Supplemental Testimony

of

Commissioner Ruth Y. Goldway

Before the
U.S. House of Representatives
Committee on Government Reform
Subcommittee on the Postal Service

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Chairman McHugh, members of the Committee on Government Reform, Subcommittee on Postal Service, I am submitting this testimony on H.R. 22, the Postal Modernization Act of 1999, as an individual statement of one Commissioner of the Postal Rate Commission and as an addendum to the testimony delivered on behalf of the full Commission by Chairman Gleiman.

I want to commend Chairman Gleiman for the careful, thorough and cooperative fashion in which he supervised the development of the Commission's joint testimony. His lengthy testimony does not reflect all of the concerns that arose during Commission discussions, but it incorporates the vast majority of our comments and the remarkable consensus we reached on a broad array of issues. In particular, I appreciate the Chairman's comments on the need to broaden the qualifications for membership on the Postal Service Board of Directors in order to assure that the public interest is well represented; his comments on the need to limit, in some fashion, the portion of profits that could go directly to bonuses; and his clear descriptions of the complex problems that could arise as a result of the establishment of the Private Law Corporation.

While I respect the hard work and several years of deliberation that have gone into the drafting of the current H.R. 22, as a relative newcomer to the field of postal services who has previously focused on the consumer's point of view, I may have a somewhat different perspective on postal reform, which I offer for your consideration.

During the economic expansion of the 1990s, consumers have experienced the turmoil and rapid changes of a highly competitive marketplace and, for the most part, they have greatly benefited. The forces of new technologies and deflationary raw material costs have combined with innovations in marketing, deregulation, mergers creating scope and scale economies, and fierce battles to gain market share so that consumers now have more and better quality goods and services available to them at lower prices. Likewise, H.R. 22 should rely more on the advantages of competition than on protecting the marketplace from possible Postal Service competition.

H.R. 22 should encourage the Postal Service to be more efficient and innovative. Its competitors would then have to respond and the public would get the benefit of lower prices and better services from all providers.

But §205's restrictions on the introduction of new products, except as part of a Private Law Corporation, limit the Postal Service's ability to be innovative and respond to changing technologies with new products. It is

inappropriate for legislation designed to prepare the Postal Service for the next century to prohibit it from providing services other than those specifically related to the physical delivery of letters, printed material or packages weighing up to 70 pounds.[1] Yes, new products can be offered by the Private Law Corporation, but, as the Chairman's testimony explains, the PRC has concerns about the construct and activities of such a corporation.

Therefore I would propose loosening the definition of *postal product* in H.R. 22's revised §102 to allow for product innovation where there is a nexus to postal operations, and where the Postal Service can show that the new product will benefit from Postal Service scale or scope economies. If the Postal Service can draw on such economies, consumers will benefit from lower prices.

We should not curtail the ability of the Postal Service to be innovative just because of its size. As the Supreme Court has said, "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."[2] Further, it has said, "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."[3]

Enhancing the ability of the Postal Service and its competitors to do battle fairly will have a beneficial impact on Postal Service productivity, industry competition and consumer welfare. However, enhancing competition in the postal industry should be a two-way street. To that end, I would ask the Committee to assess further the impact of other laws that may unfairly inhibit competition by Postal Service competitors. The Committee should consider decreasing the scope of the letter monopoly on a graduated basis, say over ten years, charging the PRC with reporting annually to Congress about such a provision's effects on universal service.

The rather elaborate and detailed statutory checks and balances built into H.R. 22's price cap mechanism will serve to protect mailers from cost shifting or sudden price increases. On the other hand, they provide little opportunity or incentive for the Postal Service to lower rates either to reflect the rapid impact of management efficiencies or to offer volume-attracting discounts. Lowering prices in a nondiscriminatory fashion (i.e., not NSA's) in a competitive market does not always mean cost shifting or predatory

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[1] I would note that the 70-pound restriction would mean the Postal Service never could compete against its competitors for larger weight packages if it so chose. The current lack of Postal Service competition for 70+ pound package delivery is meaningful; private carrier rates jump dramatically just past the 70-pound mark.

[2] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990). See also generally *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[3] Id. at 341, citing prior cases for the same proposition.

pricing, and such reductions can be a way for the Postal Service to attract new customers. Lower prices could, in themselves, be powerful incentives for the Postal Service to increase productivity and directly benefit consumers. Therefore, I am inclined to support that section of the Postal Service's price cap proposal which broadens the definition of products to current subclasses -- *as long as* H.R. 22 also includes an amendment requiring the Commission to review and adjust the baseline rates every five years. Such a regular quinquennial review would provide a public forum in which imbalances resulting from the price cap mechanism, on the high or low end, could be examined and corrected.

In this same vein, I would be inclined to allow the Postal Service broader discretion in its market tests for postal products than H.R. 22 currently allows as *long* as at the midpoint of the trial the PRC was required to review the ongoing test to determine that the resources allocated to the test were not unduly disproportionate to the revenues derived and the PRC could cancel the test if such a finding was made.

Finally, while I would appreciate the Subcommittee's consideration of these possible adjustments expanding the Postal Service's ability to compete with other providers with regard to prices and new products, I think it is vital that the Postal Service be required to present its products and services to consumers in the marketplace under the same terms as its competitors. To that end, I am concerned that H.R. 22 does not subject the operations of the Postal Service to federal laws and regulations concerning deceptive advertising. Recently, the Commission held in the *Life Time Fitness* complaint case that the Postal Service's use of language in a marketing diskette for advertising mail was "deceptive and inappropriate."[4] Nonetheless, the Commission found it necessary to dismiss the complaint because of limitations on its complaint authority.

H.R. 22 may not subject the Postal Service to the review of any regulatory agency for deceptive practices. The Federal Trade Commission is the agency primarily charged with prohibiting deceptive acts and practices,[5] but FTC jurisdiction over Postal Service operations is problematic. Section 401(1) of Title 39 permits the Postal Service "to sue and be sued in its official name," but FTC jurisdiction extends only to a corporation "which is organized to carry on business for its own profit or that of its members . . .."[6] Although the "break even" standard currently found in 39 U.S.C. §3621 would be

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[4] Docket No. C98-1, *Complaint of Life Time Fitness*, Concurring Opinion at 1, issued January 27, 1999.

[5] See 15 U.S.C. §45.

[6] 15 U.S.C. §44. See *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969) for one decision explaining the scope of FTC jurisdiction over corporations.

deleted by H.R. 22, it is unclear whether all Postal Service operations would be considered to be of the type covered by FTC jurisdiction. Further, one can read §307, which amends §409 of Title 39, as specifically excluding the FTC from policing Postal Service advertising and marketing practices.[7]

Nor is there readily apparent Commission authority over deceptive practices. H.R. 22 expands the Commission's complaint powers, but there is no specific reference to deceptive practices. For example, revised s 3662 of Title 39 would allow interested parties to file a complaint with the Commission if they believe that "the Postal Service is not providing postal service in accordance with the policies of this title," but there is no specific policy in Title 39 directed against deceptive advertising. And, as the *Life Time Fitness* case suggests, even under current law, the regulated side of Postal Service operations needs this kind of oversight.

Once again, thank you for the opportunity to share these additional comments. I look forward to further participation with my fellow Commissioners as the legislative process for H.R. 22 proceeds.

[7] Proposed 39 U.S.C. §409(d)(1)(C)(ii) applies FTC antitrust jurisdiction to certain aspects of Postal Service operations. In applying 15 U.S.C. §45 to the Postal Service, it specifically includes only the FTC's "unfair methods of competition" authority.