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

RATE ADJUSTMENT DUE TO EXTRAORDINARY OR EXCEPTIONAL CIRCUMSTANCES	**Docket No. R2013-11 R**

COMMENTS OF AMERICAN POSTAL WORKERS UNION, AFL-CIO (June 26, 2015)

The American Postal Workers Union, AFL-CIO, respectfully submits these comments in support of continuing the exigent rate in effect until the Commission conducts its long-term review under 39 U.S.C. § 3622(d)(3).

We make four points:

1) The D.C. Circuit's order resolves the key points of dispute in Order No. 1926 in favor of Vice Chairman Taub's dissent. The D.C. Circuit agrees with Vice (now Acting) Chairman Taub that the Commission may not blind itself to the multi-year effects of the Recession by imposing an artificial cutoff. The D.C. Circuit's decision also supports Vice Chairman Taub's objection that the Commission must be consistent in considering the Postal Service's public obligations in measuring its adjustment.

2) The prevailing industry argument against the exigent rate is inconsistent. It demands rate relief from a public monopoly, yet it also demands that the Postal Service be treated as a private market actor. If the Postal Service were a private business, there would be no need to regulate the fairness of postal rates at all – the Postal Service would be free to make unilateral pricing decisions based on its own view of the market. The PAEA is based on the Postal Service's status as a public institution. This public role

requires rate regulators to consider the institutional health of the public entity, not just the short-term interest of consumers to buy its product as cheaply as they would like.

3) Short-term rate fluctuations are not wise policy. The Commission must preserve "predictability and stability in rates." 39 U.S.C.§ 3622(b)(2). This counsels maintaining the status quo until the 2017 long-term review. If the Commission concludes then that the exigent surcharge has lasted too long, it can make prospective rate adjustments to compensate. This is a common-sense approach that mailers themselves have advocated elsewhere in this proceeding.

4) The industry arguments against the surcharge are based on a mechanical reading of the PAEA that mailers themselves avoid elsewhere. For example, many mailers benefit from metered mail discounts that exceed the PAEA's limitations on worksharing. These discounts are allowed, despite the apparent limitations of 39 U.S.C. § 3622(e), because the Commission deems them "reasonable." FY 2014 ACD at 68. Where mailers benefit from "reasonable" discounts allowed by the Commission, they cannot object to the same holistic approach to the exigent surcharge.

ARGUMENT

1. The D.C. Circuit's order vindicates Vice Chairman Taub's dissent.

The D.C. Circuit approved the Commission's general concept of a "new normal" environment. The Court agreed that the Commission may reasonably determine the point at which the Postal Service has adjusted to the post-Recession environment. *Alliance of Nonprofit Mailers v. Postal Regulatory Com'n*, ___ F.3d ___, 2015 WL 3513394 *5-7 (D.C. Cir. 2015).

This basic concept was not controversial in the 2013 proceedings. All three Commissioners, including then-Vice Chairman Taub, recognized that the Great Recession was not the only factor affecting mail volume. *See* Order No. 1926 at 95-96, Dissent of Vice Chairman Taub at 5-7. The disagreement between Vice Chairman Taub and the other two Commissioners was over the majority's arbitrary one-year cutoff, as well as the majority's inconsistent refusal to apply its own findings that the Postal Service had adjusted reasonably within its constraints as a public institution.

- **One-year cutoff**

The majority adopted a one-year limit, not because it was empirically justified, but because without such a limit the Commission would have to acknowledge the ripple effects of the Great Recession over several years. Order No. 1926 at 95-96. The majority candidly stated that it imposed the one-year limit as a legal fiction to prevent the Postal Service from proving ongoing losses over a longer period. *Id*.

In dissent, Vice Chairman Taub acknowledged the difficulty of fixing the end of the Great Recession's effects. His main objection was to the Commission's arbitrary one-year cutoff: "How is it that the Postal Service suddenly experiences no further impact from the Great Recession (i.e., the extraordinary and exceptional circumstance) and that the continuing financial harm attributable to volumes lost due to the Great Recession has ended?" Dissent of Vice Chairman Taub at 5.

The D.C. Circuit squarely resolved this dispute against the Commission majority. The Court picked out the majority's two leading rationales and rejected them:

> Order 1926 offered two rationales for its "count once" rule: First, the Commission worried that counting mail as lost any year beyond the first "makes it impossible for the Commission to fulfill its statutory mandate to calculate the total amount lost due to the exigent circumstance." Order 1926, at 95. Second, "once a piece

> of mail is lost in a given year due to the Great Recession, in subsequent years, the Postal Service is aware of that loss and adjusts it expectations to continue without that mail piece." Id. at 96.
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> Neither of those rationales makes sense juxtaposed against the Commission's immediately preceding explanation that the "new normal"—not the arbitrariness of turning a calendar—defines when the Postal Service "regain[ed] its ability to predict or project mail volumes" or to "adjust to the lower volumes." Order 1926, at 86. Neither of those rationales makes sense juxtaposed against the Commission's immediately preceding explanation that the "new normal"—not the arbitrariness of turning a calendar—defines when the Postal Service "regain[ed] its ability to predict or project mail volumes" or to "adjust to the lower volumes." Order 1926, at 86.

Alliance of Nonprofit Mailers, ___ F.3d ___, 2015 WL 3513394 at *8. Actual experience, not mechanical limits, must determine the length of the exigency. After the D.C. Circuit's order, the Commission may not blind itself to the Postal Service's ongoing losses just because that proof supports a longer exigency.

Furthermore, the D.C. Circuit did not merely remand for further consideration - it vacated the "count once" rule. An order vacating a rule requires the agency to nullify the rule in the interim, not merely to reconsider it. *See Allied–Signal, Inc. v. U.S. Nuclear Regulatory Com'n*, 988 F.2d 146, 150–151 (D.C. Cir.1993).

- **Inconsistent findings about Postal Service adjustment**

The D.C. Circuit also held the Commission's finding were inconsistent. *Alliance of Nonprofit Mailers*, ___ F.3d ___, 2015 WL 3513394 at *8.

On the one hand, the Commission found that the Postal Service had acted reasonably in adjusting to the Recession. Order No. 1926 at 122-136. These findings turned on the Postal Service's constraints as a public institution. "The Commission finds that the unique framework within which the Postal Service must operate is a relevant consideration in determining what constitutes best practices. The Postal Service is

charged with providing postal services as a public service. 39 U.S.C. § 101. This responsibility suggests that, for the Postal Service, 'best practices of honest, efficient, and economical management' means something more than attempting to maximize retained earnings." Order No. 1926 at 127.

Yet on the other hand, the Commission ignored these constraints when it imposed a mechanical tally of time as the measure of the exigency. *Alliance of Nonprofit Mailers*, ___ F.3d ___, 2015 WL 3513394 at *8. This required the Postal Service to meet unrealistic deadlines based on private-sector models that disregard the public obligations the Commission recognized elsewhere.

In rejecting this reasoning, the D.C. Circuit held that the Commission could not say that the Postal Service had reasonably adjusted in light of its public constraints (albeit over a longer period) while refusing to apply that finding to the length of the exigency. *Id*. It pointedly invited the Commission to reconsider the conflict between its "new normal" analysis and its praise of the Postal Service's response as "necessary." Id., 2015 WL 3513394 at *8 n.3; *see also* Dissent of Vice Chairman Taub at 5-6.

The D.C. Circuit did not mandate the indefinite extension of the surcharge. But by rejecting the majority's rationale, the D.C. Circuit vindicated Vice Chairman Taub's view that the exigent rate should cover the entire period in which the effects of the Recession were provably felt.

2. Rate "fairness" presumes the Postal Service's public obligations.

Vice Chairman Taub correctly rejected industry efforts to equate the Postal Service with a private business. Order No. 1926, Dissent of Vice Chairman Taub at 5-6. He pointed out that unlike private firms, the Postal Service's ability to adjust to decreased volume level is limited by its universal service obligation. *Id*.

This exposes an underlying inconsistency in many industry objections. On the one hand, mailers argue the Postal Service should adjust to adverse conditions by downsizing, as a private business can. They also complain that the surcharge may reduce the volume of mail due to elasticity of demand in the market.

But if this were true, there would be no need to regulate postal rates for fairness at all - the Postal Service would be as free as any other private market actor to make pricing decisions unilaterally. If the Postal Service were a private enterprise, it could balance added revenue against the risk of losing customers in its sole business judgment. In that case, the wisdom or folly of USPS pricing decisions would not be a matter for regulatory review; it would simply be tested by market forces.

The industry argument for rate "fairness" presumes the public status of the postal monopoly. *See Verizon Communications v. FCC*, 535 U.S. 467, 477 (2002). The mailers claim they are captive consumers like ratepayers of a public utility, precisely because users of First Class Mail do not have the same options as they do with competitive products. *See National Association of Greeting Card Publishers v. U.S. Postal Service*, 607 F.2d 392, 403-404 (D.C. Cir.1979). But by the same token, the Postal Service does not have the same flexibility as a private firm to adjust in response to adverse conditions, because it has a universal service obligation.

There is a right to fair rates under the PAEA, but this right proceeds from the Postal Service's status as a public monopoly. This is the only reason mailers have a right to litigate "fairness" or "necessity" in postal rates in the first place. Absent this public responsibility, the Postal Service would be free to charge whatever the market could bear. But conversely, public rate review is not just an exercise in keeping rates as low as industry consumers might like in the short term. The long-term health of the Postal Service is the main criterion in an exigent rate review. *See* Order No. 1926, Dissent of Vice Chairman Taub at 5-6. The economic arguments of the mailing industry often disregard this point, by treating the Postal Service as a private firm.

3. The Commission should not hastily impose rate fluctuations in advance of the 2017 review.

The Commission is charged with maintaining "predictability and stability in rates." 39 U.S.C.§ 3622(b)(2). It does not make wise policy to order a series of short-term rate fluctuations resulting from a tug-of-war between mailers and the Postal Service.

When they opposed the surcharge, industry mailers themselves argued that there is an independent economic value in keeping rates stable that would be undermined by rapid fluctuations. As the National Postal Policy Council commented in Case R2013-11 on July 28, 2014, p. 2, "For large mailers, adjusting mailing operations in response to changes in postal prices is a costly, complicated process. And the costs in time, software changes, and planning associated with postal price changes must be incurred every time that rates change, regardless of whether rates increase, decrease, or both." http://www.prc.gov/docs/90/90089/nppc-r2013-11-comments-surcharge.pdf.

This rationale applies here. If the exigent surcharge is hastily removed now, the Commission may well need to re-adjust rates upward in the next two years, causing the very fluctuation the NPPC complained of in 2014.

Furthermore, the Commission does not have a stable set of circumstances to assess the near future of the Service. While the determination of the length of the Great Recession is based on historical data, all Commissioners agreed in Order No. 1926 that the determination of the "reasonable and equitable and necessary" remedy is forward-looking. Order No. 1926 at 30-31, 123-128. In other words. when the Commission looks to remedy harm from the Great Recession, it must consider the present and future circumstances of the Postal Service in evaluating what remedy is appropriate. *Id*.

This forward-looking analysis forces the Commission to evaluate a present situation which is now in flux. For example, the FY 2016 Financial Service and General Government Appropriation Bill, approved by the House Appropriations Committee on June 17, 2015, would restore service standards to their July 1, 2012 levels. http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=394280. This would require the Postal Service to meet renewed service levels, after three years of plant consolidation made possible by the reduction of those standards.

This legislative reversion to July 1, 2012 service standards would change the equation for "reasonable" relief for the Postal Service. The Commission acknowledged that recent changes in service standards affect the degree to which the exigent rate is "reasonable and necessary" for the Postal Service's operation. Order 1926 at 118, *see also* Dissent of Vice Chairman Taub at 6. While a private company can vary its services

based on market forces, the Postal Service is bound by its statutory service obligation even where it is unprofitable.

This counsels maintaining the status quo until the 2017 long-term review under 39 U.S.C. § 3622(d)(3). If the Commission concludes then that the Postal Service has been unjustly enriched, it can make adjustments to compensate. As recently as June 11, 2015, the principal alliance of mailers asked for just such a retroactive rate adjustment if the exigent rate were maintained too long. June 11, 2015 Response of Association for Postal Commerce et al. R2013-11 at 9-11. The mailers' alliance asked that if the surcharge remains in place, but is later found to have been overly generous, the Commission should reduce rates in the future as compensation. *Id*., *citing Burlington Northern v. United States*, 459 U.S. 131, 141-142 (1981). While the mailers are advocating for the wrong outcome, they are correct that the Commission may make long-term compensatory adjustments later, instead of imposing fluctuating short-term changes now. This counsels maintaining the current exigent rate pending more comprehensive review in 2017.

This review should not be done piecemeal in response to interim skirmishes between the Postal Service and industrial mailers. The Commission will have a fuller opportunity in the § 3622(d)(3) review to assess the damage of the Great Recession, the service standards the Postal Service must meet, and the degree to which the exigent rate to date has under- or over-compensated the Postal Service. The Commission should not try to measure the extent of the Great Recession's impact without a stable set of circumstances, which the 2017 review will better allow.

4. Mailers' burden to pay the exigent surcharge is offset by numerous discounts the Commission also allows as "reasonable."

The industry argument assumes that mailers have a rigid statutory entitlement to end the exigent surcharge under the PAEA. They argue that the duration of the surcharge must be strictly governed by mechanical rules, and that the PAEA somehow forbids a broader consideration of the Recession's impact on the Postal Service.

Yet mailers themselves benefit from the Commission's broad consideration of measures to help them, contrary to a strict reading of the PAEA. For example, industry mailers benefit from metered mail discounts that exceed the PAEA's limitations on worksharing discounts. Even though 39 U.S.C. § 3622(e) sets strict limits on worksharing discounts, the Commission allows metered mail users a reduced rate as "reasonable" to foster their patronage. *See* FY 2014 ACD at 68. The APWU opposes such discounts as contrary to the PAEA, but to date mailers have prevailed in securing this benefit from the Commission.

The mailing industry is in no position to complain about the exigent surcharge while it continues to enjoy such discounts. In effect, these discounts give mailers a hidden offset from the exigent rate. The two issues have frequently been linked. Many commenters in 2013 argued that the Commission had to rectify the differentials among classes of First Class mail as part of any decision on the exigent rate. The Public Representative in particular urged that the Commission should address inefficient workshare discounts and *de facto* subsidies of underwater products like Standard Flats, in making any changes to the exigent rate. *See* Order No. 1926 at 163. Nevertheless, the Commission agreed with the Postal Service that the rates should be adjusted across the board, and that outstanding issues about "rate relationships, cost coverages, or

passthroughs" should be addressed elsewhere. *Id*. at 166-167. These discounts continue only because the Commission does not insist on a mechanical application of the PAEA in setting rates.

By claiming a rigid statutory right to end the exigent surcharge, mailers are wielding a double-edged sword. It would be instructive to gauge the industry's reaction if the Commission proposed a "new normal" regime that revoked metered mail discounts together with the exigent surcharge. The Commission need not decide this question here. What matters here is that the exigent rate depends on broader considerations than the industry commenters admit. Mailers have benefited for many years from the Commission's holistic decision to allow "reasonable" discounts, so they may not object to the same holistic approach to the exigent surcharge.

CONCLUSION

The Commission should extend the exigent surcharge in effect until the Commission conducts its long-term rate review under 39 U.S.C. § 3622(d)(3).

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Respectfully submitted,

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