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

STATUTORY REVIEW OF THE SYSTEM	)	
FOR REGULATING RATES AND CLASSES	)	Docket No. RM2017-3
FOR MARKET DOMINANT PRODUCTS	)	

CORRECTED REPLY OF
MPA—THE ASSOCIATION OF MAGAZINE MEDIA,
ALLIANCE OF NONPROFIT MAILERS,
AND ASSOCIATION FOR POSTAL COMMERCE
TO OPPOSITION OF THE UNITED STATES POSTAL SERVICE
TO JANUARY 17 MOTION FOR ISSUANCE OF INFORMATION REQUESTS

(January 27, 2017)

MPA-The Association of Mailers ("MPA"), Alliance of Nonprofit Mailers ("ANM") and Association for Postal Commerce ("PostCom") reply to the January 24 opposition of the United States Postal Service to the Motion for Issuance of Information Requests filed by MPA and ANM on January 17.[1] The Postal Service's objections to the information requests are without merit. Party-initiated information requests are not only appropriate but crucial in this phase of the case. The requested information is directly relevant to the Postal Service's central claim in this case: that the current regulatory system will prevent the Postal Service from achieving financial stability. The specific information requested by MPA and ANM will be unavailable for mailers to use in their comments unless produced by the Postal Service. And the Postal Service has made no showing that producing the information would be unduly burdensome.

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[1] MPA, ANM and PostCom have separately filed a motion under 39 U.S.C. § 3001.21(b) for leave to file this further reply.

The questions posed by the Commission in Order No. 3673 about the objectives of 39 U.S.C. § 3622(b) cannot be answered intelligently without assessing alternative scenarios based on varying assumptions. The Postal Service wants to control the source data to limit the scenarios the Commission considers. That approach, however, is consistent with neither due process for mailers nor the Commission's responsibilities as a regulator.

I. PARTY-INITIATED INFORMATION REQUESTS ARE APPROPRIATE NOW.

The Postal Service begins with a blanket objection to *any* "party-initiated information request at this stage of the proceeding." USPS Response at 2. "[T]his stage of the proceeding," the Postal Service asserts, "is focused on soliciting commenters' views on [only] three areas." *Id*. Parties can provide "robust" comments on "all of these issues" based on publicly available information. *Id*. Hence, the Postal Service should not be bothered with the "burden" of "having to engage in discovery, particularly document productions, at this time." *Id*. This objection ignores the Commission's discovery policies, the specific issues that the Commission has noticed for comment in phase 1 of the case, and the claims that the Postal Service has telegraphed that it plans to assert.

The Postal Service is a regulated monopoly. Effective regulation requires that a regulated monopoly be compelled to disclose sufficient information about its revenues, costs, operations, managerial decisions and other relevant facts to overcome the information advantage that the regulated entity would otherwise possess over its regulator and ratepayers.[2] The importance of full disclosure is heightened by the Postal Service's current campaign to persuade the Commission to eliminate or weaken the CPI cap. The main alternative to price-cap regulation, cost-of-service maximum rate regulation, is notoriously susceptible to gaming by the regulated monopoly. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 486-87 (2002). For this reason, the Postal Service has been required to respond to discovery from mailers and other parties since the beginning of rate regulation under the Postal Reorganization Act. *See*, *e.g.*, 39 C.F.R. §§ 3001.25 to 3001.28 (basic discovery rules).

The Postal Accountability and Enhancement Act of 2006 strengthened these disclosure requirements in several ways. First, Section 204(b) of PAEA, codified at 39 U.S.C. § 3651(c), requires the Postal Service to produce all information that the Commission "deems necessary" to prepare its annual compliance reports under Section 3651. Second, Section 602 of PAEA, codified at 39 U.S.C. § 504(f)(2), authorizes the Commission to subpoena information from the Postal Service in "any proceeding conducted by the Commission." 39 U.S.C. § 504(f)(2). Congress enacted these changes to "improve[] Postal Service accountability, mainly by strengthening oversight," 150 Cong. Rec. S6001 (May 20, 2004) (remarks of Sen. Carper), and to give [the Commission] teeth by granting it subpoena power and a broader scope for regulation and

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[2] As a Nobel Prize winning economist has noted, "The ability to control the flow of information to the regulatory agency is a crucial element in affecting decisions. Agencies can be guided in the desired direction by making available carefully selected facts. Alternatively, the withholding of information can be used to compel a lawsuit for 'production' when delay is advantageous." Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (1993) at 1 n. 1 (quoting Owen, B. and R. Braeutigam, *The Regulation Game: Strategic Use of the Administrative Process* 4 (1978)).

oversight," 151 Cong. Rec. H6513 (July 26, 2005) (remarks of Cong. Tom Davis). The intent of these provisions was to empower the Commission to ensure "the financial transparency of the Postal Service" by "obtaining information from the Service." S. Rep. No. 108-318, 108th Cong., 2d Sess. 33 (Aug. 25, 2004).

The Commission has exercised its expanded post-PAEA authority, *inter alia*, by adopting additional rules for obtaining information from the Postal Service by subpoenas, depositions and written interrogatories (39 C.F.R. Part 3005). Moreover, the Commission, recognizing that discovery is often as crucial in notice-and-comment rulemakings and informal adjudications as in on-the-record trial type adjudications, has increasingly come to rely on information requests—many of them proposed by mailers or other parties—in rulemakings and informal adjudications. In ACR2016, for example, the Commission issued seven sets of Chairman's Information Requests. In Docket No. R2017-1, the Commission issued seven sets. In Docket No. R2013-11, the Commission issued 18 sets of Presiding Officer's Information Requests. Most of these information requests included multiple questions and multiple subparts. To be sure, party-initiated information requests are properly limited by the same standards of relevance, burden and privilege as traditional discovery. But the notion that party-initiated information requests are *per se* improper is utterly unfounded.

Finally, the Postal Service's suggestion that discovery is premature because the Postal Service has yet to file its initial comments (Response at 2) is also without merit. The Commission has allowed mailers to engage in discovery from the Postal Service before any party files its initial case when early discovery is likely to help mailers prepare their initial cases. *See*, *e.g.*, Order No. 718 in Docket No. C2009-1, *Complaint of*

GameFly, Inc. (April 20, 2011) at ¶¶ 2023-24 and App. A (summarizing extensive discovery undertaken by GameFly before it filed its case-in-chief).

These standards warrant the filing of mailer-initiated information requests in this case without further delay. The central task identified by the Commission in Phase 1 is to determine "if the current system is achieving the objectives [of 39 U.S.C. § 3622(b)] while taking into account the factors listed in 39 U.S.C. 3622(c)." Order No. 3673 at 3. One of those objectives is Objective 5, "adequate revenues" and "financial stability." Order No. 3673 at 7. The Postal Service has made clear that it plans to argue that the current regulatory system precludes satisfaction of Objective 5: specifically, that the Postal Service faces financial ruin unless the CPI cap—the most important safeguard provided by PAEA against abuse of the Postal Service's pricing power—is gutted and the Postal Service is freed to extract billions of dollars of additional revenue from captive mailers. *See*, *e.g.*, Docket No. PI201-3, USPS Comments in Response to Order 3238 (June 14, 2016) at 1-2, 25-27 (the "current price cap system … certainly needs to be replaced or substantially changed"); *id*., *Section 701 Report* (November 14, 2016), Appendix B (Comments of the USPS) at 1. To justify this far-reaching change, the Postal Service has relied on analyses and projections of its balance sheet, revenues and costs, not only now and in the near future, but for years to come. *See* Docket No. PI201-3, USPS Comments (June 14, 2016) at 3-27; USPS Form 10-K for Fiscal Year 2016 (November 15, 2016) at 7-28; Testimony of PMG Brennan before the House Oversight and Govt. Reform Comm. (May 11, 2016). It is reasonable to assume that the Postal Service will offer similar analyses and projections in its phase 1 comments in this case.

The undersigned parties believe that these claims are unfounded, and that current and projected revenue and cost trends give the Postal Service ample means to attain and maintain financial stability under the current regulatory system if the Postal Service manages its operations prudently and efficiently. The mailers also believe that limiting market-dominant rate increases to the rate of inflation is essential to achieving Objective 1 (maximization of "incentives to reduce costs and increase efficiency") and Objective 8 (just and reasonable rates).

Resolving the competing claims of the Postal Service and its captive mailers is the Commission's task. But the mailers cannot effectively make their case to the Commission without the specific data needed to quantify the effects of (1) alternative assumptions about the Postal Service's future revenues and costs, and (2) the limitations on the Postal Service's right to cost recovery imposed by Objectives 1 and 8. Much of the information needed to calculate and defend these adjustments is in the sole possession of the Postal Service. The discovery policies of the Commission, the transparency policies underlying the Postal Reorganization Act and PAEA, and fundamental notions of due process entitle the mailers to obtain that information in this docket through Commission-issued information requests, the only discovery mechanism available to mailers in this kind of proceeding.

II. THE POSTAL SERVICE'S OBJECTIONS TO SPECIFIC INFORMATION REQUESTS ARE WITHOUT MERIT.

The Postal Service advances essentially three objections to particular information requests: (1) the information is irrelevant to any phase 1 issue, (2) the information is available to the mailers from other sources; and (3) producing the information would impose an undue burden on the Postal Service. We respond separately to these objections for each category of information requests.

A. Valuation of the Postal Service's Future Liabilities to Retirees

Questions 1 through 8 concern the likely *amount* of Postal Service's postretirement liabilities, and the *timing* of when those liabilities are likely to come due. In particular, these questions seek information needed to quantify the likely effects of the current proposal of the Office of Personnel Management to establish Postal Service employees as a "separate category for which OPM will drive normal cost percentages" based on "USPS-specific demographic factors, rather than government-wide demographic assumptions" (and, by implication, USPS-specific salary growth assumptions). *Federal Employees' Retirement System; Government Costs*, 81 Fed. Reg. 93851, 93852 (col. 1-2) (December 22, 2016). MPA and ANM believe that the requested information is necessary to quantify the effect of the OPM proposals on (1) the present value of the Postal Service's future liabilities to its retirees, and (2) the timing of the future payments to retirees. The timing information is needed to assess the effects of alternative assumptions about discount rates and investment approaches on the Postal Service's balance sheet, and the length of time before which the Postal Service must find additional sources of revenue to pay those liabilities (e.g., by investing its cash holdings in investment assets that offer higher returns then federal T-bills or T-bonds).

(1) The Postal Service contends, however, that the OPM proposal is irrelevant because it will have no effect on the Postal Service's actual obligations unless adopted as a final rule, an outcome that is not certain. USPS Reply at 3 & n. 5. This objection misses the point. The vast majority of the present value of the Postal Service's obligations

to its retirees consists of future payments that will not come due until years into the future. OPM, by contrast, is likely to decide whether to adopt its proposed rule change as a final rule within the next year or so. Continuing to monitor the status of the rulemaking is, in the mailers' view, a far more rationale response to this situation than arbitrarily concluding, as the Postal Service would have the Commission assume, that no relief will come, and the Commission should immediately eliminate or modify the CPI cap now on the basis of a worst-case future scenario that has now become speculative. The Postal Service's offer to "report the results" of a favorable OPM final rule in the Postal Service's future "financial reports" after the Commission has jettisoned or substantially modified the CPI cap (USPS Reply at n. 5) has it backwards. Reporting the results of the OPM rulemaking should occur before, not after, any decision is made on the fate of the CPI cap; otherwise, market-dominant mailers will be required to pay above-inflation rate increases on the basis of actuarial projections that were overtaken by events.[3]

(2) The Postal Service's alternative objection that questions 1 through 8 are unnecessary because the Postal Service "already provides detailed information on its pension and RHB liabilities in its financial reports" (USPS Reply at 3) is equally wide of the mark. The Postal Service's financial reports reflect the payment amounts calculated by the OPM on the basis of its *current* actuarial approach, which lumps Postal Service employees together with other government employees. Quantifying the effect of

[3] The Postal Service notes that the proposed OPM rule change "would not *expressly* require the use of postal-specific salary growth assumptions" (emphasis added), but does not dispute that this effect is *implicit* in carving out "U.S. Postal Service employees as a separate category for which OPM will derive normal cost percentages." 81 Fed. Reg. at 93852 (col. 1). Nor does the Postal Service dispute that adopting Postal Service-specific demographic assumptions alone would greatly reduce the present value of the Postal Service's future retiree obligations.

changing the current actuarial approach by switching to Postal Service-specific demographic and compensation assumptions requires the additional information requested by the mailers. Moreover, the Postal Service's internal calculations of the effect of switching to USPS-specific actuarial assumptions constitute, in the context of this case, admissions by the Postal Service. It should not be allowed to hide those calculations in its files while making contrary claims to the Commission or attacking the mailers' calculations as insufficiently documented.

(3) The Postal Service makes no credible claim that responding to the information requests would be unduly burdensome. Nor would such a claim be credible. The Postal Service does not deny that it possesses the requested information. Indeed, it would be surprising, given the Postal Service's vigorous advocacy of adopting USPS-specific actuarial assumptions, if the Postal Service had not analyzed the potential effect of this change in detail. *See* USPS comments in PI2016-3 (June 14, 2016) at 21, 24-25. To the extent that the Postal Service lacks some of the information, asking the OPM for it would hardly impose an undue burden on the Postal Service.[4]

B. Valuation of the Postal Service's Real Estate

Questions 9 and 10 seek information relating to the current market value of the Postal Service's real estate, and the difference between that value and the (presumably much lower) depreciated book cost reported by the Postal Service in its financial statements.

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[4] The Postal Service's rejoinder that "nothing stops the movants from" asking the OPM for the information directly (USPS reply at 3 n. 4) is frivolous. The Postal Service has an intra-government relationship with the OPM. The mailers do not.

(1) The Postal Service asserts that this information is irrelevant because the mailers do not need the requested information to make the "general point of principle" that the current economic value of the Postal Service's assets is more relevant in determining the Postal Service's financial health than the depreciated book cost of those assets. USPS Reply at 4. The Postal Service attacks a straw man. The mailers did not propound questions 9 and 10 to obtain support for that theoretical point. The mailers intend to establish that point by citing economic literature and legal precedent supporting the use of current asset values when determining the financial viability of a business enterprise.

Rather, the purpose of questions 9 and 10 is to obtain information from the Postal Service *quantifying* the effect of valuing the Postal Service's real estate portfolio at its current market value rather than at its depreciated original cost. *That* information is clearly relevant: If, as the mailers believe, the current market value of the Postal Service's real estate is approximately $70 billion higher than the depreciated book cost of the same assets,[5] financial statements that rely on the book values grossly understate the Postal Service's actual financial health.

Information from the Postal Service on this issue is relevant in two ways. First, if the Postal Service's own data show that the difference between the book and current market value of the Postal Service's real estate portfolio is large, the mailers are entitled to use this information as an admission by the Postal Service. Conversely, if the Postal

[5] OIG Report FT-WP-15-003, *Consideration in Structuring Estimated Liabilities* (Jan. 23, 2015) at 4, Figure 3 (estimating that fair market of USPS real estate assets may be as high as $85 billion, approximately $70 billion higher than the $13.2 billion net book value of the same assets.

Service's studies indicate that the difference is small, the mailers are entitled to obtain the information so they can analyze it before they submit their comments. The Postal Service's rejoinder that the mailers have no right to quantitative data until the Commission has resolved the conceptual issue of which standard of valuation is more appropriate (USPS Reply at 4) is frivolous. The Commission has not bifurcated phase 1 of this case into two sub-phases, one for resolving the conceptual issue of book vs. current value and a separate sub-phase for quantifying the significance of the issue. The mailers have only one opportunity to raise the issue. The Postal Service is certainly free to argue that the book cost of assets is a truer measure of the financial solvency of their owner than is current market value. But the Postal Service is not entitled to block discovery of the quantitative issue by unilaterally decreeing at the outset that the Postal Service is right on the conceptual issue and that quantitative data are therefore off limits for discovery.

(2) The Postal Service's objection of undue burden is also unsupported. The Postal Service suggests that the only information requested by the mailers is individual valuation studies of the "precise market value" of "each of the Postal Service's properties." USPS Response at 4. This is a caricature. While Requests 9(e) and 10 focus on asset-specific information, Requests 9(a) through (d) call for more general or overall studies or analyses. The Postal Service does not deny that such documents exist, and offers no reason to find that collecting and producing them would be unduly burdensome.

The same may very well be true of asset-specific information. If the Postal Service maintains a centralized file or database of the current market value of its real estate assets, producing that information should not be unduly burdensome. The mailers agree that, production of valuation data available only in a multiplicity of field offices *could be* burdensome. The Postal Service, however, has not alleged that it possesses no valuation data in a computerized or otherwise readily recoverable form. A party claiming that a discovery request is unduly burdensome must “state with particularity the effort that would be required to answer the [discovery request], providing estimates of cost and work hours required to the extent possible.” 39 C.F.R. §§ 3001.26(c) and 2001.27(c). This the Postal Service has not done.

C. The Pay Comparability Requirement

Questions 11 through 13 seek information relating to the Postal Service’s compliance with the pay comparability policy of 39 U.S.C. §§ 101(c) and 1003, and the policy of 39 U.S.C. § 404(b) that postal rates should be limited to those sufficient to enable the Postal Service to provided appropriate postal services “under best practices of honest, efficient, and economical management”—policies that are incorporated by reference in Factor 14 (39 U.S.C. § 3622(c)(14)). The Postal Service’s sole objection is relevance: the Commission has no authority to determine the compensation of postal employees or require that it comply the comparability requirement. USPS Reply at 4-5. This argument confuses two different issues. The Postal Service is correct that the Commission has no authority to set the compensation of postal employees. But the Commission is certainly empowered—indeed, required—to determine what share of employee costs (and other categories of costs) may be recovered by the Postal Service from the rates charged to market-dominant mailers.

Objective 1 requires the Commission, in designing a system to regulate market dominant rates, to consider whether the system has “maximize[d] incentives to reduce costs and increase efficiency." The perpetuation of an employee compensation, after a decade under PAEA, in excess of $10 billion per year is not consistent with Objective 1.

Objective 8 and Factors 11 and 14 are to the same effect. Objective 8 requires the Commission to consider whether imposing above-CPI rate increases on market-dominant products would be "just and reasonable." Factor 11 requires the Commission to consider "the need for the Postal Service to increase its efficiency and reduce its costs" (Factor 11). And Factor 14 incorporates both the pay comparability policy of 39 U.S.C. §§ 101(c) and 1003, and the "honest, efficient, and economical management" limitation imposed by 39 U.S.C. § 404(b) on the Postal Service's right to cost recovery. All of these provisions codify a century of precedent construing the just and reasonable rate standard. This precedent establishes that regulated monopolies are not entitled to recover all costs incurred regardless of their prudence or whether the productive capacity whose costs the regulated monopoly would shift to its ratepayers is fully used and useful. *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (upholding state commission order disallowing recovery of $44 million of prudently incurred investment by two electric utilities on the ground that the investment was no longer used or useful).

Finally, the likelihood that the Postal Service could narrow the compensation premium in *future* years is relevant to any meaningful assessment of the Postal Service's ability to attain revenue adequacy (Objective 5) in the future. At a minimum, these issues are sufficient to warrant discovery of the Postal Service's internal data and assessments of the causes, magnitude and mutability of the compensation premium.

The Postal Service's further argument that Section 505(b) of PAEA, codified at 39 U.S.C. § 1201 (note), bars the Postal Service from limiting the Postal Service's ability to recover inflated labor costs from captive mailers because that "may be interpreted as affecting the collective bargaining process" (USPS Reply at 4-5 & n. 9) proves too much. By the same logic, the existing CPI cap established under 39 U.S.C. § 3622(d) violates Section 505(b) of PAEA because the statutory limitation on the Postal Service's ability to extract more revenue from market-dominant mailers indirectly limits the ability of postal labor to extract more money from the Postal Service through the collective bargaining process. The Postal Service has never contended that Section 3622(d) must be treated as a nullity because it violates Section 505(b) of PAEA. Moreover, such a claim would violate the surplusage canon of construction, under which a statute should be construed to give effect to all of its provisions. *See*, *e.g., United States v. Butler*, 297 U.S. 1, 65 (1936).

The Postal Service is certainly free to argue that the compensation premium is completely beyond its control, and none of the Commission's business, and that market dominant mailers must be required to subsidize $10 billion or more a year in excess compensation regardless of whether this outcome is economical, efficient, or just and reasonable. The Commission will ultimately need to decide whether these claims are valid. The Postal Service is not entitled, however, to prejudge the issue at the outset of this case by unilaterally declaring that the Postal Service's internal analyses of the issue are off limits for discovery through information requests.

D. The Flats Sequencing System ("FSS")

Question 14 asks for information on the performance of the Flats Sequencing System ("FSS") and the prudence and efficiency of the Postal Service's decisions to deploy the FSS and continue using it despite its disastrous effects on the costs of processing flat-shaped mail.

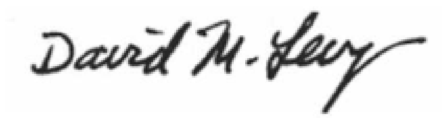
The Postal Service does not dispute that the requested documents and information are relevant, but asserts that they are cumulative because the Postal Service and the Postal Service's Office of Inspector General have published other analyses of and reports on the FSS. USPS Response at 5. The requested documents, however, are likely to include candid admissions by Postal Service management about the predicted and actual economic performance and return on investment of the FSS that may be have been scrubbed from the analyses that the Postal Service has offered for public consumption. The OIG reports, by contrast, are not admissions by Postal Service management, which has disputed many of the key conclusions of the OIG reports. The mailers are entitled to discover the actual views of the Postal Service itself on these issues.

Finally, the Postal Service's assertion that Decision Analysis Reports responsive to the information requests contain "commercial sensitive materials" is irrelevant if true. Given the obvious relevance of the information, the appropriate way to protect the commercially sensitive information is to file it under seal in accordance with the Commission's protective rules, not to bar discovery outright. 39 U.S.C. § 504(g)(3).

CONCLUSION

The undersigned parties respectfully request that the Presiding Officer direct the Postal Service to answer the information requests proposed by MPA and ANM on January 17, 2017.

Respectfully submitted,



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