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BEFORE THE
POSTAL REGULATORY COMMISSION

Procedures Related to Commission Views	:	**Docket No. RM2015-14**

REPLY COMMENTS OF UNITED PARCEL SERVICE ON THE PROPOSED RULE TO ADOPT PROCEDURES RELATED TO THE COMMISSION'S VIEWS ON INTERNATIONAL POSTAL AGREEMENTS (September 14, 2015)

Pursuant to Commission Order No. 2602 (July 21, 2015), United Parcel Service ("UPS") hereby respectfully submits reply comments on the proposed rules for procedures related to the development of the Commission's views on international postal agreements. UPS agrees with the calls for increased transparency from FedEx and the Public Representative, and agrees with the Public Representative that an opportunity to submit reply comments should be provided. UPS also finds the Postal Service's proposed redefinition of "modern rate regulation" in 39 C.F.R. § 3017.1(a) to be inconsistent with 39 U.S.C. § 407(c), and urges the Commission to reject it.

I. OVERVIEW

A proper understanding of the role of the Commission's views within the statutory framework is instrumental to UPS's reply comments. Accordingly, while other parties' initial comments explored this framework, UPS offers additional context to aid the Commission in its work in this docket.

Section 407(c)(1) of the Postal Accountability and Enhancement Act of 2006 ("PAEA") requires the Secretary of State to solicit the views of the Commission on

whether a proposed treaty, convention, or amendment affecting an international market dominant product's rate or classification is "consistent with the standards and criteria established by the Commission under 39 U.S.C. § 3622." Under § 3622, the Commission must establish a modern regulatory system for market dominant products that is designed to achieve the objectives of, and take into account the factors Congress set forth in, § 3622(b)-(c) of PAEA. Section 407(c)(2) requires the Secretary of State to "ensure that each treaty, convention, or amendment is consistent with the views submitted by the Commission . . . except if, or to the extent, the Secretary determines in writing, that it is not in the foreign policy or national security interest of the United States to ensure consistency with the Commission's views."

This is an important role for the Commission. Its views should be crucial in determining the Secretary of State's posture in international postal negotiations. The Commission informs the Secretary whether the proposed international postal arrangements comport with the Commission's established standards and criteria under § 3622. These standards and criteria include such central congressional policies as ensuring adequate revenue for the Postal Service (*i.e*., cost coverage), appropriately allocating institutional costs between market dominant and competitive products, ensuring mail security, and enhancing transparency. *See* 39 U.S.C. § 3622(b)(5)-(7), (9).

The rates designated postal operators charge each other, known as terminal dues, have a meaningful impact on Postal Service finances for international postal products, the mailing industry, private companies providing international delivery services, domestic U.S. companies that compete with overseas and domestic firms who

use international delivery services, and the general public. This is especially true considering the tremendous growth in e-commerce, and the ability of businesses in China, Hong Kong, Singapore, and other countries to ship small packages up to four pounds to anywhere in the United States at rates so low the Postal Service loses money on virtually every piece it handles. The disparity in rates the posts charge each other and the rates private companies must pay fundamentally distorts the international shipping market. This was the conclusion reached in the study conducted for the Commission by Copenhagen Economics and as attested to by numerous parties before the House Oversight and Government Affairs Committee on June 16, 2015, including the Postal Service's own Inspector General. The Inspector General testified:

> An unintended consequence of terminal dues is that the system picks winners and losers, undermining efficient market forces. In the United States, China has an unfair edge over U.S. businesses.[1]

Acting Chairman Robert Taub also testified:

> I think the only conclusion that most onlookers unfamiliar with the UPU terminal dues system would come to is that progress on terminal dues has been glacial since the previous subcommittee hearing 15 years ago. Indeed, a decade and a half later, the Commission concluded in its most recent ACD issued less than three months ago, on March 27, 2015: 'The Commission recognizes that the pricing regime for the Inbound Letter Post product, based upon the current UPU formula, results in non-compensatory terminal dues rates. As a result, domestic mailers continue to subsidize the entry of Inbound Letter Post by foreign mailers who use the same postal infrastructure but bear none of the burden of contributing to its institutional cost.'[2]

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[1] *Fair Competition in International Shipping: Hearing Before the House Subcommittee on Government Operations* (Jun. 16, 2015) (statement of David Williams, Inspector General, United States Postal Service).

[2] *Fair Competition in International Shipping: Hearing Before the House Subcommittee on Government Operations* (Jun. 16, 2015) (statement of Robert Taub, Acting Chairman, Postal Regulatory Commission).

The issues raised by UPU proposals extend beyond the legality of terminal dues rates. The Commission must also consider other UPU proposals in light of, for example, the objective of § 3622(b)(7) "[t]o enhance mail security and deter terrorism." Recent studies have demonstrated that the global postal system, including the Postal Service, has become the vehicle of choice for those seeking to transport illicit and dangerous goods into the United States by injecting them into the U.S. mail stream.[3]

The continued resistance by UPU postal operators, including the Postal Service, to enforce compliance with U.S. customs laws, including requirements to provide advance electronic manifesting for inbound shipments, fundamentally undermines mail security and creates a conduit for terrorism and other dangers. As a result the Commission should also state its views on whether UPU proposals are in accord with applicable customs requirements and the objective of ensuring that the U.S. mail system is secure.

Given these and other critical issues, it is more important than ever that the Commission carefully scrutinize any proposed agreement for its compliance with the Commission's standards and criteria established under § 3622, and make every effort to ensure that the public is well informed of UPU proposals, the resulting effects on the mailing and business communities, and the Commission's views.

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[3] "At present, LegitScript's data indicates that our own government-run postal service is the carrier of choice for most illegal online pharmacies." LegitScript, *Rogue Internet Pharmacy Shipping Analysis: How Do Illegal Drugs Get Into U.S. Commerce and Delivered to Customers?* (Sep. 9, 2015), http://blog.legitscript.com/2015/09/rogue-internet-pharmacy-shipping-analysis-how-do-illegal-drugs-get-into-u-s-commerce-and-delivered-to-customers/.

Unfortunately, the public has little visibility into proposals before the quasi-governmental UPU, an organization affiliated with the United Nations. UPU negotiations have become increasingly secretive. As a result, for example, in recent meetings of the UPU Postal Operations Council ("POC") — which consists of the very postal operators that should be subject to independent regulatory scrutiny — private express companies and their trade association, the Global Express Association, were excluded from even observing meetings. The Postal Service has fought vigorously to keep these Commission proceedings, and the proposals considered, similarly closed to the public. In 2012, when the Commission opened an informal proceeding to solicit the views of the public on proposals to go before the Doha Congress, the Postal Service's comments were in favor of limiting transparency and the authority of the Commission to comment on whether UPU proposals are in agreement with PAEA, or even in the best interests of the Postal Service.[4]

UPS commends the Commission's efforts in this docket to increase transparency and openness regarding the development of the Commission's views on proposed UPU agreements. The question remains, however, will the level of public disclosure resulting from this proceeding be enough to lead to a meaningful result? In response to the initial comments filed on August 27, 2015, UPS provides the following comments.

II. UPS SUPPORTS THE PUBLIC REPRESENTATIVE'S CALLS FOR GREATER TRANSPARENCY.

The Public Representative recommends that the Commission "make every effort to provide the text or a detailed summary of the relevant proposals to the public,"

[4] *See, e.g.*, Dkt. No. PI2012-1, Postal Service Reply Comments at 7 n.12, 11 (Aug. 31, 2012).

recognizing that such information is vital to the ability of commenters fully and accurately to assess the relevant proposals and provide meaningful input. Public Representative Comments at 3. UPS agrees, and supports any and all efforts by the Commission to provide as much information as possible, as soon as possible, concerning ongoing UPU deliberations, as well as the resulting proposals. Otherwise, any discussion of the proposals would likely lack meaningful impact.

Unlike in the case of virtually all other market dominant products offered by the Postal Service, the rates for inbound single pieces are kept hidden from the public. In the past, the published UPU proposals have been redacted to hide the actual terminal charges paid to and by the Postal Service under the terminal dues system. It is difficult to see how the public can be expected to provide meaningful comments on proposals with virtually no visibility into the rates charged by the Postal Service to process and deliver market dominant mail. There is no reason why these rates for market dominant products and services should be hidden from view. Like the rates for all other generally-available market dominant products and services, they should be available for the public to see.

In addition to transparent and timely publication of UPU proposals, UPS further proposes that the Commission publish its views on the legality of UPU proposals in the Federal Register when those views are sent to the State Department.[5] In 2012, the Commission provided notice only that the State Department had requested its views; the Commission's views were not made public. Instead, the public was left to speculate

[5] As discussed below, UPS agrees with FedEx that this result is mandated by the Administrative Procedure Act.

as to whether the Commission endorsed all of the relevant proposals, endorsed some but not others, or determined that the proposals could not be reconciled with the requirements of § 3622.

As with the rates for inbound mail under the terminal dues system, there is no need for such secrecy. Even assuming *arguendo* that the terminal dues charges themselves are commercially sensitive, the Commission's views on whether those rates and classifications comply with U.S. law are clearly not commercially sensitive. That is a matter of whether important public policies adopted by Congress are being followed.

Keeping the Commission's views on UPU proposals from the public also has a deleterious effect on public participation and undermines Congress's mandate in PAEA to provide transparency in postal policy and ratemaking. While § 407(c)(2) allows the Secretary of State in certain circumstances to keep *the Secretary's* determinations confidential if important matters of foreign policy or national security would otherwise be adversely affected ("provided that the Secretary may designate which portions of the determination or explanation [not to follow the Commission's views] may be kept confidential for reasons of foreign policy or national security"), the Commission has no such statutory right or authority. Instead, it should endeavor to be as open with the public as possible.

Publishing the Commission's views engenders greater public confidence that the objectives of §§ 3622 and 407 are being followed. Even a redacted version of the Commission's views that does not include specific terminal dues charges, for example, would be highly useful in conveying whether the Commission believes that the

proposals meet the § 3622 standards and criteria, including the objectives that postal products generate sufficient revenues to maintain the Postal Service's financial stability, ensure mail security, and increase transparency. Without visibility into the Commission's reasoning for its views on UPU proposals, potential commenters will be discouraged from participating in the proceeding at all, thereby depriving the Commission of valuable input from the public and those affected by UPU requirements and proposals.

Moreover, UPS agrees with the Public Representative that the Commission should amend the proposed rules to include a provision for reply comments. As the Public Representative has observed, "reply comments offer interested parties an opportunity to provide countervailing arguments or differing points of view [and] serve an important purpose in public inquiry dockets." Public Representative Comments at 8. Despite the limited time frame, reply comments are valuable because they allow parties to point out flaws in other parties' initial comments, and should expedite rather than delay the Commission's development of its views.

III. UPS AGREES WITH FEDEX THAT THE COMMISSION'S VIEWS SHOULD COMPLY WITH NOTICE AND COMMENT REQUIREMENTS OF THE APA.

UPS supports FedEx's proposal to strengthen the proposed rules by incorporating the procedural safeguards of the Administrative Procedure Act, contained in 5 U.S.C. § 553.[6]

Exceptions to the procedural requirements of § 553 are "narrowly construed and only reluctantly countenanced." *Lake Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 6 (D.C. Cir.

[6] These procedural safeguards are required here because the Commission's views are a "rule" under 5 U.S.C. § 551(4) because they are an "agency statement" "interpret[ing] or prescrib[ing]" "law or policy." The APA is applicable to agency action by the Commission under 39 U.S.C. § 503.

2011). The foreign affairs exception to § 553 is particularly narrow: it allows agencies to forego these procedural protections only when doing so would "so affect relations with other Governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences." *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 201 (2d Cir. 2010) (quoting H.R. Rep. No. 79-1980 at 23 (1946)); *see also Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008) ("For the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences.").

In this case, it could hardly be said that complying with the notice and comment requirements of § 553 would "provoke definitely undesirable international consequences." The Commission, by initiating this docket, has already indicated its willingness to allow public discussion and comment on the views it should submit to the Secretary of State. Further, as discussed by FedEx in its Initial Comments, the scope of the parties' comments and Commission's views are limited to compliance with "the standards and criteria established by the Commission under section 3622," 39 U.S.C. § 407(c), which does not directly concern foreign affairs at all. Thus, since the foreign affairs exception to the procedural protections of § 553 is inapplicable, the Commission should amend the proposed rules to include these procedural protections.

IV. THE COMMISSION'S DEFINITION AND UNDERSTANDING OF "MODERN RATE REGULATION" IN § 3017.1(A) IS CORRECT, AND THE POSTAL SERVICE'S PROPOSED AMENDMENT SHOULD BE REJECTED.

In its Initial Comments, the Postal Service takes issue with the definition of "modern rate regulation" the Commission has proposed in § 3017.1(a). The Postal Service acknowledges that "[t]hese proposed rules would define 'Modern rate regulation' as 'the standards and criteria the Commission has established pursuant to

39 U.S.C. § 3622,' *which is identical to the statutory language in 39 U.S.C. § 407(c)(1)*." Postal Service Comments at 9 (emphasis added). Nevertheless, the Postal Service argues this definition is inappropriate because "the scope of the Commission's view under this statutory requirement has shifted beyond the plain reading of the statute to include an analysis of all of the objectives and factors of 39 U.S.C. § 3622 for proposals to be considered at a future UPU Congress."[7] *Id.*

The Postal Service is incorrect: when the Commission considers the objectives and factors of 39 U.S.C. § 3622 in evaluating UPU proposals, the Commission is properly giving heed to the statutory language of 39 U.S.C. § 407(c)(1). This statutory language requires the Commission to evaluate UPU proposals for conformance "with the standards and criteria established by the Commission *under Section 3622.*" 39 U.S.C. § 407(c)(1) (emphasis added). As a matter of basic agency law, any standard or criterion established by the Commission "under" § 3622 must be *consistent with* § 3622. This is because agencies' jurisdiction and substantive powers are limited by statute, and they can only act in conformance with their statutory mandate. *See City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1869 (2013) ("for agencies charged with administering congressional statutes[,] [b]oth their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than

[7] The Postal Service's recent proposal is at odds with how it interpreted the Commission's authority in 2012. It said then that under § 407(c) "the Commission is tasked with providing its view on whether proposals submitted for the UPU Congress which relate to rate or classifications of market dominant products, as established in 39 U.S.C. § 3622, ***are consistent with the objectives and factors of subsections (b) and (c)***." Dkt. No. PI2012-1, Postal Service Initial Comments at 3 (Aug. 27, 2012) (emphasis added); *see also id.* at 4 ("In developing its comments, the Commission should be guided primarily by the underlying objectives of rate regulation as codified in section 3622(b).").

when they act beyond their jurisdiction, what they do is ultra vires.”). Thus, when the Commission considers whether a UPU proposal “is consistent with the standards and criteria established by the Commission under section 3622,” that necessarily requires the Commission to consider whether the UPU proposal is consistent with the objectives and factors of § 3622 itself. Those statutory objectives and factors are the *source* of the Commission’s authority to set standards and criteria, and the Commission’s standards and criteria must support those statutory objectives and factors.

Having empowered and required the Commission to craft regulations in conformance with § 3622, it is implausible that Congress would require that the Commission ignore § 3622 when evaluating UPU proposals. After all, agencies must *always* consider their governing statutes when taking *any* action, and must ensure that their actions are consistent with those statutes. *Arlington*, 133 S. Ct. at 1869; *see also Chevron U.S.A, Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

At a minimum, 39 U.S.C. § 407(c)(1) should not be read as preventing the Commission from considering the objectives and standards of § 3622 without a clear and unambiguous statement to that effect. No such statement exists in 39 U.S.C. § 407(c)(1). To the contrary, by requiring the Commission to consider whether UPU proposals are “consistent with the standards and criteria established by the Commission under section 3622,” 39 U.S.C. § 407(c)(1) is most sensibly read as affirmatively *encouraging* the Commission to consider the objectives and factors of § 3622. This is because, again, the Commission’s standards and criteria “under” § 3622 must be *consistent with* § 3622.

The Postal Service's interpretation also reads the phrase "standards and criteria" out of the statute. It is a long-standing and fundamental canon of statutory interpretation that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003). Congress obviously knew the meaning of the word "regulation" in 2006, but it chose to use instead the words "standards and criteria," which demonstrates that Congress intended a broader meaning of § 407(c)(1) than the Postal Service's suggested limitation to regulations alone. *See* Postal Service Comments at 9 (limiting the definition of "Modern rate regulation" to the "standards and criteria that the Commission has established in 39 C.F.R. part 3010 with respect to rates and part 3020 with respect to classification pursuant to its authority in 39 U.S.C. § 3622."). The Postal Service's proposed rejection of the statutory text should itself be rejected.

V. CONCLUSION

UPS commends the Commission for its efforts to increase transparency and formalize the procedures by which parties can comment on the critical proposals that will be considered at this and future UPU Congresses. The Commission should take further steps to guarantee transparency, in accordance with the proposals of FedEx and the Public Representative. The Commission should also reject the Postal Service's attempt to hamstring and narrow the ability of the Commission and commenting parties to comment on the UPU proposals.

Respectfully submitted,

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