

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

RATE ADJUSTMENT DUE TO EXTRAORDINARY OR
EXCEPTIONAL CIRCUMSTANCES

Docket No. R2013-11R

**COMMENTS OF THE GREETING CARD ASSOCIATION AND
THE NATIONAL POSTAL POLICY COUNCIL
(June 26, 2015)**

The Greeting Card Association (“GCA”)¹ and the National Postal Policy Council (“NPPC”)² respectfully submit these comments on Order No. 2540,³ issued in response to the opinion of the U.S. Court of Appeals in *Alliance of Nonprofit Mailers v. Postal Regulatory Commission*, No. 14-1009 (Slip Op. June 5, 2015) (“ANM”).

GCA and NPPC, as representatives of First-Class mailers, have a keen interest in the prompt elimination of the exigency surcharge. Because First-Class Mail provides the largest share of the Postal Service’s revenue and makes the largest contribution to institutional costs, First-Class mailers are picking up most

¹ GCA is a national trade association of greeting card publishers and related enterprises; as such, it represents the citizen mailer who uses its members’ products as well as Single-Piece First-Class Mail users generally.

² The National Postal Policy Council is an association of large business users of letter mail, primarily First-Class Mail using the Automation rate category, with member companies from the telecommunications, banking and financial services, insurance, and mail services industries. Comprised of 39 of the largest customers of the Postal Service with aggregated mailings of nearly 30 billion pieces and pivotal suppliers, NPPC supports a robust postal system as a key to its members’ business success and to the health of the economy generally.

³ Notice and Order Establishing Procedures on Remand and Suspending the 45-Day Notice Requirement for Removing the Exigent Surcharge (June 12, 2015), 80 *Fed. Reg.* 34937 (June 18, 2015).

of the surcharge tab. Now, six years after the recession ended, it is time for the surcharge to end as quickly as possible.

I. INTRODUCTION AND SUMMARY

The scope and character of this proceeding are governed by the decision of the Court of Appeals in *ANM*. For purposes of the remand, correctly interpreting that decision is the first thing to be done. It is important to understand what the *ANM* court did. In *ANM*, the Court of Appeals:

- 1) Unambiguously affirmed the Commission's new normal analysis in Order No. 1926 that any volume losses "due to" the 2007-2009 recession ended once a new normal was achieved, and firmly rejected the Postal Service's desire to count lost volumes essentially forever;
- 2) Vacated that portion of Order No. 1926 that established – alongside the new normal analysis – the "count once" rule for measuring volume lost owing to the recession, and remanded to the Commission the narrow issue of the "count once" approach to counting volume losses due to the recession that ended six years ago;
- 3) Affirmed the Commission's findings with regard to the econometrics; and
- 4) Rejected the Postal Service's argument that exigency losses are to be quantified not under the "due to" branch of Section 3622(d)(1)(E), as the Commission had done, but under the "necessary" branch.⁴

The fourth of these points is particularly important. The Court clearly explained (Slip Op., at 11-13) that the Commission, in making findings under the "due to" test of Section 3622(d)(1)(E), acted correctly in including in that analysis the quantification of the loss as well as its causal antecedents. That ruling followed the lead of *United States Postal Service v. Postal Regulatory*

⁴ The *ANM* Court also observed that the Postal Service's contention that the new normal analysis was inconsistent with its finding of necessity was not properly before it, not having been presented on brief, but that the Commission was "free to" consider it – or not -- on remand.

Commission, 640 F.3d 1263 (D.C. Cir. 2011) (requiring “causal connection between the exigent circumstances and the proposed rate adjustments”). The Court held that the statutory “due to” language was “not as woodenly literal” as the Postal Service assumed, and that it was both reasonable to quantify the volume and financial loss under that rubric and appropriate to do so through the new normal analysis. It specifically approved the Commission’s effort to “capture precisely the time when the exigent character of a circumstance dissipates – when its effects lose their exceptional character.” *ANM*, Slip Op. at 12.

In short: because the Commission properly quantified the recovery under the “due to” standard – because the statute authorizes a rate adjustment *only* for the consequences of extraordinary or exceptional circumstances such as the recession – any recovery authorized in this proceeding must be limited by (i) the new normal analysis, and (ii) a supportable adjustment. We take up the latter issue in the next section.

Because the *ANM* Court affirmed the Commission’s decisions regarding the econometrics, the issue in this proceeding is simply how to apply the results from them to count the volume loss due to the recession. GCA and NPPC submit that the Commission should:

- Limit its consideration to considering the proper count of mail pieces lost due to the recession;
- Recognize that the Postal Service’s “count every piece every time” overcounts volume losses;
- In counting the total volumes lost due to the recession, recognize that some of the pieces lost in Year 1 or Year 2 due to the recession would have left the mail in subsequent years for other reasons; and

- Ensure that mailers are protected against any over-recovery by the Postal Service of any further amount that the Commission ultimately may authorize under 39 U.S.C. §3622(d)(1)(e).⁵

At present – six years after the recession ended -- there is no legal authority for the Postal Service to collect one penny from the surcharge beyond the \$2.766 billion authorized by Order No. 1926. Although the Commission has suspended the immediate obligation on the part of the Postal Service to provide 45-day notice of the surcharge's recession, it has not suspended the current surcharge target (Order No. 2540 at 6) and the Postal Service may not lawfully collect more than the \$2.766 billion in net contribution approved in Order No. 1926.

The Commission should ensure that mailers are not burdened by having to pay more contribution than legally required by mandating that the surcharge be rescinded immediately once the targeted net contribution is achieved. This is especially important in the absence of a mechanism for making mailers whole from any overcharge (see section III below). GCA and NPPC urge the Commission to conclude this proceeding expeditiously.

II. THE POSTAL SERVICE'S SERVICE VOLUME LOSSES DUE TO THE RECESSION WERE SUBSTANTIALLY LESS THAN IT NOW ASSERTS

In Order No. 1926 (December 24, 2013), the Commission calculated the volume losses "due to" the 2007-2009 recession after accepting some aspects of an econometric model sponsored by witness Thress and rejecting others. The

⁵ GCA and NPPC note that there may exist other ways of calculating a possible recovery going forward (see comments of MPA *et al*, filed concurrently in this proceeding), but these comments address only the "count once" issue specifically remanded by the Court.

ANM Court affirmed the Commission’s ruling that the counting of volume lost due to the recession properly should be cut off once volumes stabilized at a “new normal,” stating that the new normal analysis “comfortably passes” judicial review. Slip op. at 17.⁶ The Court also affirmed the Commission’s decisions regarding the econometric model.

The only aspect of the Commission’s calculation of the volumes lost “due to” the recession that was vacated and thus is properly the subject of this remand proceeding is the so-called “count once” method that the Commission used in Order No. 1926 to determine the actual recession-caused volume loss using results from the econometric model. The Court vacated that aspect of the order on the grounds that neither of the two rationales the Commission offered for the “count once” approach made sense in light of the new normal determination. Thus, the issue for the Commission now is not to recalculate the econometrics, but rather to adopt a reasonable way to apply their results to count the pieces lost “due to” the recession.

As to the counting issue, is important to note what the Court did and did not do. First, the Court held only that neither of the Commission’s justifications for the “count once” rule was reasonable. In particular, the Court did *not* direct the Commission to approve the type of alternative calculation that the Postal Service presented in its *USPS Motion* – which is a “count every piece every year”

⁶ The *ANM* Court also rejected the Postal Service’s contention that the Commission should have identified the start of the new normal by subclass rather than by class. *Id.* at 14.

approach. Instead, the Court merely remanded the matter to the Commission for further consideration.

Second, nothing in the Court's opinion in *ANM* relieves the Postal Service of its burden of proof on the issue of counting volume lost due to the recession. Slip Op. at 15 (noting that the Postal Service bore the burden of proof of showing its net volume losses); see also Order No. 1926 at 18 (*quoting* Order No. 865: "establishment of a 'due to' causal nexus requires the Postal Service to 'quantify the net financial impact of the exigent circumstances.'"). That is a matter for the Postal Service to prove, not one that can be assumed.

A. The Postal Service's "Count Every Piece Every Year" Approach Overstates The Volumes Lost Due To The Recession

In its *Motion* filed June 8, the Postal Service included a spreadsheet adapted from Commission Library Reference PRC-LR-2013-11-1.xls accompanying Order No. 1926, and urged the Commission to count every piece purportedly lost due to the recession for every year until the new normal was reached. The Commission specifically invited comment on that approach in Order No. 2540 (at 7). The Postal Service's "count every piece every year" approach falls well short of satisfying the Service's burden of proof as to the volume lost due to the recession. Indeed, although the Postal Service characterizes it as an "absolute floor" for the calculation of volume, and hence revenue, loss (*USPS Motion* at 2), a more accurate description is that it is an absolute *ceiling*, not a floor, on volume losses due to the recession, and it actually overstates the volume lost.

The Postal Service's "count every piece every year" approach simply sums, without any further analysis, the entire volumes estimated by the econometrics as lost in each year and reaches a total of approximately 35.08 billion pieces. See *USPS Motion* at 6. That approach takes the opposite extreme from the Commission's "count once," which counted pieces as lost in the first year that they were lost, but not in subsequent years, and counted approximately 25.255 billion pieces of mail as lost due to the recession before the new normal was achieved. Thus, the Postal Service's "count every piece every year" approach counts about 10 billion more pieces of mail purportedly lost "due to" the recession than does the "count once" approach the Commission applied in Order No. 1926.

Several observations are appropriate at this point. First, the Postal Service must prove that its approach to counting pieces is correct, because it bears the burden of proving its financial losses due to the recession.

Second, the Postal Service's current estimate of 35 billion pieces purportedly lost due to the recession until the new normal was achieved is the absolute *maximum* volume loss. That is because it counts every piece that the econometrics indicated was lost due to the recession, and recounts each piece fully every year.

Third, the Postal Service's "count every piece every year" approach appears to overcount the volume loss significantly, as explained below, which would lead to an overrecovery. This means that it has not proved that counting

“every piece every year” is a correct way to interpret the results of the econometric model.

The potential for overcounting and overrecovery can be illustrated by the Postal Service’s own example (used during the appellate process) of a cable subscriber who lost her job at the beginning of the recession and for that reason cancelled her cable service, thereby eliminating 12 monthly payments from that year’s mail (here, 2008).⁷ Under the “count once” approach used in Order No. 1926, the Commission treated those eliminated payments as lost only in the first year, for a total of 12 lost pieces. In contrast, the Postal Service’s “count every piece every year” approach would total a cumulative loss of 36 pieces for the three years (2008, 2009, and 2010) until the new normal for First-Class Mail began in 2011.⁸

The problem with the Postal Service’s “count every piece every year” approach is that it relies on two flawed, and unproven, assumptions. First, it assumes, without proving, that all of the lost volume is “due to” the recession. Second, it assumes, without proving, that the same mail piece would have been mailed (or lost) in each successive year; thus, cable payments mailed in the first year (2008), but lost due to the recession in the second year (2009, for First-Class Mail) are also assumed to be lost in the third year (2010) because they are

⁷ Presumably cable invoices would be lost as well, but the *ANM* opinion makes no reference to them and, for consistency, we do the same. Obviously, if the cable company invoices were included, the numbers would double, but the effect on the count is the same either way.

⁸ The Postal Service has argued that those pieces are lost essentially forever, or at least until volumes return to pre-recession levels. But that argument was rejected and is now foreclosed by the Commission’s new normal analysis, which the *ANM* Court affirmed.

not included in the 2010 starting volume (because they were lost in 2009).⁹ That is a consequence of an assumption that the Postal Service makes regarding the proper “beginning” volume to use when counting pieces each year; it is not an outcome driven by the econometric model. In short, the permanent loss of a piece is inherently *assumed* in the Postal Service’s counting approach, not *proven* by it.¹⁰

That assumption is unreasonable, and therefore does not satisfy the Service’s burden of proof. Consider the possibility that the cable subscriber, had she not cancelled her service in 2008, would have shifted to electronic payment in 2009 or 2010. Or that she adopted a new technology – video streaming – with electronic invoicing and payment. In either case, her formerly mailed payments would have remained “lost” from the postal system, but not because of the recession; they would be lost because of electronic diversion.¹¹

The “count every piece every year” approach ignores these possibilities because it continues to count a piece lost due to the recession as lost in each successive year without any further consideration. It does not address the

⁹ This is because the starting point for the volume calculation in each year is the *reduced volume* from the preceding year.

¹⁰ Another problem is that the example does not reflect how the Postal Service’s model actually operates. The model simply starts its analysis with the known volumes at the end of each preceding year, and attempts to identify and quantify the factors that led to the known volumes as of the end of the year. Whether a particular mailer left or entered the mailstream is not part of the calculation. Thus, nothing about that model speaks to whether a particular cable customer’s decision to cut the cable cord in 2008 had any continuing effect in subsequent years.

¹¹ Thus, had the cable subscriber kept her service in 2008 but diverted to electronic payments or video streaming in 2009 and 2010, her 24 payments for those years would have been lost not due to the recession, but for a different reason for which the exigency provision is not available.

possibility that cable payments lost due to the recession in 2008, had they instead remained in the mail that year, might have left the system for other reasons in 2009 or 2010.

The Commission has repeatedly stated, and the Court in *ANM* affirmed, that the Postal Service bears the burden of proving that its recovery is limited only to those volume losses “due to” the recession. The Postal Service has not met its burden because its “count every piece every year” approach includes volume that would have left for non-recession reasons.¹² It follows that an accurate count of the volume loss *due to the recession* must be less than the 35 billion pieces now asserted by the Postal Service. Accordingly, the Postal Service’s “count every piece every year” is not a reasonable approach.

B. An Improved Counting Method Takes Into Account Other Factors, Including Diversion, That Caused Mail To Leave During The Recession

GCA and NPPC suggest that an approach that follows from this reasoning is to take into account the likelihood that had a piece not left the mail in 2008 due to the recession, it nevertheless would have left for other reasons in 2009 or 2010. That approach would prevent the overcount inherent in the “count every piece every year” approach urged by the Postal Service. Such an approach also is fully consistent with the econometrics that the Commission has already approved and the Court affirmed, and properly recognizes that a portion of the

¹² In contrast, the Commission’s “count once” approach avoids this problem by not assuming that the pieces continue to be lost in subsequent years.

pieces that left due to the recession in 2008 or 2009 might have converted to electronic in 2009 or 2010, respectively, or been lost for another reason.

This approach can easily be undertaken using the results from the Commission's approved econometrics, which produced PRC-LR-R2013-11-1.xls.

One needs merely to sum:

- (1) the volume lost due to the recession in 2008;
- (2) the volume lost due to the recession in 2009;
- (3) the proportion of the volume lost due to the recession in 2008 that would have been lost due to the recession in 2009 had it remained in the system;¹³
- (4) the volume lost due to the recession in 2010; and
- (5) the proportion of the volume lost due to the recession in 2009 that would have been lost due to the recession in 2010 had it remained in the system (and, for Periodicals, repeat this approach for 2011).

Indeed, not taking steps (3) and (5) would assume that those pieces are always lost due to the recession (*i.e.*, the "count every piece every year" approach), when the econometrics says otherwise.

Summing the losses *due to the recession* for each year in this way would count the volume of pieces that left the mail due to the recession and not for other reasons. Such a counting approach, which accounts for pieces that would have left the mail even had the recession not occurred, is directly responsive to the specific instruction from the *ANM* court to revisit the "count once" approach to counting the volume lost due to the recession, and would avoid the overcount inherent in the Postal Service's approach.

¹³ This is the difference: the "count once" approach ignores these pieces; the "count every piece every year" approach assumes that these pieces are always lost due to the recession.

III. THE COMMISSION SHOULD ENSURE THAT MAILERS ARE PROTECTED FROM ANY OVER-RECOVERY BY THE POSTAL SERVICE

In its *Motion*, the Postal Service pledged to continue to track and report collected revenue as required by Order No. 2319. That is important, but insufficient. Given that there currently is no legal authority for the Postal Service to collect any more than the \$2.766 billion in net contribution authorized by Order No. 1926, the Commission must ensure that mailers are protected from, and made whole for, any recovery by the Postal Service beyond that amount (or such other amount that the Commission might authorize in this remand proceeding).

The suspension of the 45-day notice period by Order No. 2540 did not alter or suspend the current \$2.766 billion surcharge amount (*id.* at 6). However, given that the Postal Service may reach that amount by early or mid-August, the timeline leaves a real danger that mailers will be forced to overpay.

Thus, even if the Commission decides that no additional exigency recovery is justified, the Postal Service will almost surely collect more than the \$2.766 billion in net contribution. This is because the 45-day notice requirement has been suspended, which otherwise might have been made by the date of this filing. The Service undoubtedly would claim that it would face insurmountable difficulties in removing the surcharge in a timely manner to prevent an over-collection.¹⁴

¹⁴ The 45-day notice requirement does not appear to apply to the removal of an exigent surcharge. See 39 U.S.C. §3622(d)(1)(E) (authorizing exigency rates “notwithstanding any limitation set under subparagraph . . . (C)” -- which includes the 45-day notice provision).

The risk of overcollection persists even if the Commission approves some additional surcharge amount. Although the Postal Service's *Motion* assumes that whatever amount the Commission eventually might authorize it to recover will be larger than the amount collected during the remand proceedings, this is by no means self-evident.¹⁵ And the Postal Service has completely ignored the opposite possibility that a further amount, if any, that the Commission may authorize would be less than it might collect while remand proceedings are pending.

And, of course, these risks of an overrecovery only grow the longer this remand proceeding takes. The history of this case (which began in 2010) to date suggests that the process of awaiting the mandate, issuance of the Commission's decision on remand, and any subsequent judicial review is unlikely to be completed before any additional surcharge would be fully recovered and more. For example, even assuming the Postal Service's \$1.2 billion estimate of new net contribution were correct, the Postal Service could collect that amount in something less than a year, quite possibly well before any appellate review is completed. The smaller amount under the more realistic approach presented in Section II would be collected much more quickly.

Thus, there is a real risk that a surcharge could well remain in place beyond the time needed in order for the appropriate amount to be collected. This would amount to a substantial, burdensome, and unlawful overcollection,

¹⁵ The Postal Service *Motion* asserted (at 2) that it is entitled to \$1.2 billion in additional contribution, arguing that "[t]his additional amount will provide a more than adequate cushion to sustain maintenance of the surcharge while the necessary further proceedings are conducted."

because it would not be an amount tied to the volumes lost due to the recession. Under 39 U.S.C. §3622(d)(1)(E), as twice affirmed by the Court, any monetary recovery based on exigent circumstances must be limited by the volumes lost due to the exigency, and there is no legal basis for a larger amount.

The Postal Service has not proposed any mechanism by which mailers could be made whole if it were to recover more money from the current surcharge during the remand proceedings than to which it is ultimately determined to be entitled. That is unacceptable. Any collection of revenue beyond the \$2.766 billion in net revenue currently authorized must be conditioned on mailers being made whole.

Accordingly, the Commission must ensure that any amount collected by the surcharge beyond that properly authorized (by Order No. 1926 or by a further Order in this remand) is conditioned on adoption of a method of preventing the Postal Service from over-collecting and ensuring that mailers are made whole in the event of any over-recovery.

IV. CONCLUSION

For the foregoing reasons, the Greeting Card Association and the National Postal Policy Council respectfully urge the Commission to adopt procedures to govern the removal of the exigent surcharge consistent with these comments.

Respectfully submitted,

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