMAND SHOULD BE LIMITED.

The only portion of Order No. 1926 that was returned to the Commission is the "count once" limitation on the exigent rate authority available to the Postal Service. The Commission will need to decide whether the "count once" limitation should be abrogated and, if so, determine the effect on the cumulative recovery allowed. This is a narrow task. As the court stated:

> We grant the Postal Service's petition for review in part, vacate the 'count once' portion of the Commission's order, and otherwise deny the petition. We also deny the Mailers' petition for review. The case is remanded for proceedings consistent with this opinion.

Slip op. at 20.

Due process entitles all interested parties to a reasonable opportunity to be heard on these issues before the Commission decides them. 5 U.S.C. § 553(c); 39 USC § 3622(d)(1)(E) (authorizing the Commission to prescribe an exigent rate increase "after notice and opportunity for a public hearing and comment"); and *Action on Smoking and Health v. Civil Aeronautics Bd*., 713 F.2d 795, 800 (D.C. Cir. 1983) (rejecting agency's attempt to promulgate a revised rule on remand without allowing for additional comment and explaining that while it would not "hold that an agency must start from scratch in *every* situation in which rules are vacated or remanded," the exceptions to the notice and comment requirement "will be narrowly construed and only reluctantly

countenanced").[1] The Postal Service's *ex cathedra* pronouncement that "the absolute floor for a revised estimate of the total contribution loss is well above the amount of $2.766 billion embedded in Order No. 1926, and is in no circumstances less than $3.957 billion" (USPS Motion at 2) prejudges the very issue to be decided. The Postal Service has no right to have its calculations accepted until other parties have had an opportunity to scrutinize and respond to them. The narrow scope of this issue means, however, that it can be litigated and resolved relatively quickly.

The Postal Service Motion asks the Commission not only to recalculate the surcharge without the "count once" limitation but also to selectively re-open the record to relitigate portions of the Order No. 1926 that the court upheld. The Postal Service seeks, in particular, to relitigate the "new normal" limitation on the theory that the "rationale for the dates chosen by the Commission as marking the arrival of the 'new normal' can[not] be reconciled with the Commission's analysis in a subsequent portion of Order No. 1926 concerning why relief from exigent harm meets the 'necessary' prong of the statutory exigent provision." USPS Motion at 3-4. The Postal Service claims that "the court left open the question of whether the totality of Order No. 1926 stated a consistent position regarding the Postal Service's ability to reduce institutional costs through operational adjustments made in response to dramatically lower volume levels." *Id*. at 3. The Postal

[1] The Commission solicited and received multiple rounds of comments after remand of the first exigency decision in *USPS v. PRC*, 640 F.3d 1263 (D.C. Cir. 2011). *See* Order No. 747 (July 7, 2011); Order No. 781 (July 29, 2011); Order No. 864 (September 20, 2011); Order No. 937 (Oct. 31, 2011); Order No. 1059 (November 12, 2011). Likewise, the Commission allowed further comment by the parties after remand of Order No. 718 in *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013). See Order No. 1700 (April 1, 2013); Order No. 1763 (June 26, 2013). Because of the scope of the remand in the present case is narrower, the required proceedings may be briefer. But comment nonetheless must be allowed.

Service's reading of the court's opinion is refuted by the opinion itself. The court, after considering the Postal Service's criticisms of the "new normal" restriction, Slip op. at 11-15, held that the Commission's application of the "new normal" rule was well reasoned and grounded in the evidence before the Commission. The Court noted, among other things, that accepting the Postal Service's "wooden" reading of the "due to" clause would justify an "unending rate increase." Id at 13. The Court therefore held that the "new normal" standard as applied by the Commission "comfortably passes deferential APA review." *Id*. at 17.

The Postal Service gains nothing by asserting that the Commission's application of the "new normal" constraint was "inconsistent with the "Commission's analysis of whether the rate increase was 'necessary.'" USPS Motion at 3-4. The court expressly declined to consider the argument because it was not properly before the court. Slip op. at 17 n. 3.

The court's observation that the "Commission . . . is free to consider that argument on remand," Slip op. at 17 n. 3, is likewise unhelpful to the Postal Service. USPS Motion at 4 n. 3. The quoted statement is an unexceptionable truism of administrative law: an agency is normally permitted to consider any issue on remand. Apart from the effect of "count once" rule, however, the Commission is not *required* to reconsider any aspect of Order No. 1926. And nothing in the court's opinion (including footnote 3) suggested that the Commission *should*, rather than *could*, reconsider its findings on the "new normal" constraint.[2] To the contrary, as noted, the Court rejected the underlying premise of the

[2] The Postal Service's portrayal of the record before the D.C. Circuit is incoherent. On the one hand, the USPS asserts states that it presented its position that the "new normal" standard is inconsistent with the discussion of the "necessary" clause of the statute "very

Postal Service's argument: that the "new normal" standard must allow the Postal Service to recover through exigent rate increases any and all costs whose recovery is "necessary" within the meaning of 39 U.S.C. § 3622(d)(1)(E). The "new normal" constraint implements the "due to" or causation prong of 39 U.S.C. § 3622(d)(1)(E), not the "reasonable and equitable and necessary" prong. Slip op. at 13.

Finally, if the Commission were to reopen the record for reconsideration of the "new normal" limitation, the record should also be reopened to consider other issues that are likely to warrant *reducing* the allowed exigent surcharge. For example:

(1) The court, while holding that the "count once" rule was arbitrary, did not preclude the Commission from imposing other restrictions on the amount of recovery available. For instance, the Commission could conclude that volume lost in the second and subsequent years because of the recession would nevertheless have been lost in subsequent years because of internet diversion or other alternative causes. That is, even if the hypothetical cable customer cancelled her subscription in the first year of the recession because she lost her job, she may have switched to receiving her bills

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forcefully in its briefs to the court." USPS Motion at 4, n.3. The USPS then claims that "in light of how extensively these arguments were developed by the Postal Service in its briefs, it seems clear that the court in footnote 3 is suggesting that the Commission reconsider this issue on remand." *Id*. This position is absurd. The court's opinion, explicitly stated in the footnote, was that the USPS had *not* properly raised the issue in its briefs. How could the court simultaneously (1) find that the USPS had not raised the issue in its briefs and (2) rely on the Postal Service's briefing of the issue to suggest that the Commission reconsider the issue on remand? If, of course, the Postal Service's footnote is intended to say either that the Court misread its Briefs or that the Court did not understand its argument, the remedy does not reside with the Commission.

electronically even if she had remained employed—and this switch may have occurred before the advent of the "new normal."

(2) As the mailers explained in their briefs to the court, Order No. 1926 overstated the losses that were due to the 2007-2009 recession by erroneously attributing to the recession the volume losses associated with (1) several non-linear intervention variables in the Thress model, and (2) the trend component of the macroeconomic variable for Single-Piece First-Class Mail. The D.C. Circuit declined to consider these challenges on the ground that they involved "highly technical" issues that were beyond the expertise of "generalist judges." Slip op. at 18-19. The Commission is not so constrained. If the record is to be opened for reconsideration of issues other than the effect of eliminating the "count once" constraint, these issues should be reconsidered as well.

(3) Mail volume trends since 2013 raise serious doubt about whether the 2007-2009 recession caused as large a share of the decline in mail volume during and after the recession as the Commission concluded in Order No. 1926.

(4) Even assuming *arguendo* that the prescription of a larger and longer-lasting exigent surcharge might have been "reasonable and equitable and necessary" under 39 U.S.C. § 3622(d)(1)(E) in December 2013, when the Commission issued Order No. 1926, developments since then raise serious questions about whether the Postal Service needs any further surcharge revenue today. As the Court pointed out, the purpose of 3622 (d)(1)(E) is to assess the Postal Service's "*current* need to get back on its feet in the

wake of the now-defined exigency." Slip op. at 13 (emphasis in the original). The 2007-2009 recession ended by any measure at least four years ago, and it is open to question whether the Postal Service's financial position is as precarious as the Commission perceived at the end of 2013, when Order No. 1926 was issued.

For these and other reasons, venturing beyond the "count once" issue is likely to result in a proceeding that is more protracted and costly, with an end result less remunerative to the Postal Service, than a remand limited to the "count once" issue. And re-opening the record selectively, as the Postal Service proposes, would raise serious Due Process and APA issues that should be avoided.

## II. IF THE COMMISSION GRANTS INTERIM RELIEF, IT MUST PROTECT AGAINST OVER-RECOVERY BY THE POSTAL SERVICE.

The Postal Service's request for a temporary extension of the exigent surcharge pending remand, if granted at all, should be granted only if the Postal Service agrees to conditions that would make mailers whole if the additional surcharge revenue is ultimately found unwarranted.

The Commission's threshold authority to provide the interim relief sought by the USPS is unclear. As the USPS has recognized, it must provide at least 45 days advance notice before changing market dominant rates. USPS Rule 28(j) letter to D.C. Circuit (May 19, 2015) at 1; 39 U.S.C. § 3622(d)(1)(C); Order No. 2319 at 5-6. The notion that the Commission could "relieve the Postal Service of its obligation to notify its customers that the surcharge is scheduled to end" is unfounded. Department of Justice response to

USPS Rule 28(j) letter (May 21, 2015) at 1. The 45-day notice requirement is a "requirement" under 39 U.S.C. § 3622(d), not a discretionary "objective" or "factor" under 39 U.S.C. §§ 3622(b) and (c). To give mailers 45-day advance notice of an extension of the surcharge, the Commission would need to issue an extension order now, even before the court's mandate issues.[3] Whether the Commission has the authority to do this is uncertain. 28 U.S.C. § 2349(a), which 39 U.S.C. § 3663 incorporates by reference, suggests that the Commission may not regain jurisdiction to act in this docket until the court's mandate issues.

If the Commission decides to extend the expiration date of the surcharge during the remand proceedings, however, the Commission must condition any such extension on conditions that prevent the Postal Service from retaining unwarranted gains if all or part of the extended surcharge is ultimately found unjustified. The balance of equities requires this. The Commission obviously cannot determine how large an increase in surcharge recovery (if any) is warranted by alteration or abrogation of the "count once" limitation until the end of the remand process. If the existing surcharge is allowed to expire, and the Commission ultimately finds that the Postal Service was entitled to more, the Commission can make the USPS whole by authorizing a renewed surcharge. By contrast, if the Commission were to allow the exigent surcharge to remain in effect pending remand, and all or part the surcharge were ultimately found excessive under 39 U.S.C. § 3622(d)(1)(E), mailers could never recover those amounts. 39 U.S.C. § 3681. This fact distinguishes the Postal Service from most other regulated monopolies, from which ratepayers may obtain refunds or reparations for rates that are subsequently found

[3] Issuance of the court's mandate is not scheduled to occur until July 27. *See* Fed. R. App. P. 35(c), 40(a)(1) and 41(b),

to exceed just and reasonable levels. *Cf. Burlington Northern Inc. v. United States*, 459 U.S. 131, 141-42 (allowing railroads to maintain higher rates pending remand by Court of Appeals because, *inter alia*, under the Interstate Commerce Act, "the shipper may receive reparation for overpayment while the carrier can never be made whole after underpayment").

Hence, if the Commission does grant a temporary extension of the surcharge in the interim, the extension should be conditioned on an agreement by the Postal Service to make the mailers whole through an offsetting hold-down of future CPI-based rate increases if the Commission ultimately finds that all or part of the extended surcharge revenue was unwarranted. The Commission's authority to impose such a condition is clear. 39 U.S.C. § 3622(d)(1)(E) empowers the Commission to deny approval of exigent surcharges that are not "reasonable and equitable." Absent protective conditions sufficient to protect against the risk of unjust enrichment of the Postal Service and irreparable injury to mailers, the "reasonable and equitable" standard would require outright denial of the requested extension of the surcharge termination date. *A fortiori*, Section 3622(d)(1)(E) empowers the Commission to take the less restrictive step of conditioning extension of the surcharge termination date on a requirement that the Postal Service keep account of the extended surcharge amounts and make mailers whole if any of the additional amounts are ultimately found to be unjustified.[4]

[4] *Cf*. *Utah Power & Light Co., PacifiCorp and PC/UP&L Merging Corporation*, 45 FERC ¶ 61,095 (1988) at 61280, remanded in part on other grounds, *Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991) (holding that, because the FERC could have denied outright as anticompetitive a proposed merger of electric utilities, the FERC could properly condition approval of the merger on a requirement that the merged company wheel power generated by unaffiliated power producers; "the power to condition approval is fairly subsumed within the broader power to disapprove. . . . Thus, conditioning the

## CONCLUSION

The undersigned parties respectfully request that the Commission adopt the foregoing procedures for the remanded phase of this case after the Court of Appeals' mandate issues.

Respectfully submitted,

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merger so as to make it consistent with the public interest represents no extension of the Commission's authority.").

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