

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001

ANNUAL COMPLIANCE REPORT, 2009

)

Docket No. ACR2009

REPLY COMMENTS OF ASSOCIATION FOR POSTAL COMMERCE,
ALLIANCE OF NONPROFIT MAILERS, AMERICAN BUSINESS MEDIA,
DIRECT MARKETING ASSOCIATION, MAGAZINE PUBLISHERS OF AMERICA,
INC., AND NATIONAL POSTAL POLICY COUNCIL

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The undersigned parties (“Mailers”) respectfully submit these joint reply comments. These comments respond to the initial comments of the Public Representative, which ask the Commission to prescribe, on its own initiative, rate increases in excess of the CPI cap on the theory that the Postal Service’s failure to try to achieve break-even by filing an “exigent” rate increase under 39 U.S.C. § 3622(d)(1)(E) is an unlawful act that the Commission may remedy under § 3622(b)(5). Public Representative Comments at 4-33.

INTRODUCTION AND SUMMARY

In its comments, the Public Representative asks the Commission to remedy the Postal Service’s failure to achieve break-even overall revenues by ordering the Postal Service to increase its rates in excess of the CPI cap. The reasoning of the Public Representative appears to be as follows:

- The Postal Accountability and Enhancement Act of 2006 (“PAEA”) not only permits but requires the Postal Service to charge rates that cover total costs. Public Representative Comments at 11-13.
- When CPI-based rate adjustments authorized by 39 U.S.C. § 3622 fail to generate enough revenue to cover the Postal Service’s total costs, the Postal Service is not only permitted but required to implement an “exigent” rate increase pursuant to 39 U.S.C. § 3622(d)(1)(E). The Postal Service’s failure to do so violates the ratemaking standards of Title 39. Public Representative Comments at 7-8, 11-13.
- The Postal Service’s “noncompliance” with Title 39 in turn permits—indeed, requires—the Commission to exercise its authority under 39 U.S.C. §§ 3653(c) and 3662(c) to force the Postal Service to implement “exigent” rate increases—even if the Postal Service believes that such increases would be counterproductive and self-destructive. Public Representative Comments at 13-16.

The Public Representative is vague about the amount of the increases that the Commission should impose. On pages 13-26 of its comments, the Public Representative submits calculations purportedly showing that back-to-back rate increases ranging from 3.1 percent to 10.1 percent annually in FY2010 and FY2011 would be necessary to return the Postal Service to break-even, depending on several alternative assumptions about what legislative relief Congress might provide to the Postal Service. Elsewhere, however, the Public Representative disavows any recommendation “that the Commission order any particular rate adjustments,” explaining that the Public Repre-

sentative is offering the calculations only “as a set of options for Commission consideration within the Commission’s arsenal to meet its responsibilities to oversee the Postal Service.” Public Representative Comments at 15. Moreover, given “the implications of rate shock,” the Public Representative asserts that the PAEA leaves the Commission to phase in the above-CPI rate increases over time, or conditionally, or temporarily. *Id.* at 15.

In any alternative, there is no legal or factual basis for the Commission to prescribe *any* rate increase.

First, the factual premise of the Public Representative’s position—that the Postal Service’s Governors and senior management have recklessly ignored the option of seeking further price increases that could have improved the Postal Service’s “financial stability”—is fictitious. It should be obvious to even the most casual observer that the Postal Service’s Board of Governors and senior management are acutely aware of the Postal Service’s financial problems, have thought seriously about them, and have taken painful actions in an attempt to alleviate them.¹

But it is also obvious that the Postal Service’s financial problems have multiple causes with no quick fix. These causes include the current economic downturn, the long-term migration of communications from mail to the Internet, and the failure of the Postal Service to reduce its costs as quickly as demand has fallen.² The resulting

¹ See USPS 2009 Report on Form 10-K (Nov. 15, 2009) at 6-8, 12-21, 24-29, 54-55; USPS, Integrated Financial Plan Fiscal Year 2010 (Nov. 25, 2009); USPS, Assessment of U.S. Postal Service Future Business Model (November 2009).

² See documents cited in previous footnote; GAO Report GAO-10-191T, *U.S. Postal Service: Financial Challenges Continue, with Relatively Limited Results from Recent Revenue Generation Efforts* (Nov. 5, 2009); GAO Report GAO-09-958T, *U.S. Postal*

shortfalls have been exacerbated by a formula for funding the Postal Service's Civil Service Retirement System ("CSRS") obligations that may have overcharged the Postal Service by as much as \$75 billion.³

The undersigned parties, who represent private businesses that have also suffered from the current economic downturn—and have reduced their mail volume at *existing* postal prices—believe that the Postal Service's judgment about the imprudence of seeking further rate increases at this time is correct. We agree with the Government Accountability Office that "increasing postal rates may provide a short-term revenue boost but would risk depressing mail volume and revenues in the long term, in part by accelerating diversion of payments, communications, and advertising to electronic alternatives."⁴

The Public Representative is entitled to disagree. Disagreements of this kind, however, do not entitle the Commission to override the judgment of Postal Service management by imposing an "exigent" rate increase.⁵ The "financial stability" objective of 39 U.S.C. § 3622(b)(5) is subordinate to the CPI-based price cap of 39 U.S.C.

Service: Restructuring Urgently Needed to Achieve Financial Viability (Aug. 6, 2009); GAO Report GAO-09-790T, *U.S. Postal Service: Broad Restructuring Needed to Address Deteriorating Finances* (July 30, 2009); GAO Report GAO-09-674T, *U.S. Postal Service: Network Rightsizing Needed To Help Keep USPS Financially Viable* (May 20, 2009).

³ USPS Office of Inspector General, *The Postal Service's Share of CSRS Pension Responsibility* (Report No. RARC-WP-10-001) (Jan. 20, 2010); see also Public Representative Comments at 2 (citing OIG Report).

⁴ GAO Report GAO-10-191T, *U.S. Postal Service: Financial Challenges Continue, with Relatively Limited Results from Recent Revenue-Generation Efforts* (Nov. 5, 2009) at 8.

⁵ The word "exigent" does not appear in the statute. Following common usage, however, we use the term "exigent rate increase" as a shorthand for a rate increase authorized by 39 U.S.C. § 3622(d)(1)(E).

§ 3622(d), as the plain language, legislative history and economic logic of the latter provision make clear.

Moreover, the current facts do not fall within the narrow circumstances that may warrant an exigent rate increase under 39 U.S.C. § 3622(d)(1)(E). The short answer is that the Postal Service has not requested such an increase, and the Commission may not impose an exigent increase on its own initiative. Furthermore, the causes of the Postal Service's current deficits are neither "extraordinary" nor "exceptional" within the meaning of the statute; and the Public Representative has made no showing that the Postal Service would need such an increase if operating under "best practices of honest, efficient and economical management."

Without a legal basis for an above-CPI rate increase under 39 U.S.C. §§ 3622(b)(5) or 3622(d)(1)(E), the Public Representative's case for relief under 39 U.S.C. § 3653 collapses. Sections 3653(c) and 3662(c) are enforcement mechanisms, not substantive ratemaking standards in their own right. They do not authorize the Commission to raise otherwise-lawful rates to levels that would be unlawful because they would exceed the applicable caps.

ARGUMENT

I. THE POSTAL SERVICE'S FAILURE TO BREAK EVEN IN FY2009 DID NOT AMOUNT TO NONCOMPLIANCE WITH 39 U.S.C. § 3622.

The fundamental legal premise of the Public Representative's comments is that Title 39 not only permits but requires the Postal Service to set rates that are calculated to achieve break-even status. Failing to set such rates, the Public Representative

asserts, constitutes “noncompliance” under 39 U.S.C. § 3653(c) with various objectives of 39 U.S.C. § 3622(b)(5), most notably Section 3622(b)(5), the objective of assuring “adequate revenues, including retained earnings, to maintain financial stability.” The Commission is authorized to remedy this “noncompliance,” the Public Representative contends, by prescribing higher rates pursuant to 39 U.S.C. §§ 3653(c) and 3662(c). Public Representative Comments at 11-16.

This legal premise is clearly incorrect. The “financial stability” objective of 39 U.S.C. § 3622(b)(5) is subordinate to the CPI-based price cap of 39 U.S.C. § 3622(d).

The Postal Reorganization Act of 1970 required the Postal Service to set rates that achieved break-even “as nearly as practicable.”⁶ The PAEA, however, amended Title 39 to eliminate any provision that entitles the Postal Service to break-even earnings, let alone any requirement that the Postal Service set rates at break-even levels. See PRC Annual Report to the President and Congress for FY 2009 at 20 (“Nor does the PAEA require the Postal Service to break even.”).

To the contrary, the central purpose of PAEA was to *replace* the cost-of-service ratemaking established by the Postal Reorganization Act (i.e., regulation designed to assure full recovery of the Postal Service’s total costs in a specified test year) with index or incentive ratemaking (i.e., regulation designed to ensure that the Postal Service’s rates do not increase faster than the Consumer Price Index, an inflation index *for the economy as a whole*). If the Postal Service’s unit costs increase more slowly than the

⁶ Former 39 U.S.C. § 3621. Even the Postal Reorganization Act did not require the Postal Service to achieve break-even in every year, or any given year. See *Newsweek, Inc. v. USPS*, 663 F.2d 1186, 1203-1205 (2nd Cir. 1981), *aff’d on other grounds*, *Nat’l Ass’n of Greeting Card Publishers v. USPS*, 462 U.S. 810 (1983).

CPI, then the Postal Service is entitled to retain the extra income. If the Postal Service's unit costs increase more quickly than the CPI, than the Postal Service must absorb the shortfall or reduce its costs. That is the very point of incentive ratemaking.

The general objectives of 39 U.S.C. § 3622(b), including § 3622(b)(5), do not trump the CPI cap. The language and legislative history of Section 3622, and the rate-making policies inherent in index-based ratemaking, all confirm this fact. We discuss each item in turn.

A. The Public Representative's Expansive Reading Of 39 U.S.C. § 3622(B) Ignores The Language And Structure Of 39 U.S.C. § 3622.

39 U.S.C. § 3622, the cornerstone of PAEA, imposes an absolute limit on overall percentage increases in rates for each market dominant class, with only narrow exceptions. Section 3622(d)(1)(A) specifically provides that "The system for regulating rates and classes for market dominant products *shall . . . include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal variation over the most recent available 12-month period preceding the date on which the Postal Service files notice of its intention to increase rates.*" 36 U.S.C. § 3622(d)(1)(A) (emphasis added). Similarly, Section 3622(d)(1)(D) specifically directs the Commission to "establish procedures whereby the Postal Service may adjust rates *not in excess of the annual limitations under subparagraph (A).*" *Id.*, § 3622(d)(1)(D) (emphasis added). Neither provision creates any exception for circumstances in which the CPI rate cap prevents the Postal Service from recovering its total costs.

Section 3622(b)(5) and the other objectives of Section 3622(b) do not support a contrary result. The structure and organization of Section 3622 make clear that the objectives of § 3622(b) do not and cannot trump the CPI cap established by § 3622(d). Section 3622 establishes a hierarchy of regulatory authority. At the bottom are Section 3622(c)(2) and the thirteen other factors enumerated in § 3622(c)(1) through (14). Section 3622(c) merely requires that the Commission, in establishing and revising a system of ratemaking for market-dominant products, “take” these factors “into account.” Above the factors enumerated in § 3622(c) are the nine “objectives” enumerated in § 3622(b): the Commission is directed to design the ratemaking system “to achieve” those objectives. *Id.*

At the top of the hierarchy, however, is the CPI-based cap established by § 3622(d)(1). This is the only ratemaking standard that the legislation requires the Commission to enforce as an absolute command (“shall . . . include”). Section 3622(d) allows only two exceptions to the CPI cap: the catch-up or banking exception of Section 3622(d)(2)(C) and the exception of Section 3622(d)(1)(E) for “extraordinary and exceptional” circumstances. By establishing the CPI cap as a mandatory constraint on each rate class (“shall apply”), § 3622(d)(2)(A), enumerating only two exceptions to that constraint, and directing that the CPI cap shall be binding “except as provided” by those exceptions, § 3622(d)(2)(A), Congress has foreclosed any exception to the CPI cap based on any other “objective,” “factor” or other provision of PAEA. Allowing Section 3622(b)(5)—or any other objective of Section 3622(b)—to trump the specific provisions of Section 3622(d) limiting annual rate increases to the CPI (§ 3622(d)(1)(A)) would invert this clear statutory hierarchy, and violate the “fundamental rule of statutory construction” that, when two statutory provisions are arguably in conflict, “specific provi-

sions trump general provisions.” *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003).⁷

B. The Public Representative’s Reading Of 39 U.S.C. § 3622(B) Ignores The Legislative History Of 39 U.S.C. § 3622.

The legislative history of the PAEA provides further confirmation that Congress did not intend the objectives of 39 U.S.C. § 3622(b) to trump the CPI-based cap established by Section 3622(d)(1). The legislative history reveals that Congress: (1) was aware that a CPI-based cap increases could result in a failure to cover costs; but (2) declined to create any exception to the cap in this circumstance beyond the narrowly drawn exigency provision of 39 U.S.C § 3622(d)(1)(E).

Congress was aware during the deliberations leading to the enactment of PAEA that a CPI cap on rate increases might prevent postal rates from covering total Postal Service costs. In 2004, for example, Postmaster General Potter testified that, because an imperfectly crafted price cap could be harmful “given the volatility of today’s marketplace,” the price cap should “be constructed to recognize the many cost factors which enter into the ratemaking process, many of which are beyond our control.” *The Postal Service in Crisis: A Joint Senate-House Hearing on Principles for Meaningful Reform*, Joint Hearing Before the Committee on Government Reform, U.S. House of Represen-

⁷ In addition—and in any event—the Public Representative’s survey of the objectives of Section 3622(b) is incomplete and one-sided. The first two objectives are to “maximize incentives to reduce costs and increase efficiency” (39 U.S.C. § 3622(b)(1)) and to “create predictability and stability in rates” (*id.*, § 3622(b)(2)). As explained elsewhere here, allowing the Postal Service to exceed the CPI cap would harm both objectives. The Public Representative makes no attempt to reconcile its proposed relief with either objective.

tatives, and Committee on Governmental Affairs, U.S. Senate, 108th Cong., 2d Sess. 63 (2004) (“2004 Joint Hearings”).

Consistent with this concern, several versions of the legislation considered by Congress between 2004 and 2006 would have allowed the Commission to implement a mixture of price cap *and* cost-of-service regulation, and would have allowed the Postal Service to exceed the CPI cap whenever the Commission found that above-CPI rate increases were “reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” See H.R. 22 § 201 (as reported in H.R. Rep. No. 66, 109th Cong., 1st Sess. 4 & 46 (April 28, 2005) (to be codified as proposed 39 U.S.C. § 3622(d) and (e)).

The Senate version of the legislation, however, was drafted to allow above-CPI rate increases only in “unexpected and extraordinary circumstances” akin to the terrorist attacks of September 11, 2001, and the anthrax mailings that occurred soon afterwards. See S. Rep. No. 318, 108th Cong., 2nd Sess. 101 (Aug. 25, 2004) (S. 2468, to be codified at 39 U.S.C. § 3622(d)(4)). The accompanying discussion of the legislative language made clear the narrowness of this exception:

The Committee believes that the rate cap system to be established under this statute by the Postal Regulatory Commission should give the Postal Service the flexibility to respond to all circumstances it is likely to face in the normal course of business. However, the terrorist attacks of September 11, 2001 and the subsequent use of the mail to transmit anthrax highlight the need to address unexpected and extraordinary circumstances and their effect on the Postal Service and its financial requirements. Therefore, the Postal Regulatory Commission shall establish procedures under which the Postal Service can adjust rates on an expedited basis

due to unexpected and extraordinary circumstances. *The Committee hopes that these procedures will never be needed*; however, it would be unwise not to recognize the potential need for rapid changes to the postal rate structure in the event of a *national emergency*.

Id. at 11-12 (emphasis added). *Accord, id.* at 43 (“Lastly, the Postal Regulatory Commission shall establish procedures whereby rates may be adjusted on an expedited basis due to unexpected or extraordinary circumstances such as the September 11, 2001 terrorist attacks or the use of the mails to transmit anthrax.”).

The version of the provision that ultimately became law combined the restrictive language of the House bill (“reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States”) *and* a further requirement that the circumstances giving rise to the Postal Service’s financial exigency be “extraordinary or exceptional.” 39 U.S.C. § 3622(d)(1)(E). The enactment of this narrowly drawn exception to the CPI cap precludes any claim that 39 U.S.C. §3622(b)(5), or the other objectives of Section 3622(b), may be read as a broader exception to the CPI cap when the Postal Service is in financial need. “When Congress provides exceptions to a statute,” the “proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.” *United States v. Johnson*, 529 U.S. 53, 58 (2000); *accord, TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001).

C. The Public Representative’s Reading Of 39 U.S.C. § 3622(B) Would Eviscerate The Incentive Effect Of The CPI Cap.

The decision of Congress to limit narrowly the scope of any cost-recovery exception to the CPI cap was clearly sound. Allowing the Postal Service to file above-CPI

rate increases whenever the Commission found that this would promote the Postal Service's "financial stability" would eviscerate one of the central purposes of the index mechanism: creating an incentive for the Postal Service to control its costs. As the Postal Service has noted:

A price cap system . . . provides greater incentives for efficiency due to the fact that it fundamentally changes the relationship between cost and price. Thus, reading this factor [§ 3622(c)(2)] as "requiring" that every class of mail cover its costs, regardless of the ceiling imposed by the cap, would eviscerate the framework set forth by Congress.

Docket No. RM2007-1, Initial Comments of the USPS (April 6, 2007) at 22-23.

The fundamental logic of incentive ratemaking is to provide incentives for a regulated carrier to hold its cost increases below the level of the index, by "severing the linkage under traditional cost-of-service ratemaking" between a regulated company's costs and rates.⁸ To create the desired incentive, however, the commitment not to allow an above-index rate increase if the regulated entity fails to control its costs must be credible. If the regulated entity believes that nonrecovery of actual costs may plausibly cause the regulator to relent, the index mechanism loses its effectiveness as a control on costs.⁹ Exceptions that allow above-index rate increases when the regulated entity is losing money undermine the "regulatory commitment" to the index cap, and have long been recognized as the "Achilles heel" of price cap regulation.¹⁰ Allowing a

⁸ *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985 (1993) ("*Order No. 561*") at 30,948-49 & n. 37, *aff'd*, *Ass'n of Oil Pipelines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

⁹ Michael A. Crew and Paul R. Kleindorfer, "A Critique of the Theory of Incentive Regulation: Implications for the Design of Performance Based Regulation for Postal Service," in Crew and Kleindorfer, eds., *Future Directions in Postal Reform* (2001).

¹⁰ *Id.*

regulated firm to breach the rate cap on the ground that the firm needs more money to cover its costs would have this very effect.

This is a particularly serious concern for the Postal Service. As noted above, the rigidity of the Postal Service's costs has been a major contributor to the Postal Service's financial woes. The CPI cap has had the salutary effect of forcing the Postal Service and its stakeholders to begin the painful but necessary steps toward rationalizing the capacity and costs of the network. Allowing above-CPI rate increases merely to promote "financial stability" would destroy the credibility of the CPI cap, and the resulting incentives to make further progress in cutting the Postal Service's costs.

II. THE PRESENT CIRCUMSTANCES DO NOT JUSTIFY AN EXIGENT RATE INCREASE UNDER 39 U.S.C. § 3622(d)(1)(E).

A major premise of the Public Representative's comments is that the Postal Service's current financial situation is so "extraordinary or exceptional" as to justify an "exigent" above-CPI rate increase pursuant to 39 U.S.C. § 3622(d)(1)(E) "to avoid financial embarrassment of the Postal Service and severe service reductions." Public Representative Comments at 7-8. "If this is not an extraordinary or exceptional circumstance," the Public Representative asks, "then what is?" *Id.* at 9. Beyond this rhetorical question, however, the Public Representative offers no explanation of how the current circumstances satisfy Section 3622(d)(1)(E). In fact, they do not.

As noted above, Section 3622(d)(1)(E) allows (but does not require) the Postal Service to increase rates faster than the CPI if the Commission finds: (1) after a "request by the Postal Service" that (2) "extraordinary or exceptional" circumstances have rendered index-based rate increases inadequate to cover the Postal Service's

costs *and* (3) an additional increase is “reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” 39 U.S.C. § 3622(d)(1)(E). An exigent rate increase thus has three prerequisites: a request by the Postal Service; extraordinary or exceptional circumstances; and an efficiency requirement. None of these three circumstances are present. We discuss each in turn.

A. The Commission May Not Impose An Exigent Rate Increase That The Postal Service Has Not Requested.

The immediate and insurmountable legal obstacle to approval of an exigent rate increase is the Postal Service’s decision not to request such an increase. The statutory rate-adjustment mechanism codified in 39 U.S.C. § 3622(d) clearly contemplates that rate changes under Section 3622(d) must be initiated by the Postal Service, not the Commission. Section 3622(d)(1)(C)(i) provides that rate adjustments implemented under “this section”—i.e., Section 3622—shall be initiated by the filing of public notice by “the Postal Service.” Section 3622(d)(1)(D) requires the Commission to establish procedures under which “the *Postal Service* may adjust rates” within the CPI cap. (Emphasis added.) And Section 3622(d)(1)(E) likewise requires that an exigent increase, if approved by the Commission, must be approved “within 90 days after any *request by the Postal Service.*” *Id.* (emphasis added). The requirement of a “request by the Postal Service” makes clear that the initiative in seeking an exigent rate increase rests with the Postal Service, not the Commission, and that exigent rate increases are permissive, not mandatory. No Postal Service request, no exigent rate increase—a rule that is entirely consistent with the allocation or ratemaking initiative under PAEA.

B. The Causes Of The Postal Service's Current Deficits Are Neither "Extraordinary" Nor "Exceptional" Within The Meaning Of 39 U.S.C. § 3622(d)(1)(E).

The Public Representative appears to assume that the Postal Service's current deficits, because they are large, necessarily must be "extraordinary or exceptional" within the meaning of 39 U.S.C. § 3622(d)(1)(E). This is incorrect. To be "extraordinary or exceptional," a Postal Service revenue shortfall must be unforeseeable as well as large. As noted above, what Congress has in mind were unforeseen shocks on the system comparable to the "terrorist attacks of September 11, 2001, and the subsequent use of the mail to transmit anthrax . . ." H. R. Rep. No. 108-31, 108th Cong., 2d Sess. 11, 43, 101 (2004). *Accord*, Docket No. RM2007-1, *Regulations Establishing A System of Ratemaking*, Order No. 26 (Aug. 15, 2007) at ¶ 2105 (noting "the clear import of the PAEA's overarching ratesetting philosophy that exigent requests are meant to be a safety net for dealing with unforeseeable emergencies").

The foreseeability requirement is consistent with the underlying principle of incentive ratemaking. To provide credible incentives for efficient operation, a carrier should not be allowed to seek above-CPI increases to recover shortfalls that result from causes that the carrier reasonably could have taken steps to mitigate.

The causes of the Postal Service's current problems, far from being unforeseeable, have been foreseeable for a long time. The erosion of communications from the mail to the internet has been observed for years, and has been taking a noticeable toll on the Postal Service's finances for some time.¹¹ The inefficiently high level of Postal

¹¹ See USPS Transformation Plan (April 2002) at 3-4 and Appendix E; President's Commission on the United States Postal Service, *Embracing the Future: Making the Tough Choices to Preserve Universal Postal Service* (July 2003) at iv, 6-8 ("Challenge

Service costs have been observed for decades.¹² And recessions are a fact of economic life: the American economy has endured 21 recessions since 1900.¹³

C. The Public Representative Has Not Begun To Satisfy The Economic Efficiency Requirement Of 39 U.S.C. § 3622(d)(1)(E).

The Public Representative essentially ignores the third element of Section 3622(d)(1)(E)—the requirement that any exigent rate increase be “reasonable and equitable and necessary to enable the Postal Service, under *best practices of honest, efficient, and economical management*, to maintain and continue the development of *postal services of the kind and quality adapted to the needs of the United States*.” (Emphasis added.) “Honest, efficient, and economical management” is a term of art for a long-established regulatory doctrine that serves to prevent rate regulation from becoming a blank check for recovery of all costs actually incurred, regardless of their efficiency. See *D.C. Transit System v. WMATA*, 466 F.2d 394 (D.C. Cir. 1972) (upholding disallowance of proposed rate increases on the ground that the carrier’s deficits resulted from inefficient operations); *id.* at 408-410 (citing precedent); *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3rd Cir. 1987). And the reference to “postal services of the kind and quality adapted to the needs of the United States”

#1: Electronic Diversion of Mail Changes Everything”). See also Report of the Commission on Postal Service (April 1977) at 19-24.

¹² See *Toward Postal Excellence: The Report of the President’s Commission on Postal Organization* (June 1968) (“Kappel Commission Report”) at 24-29, 154-163; Report of the Commission on Postal Service (April 1977) at 12-15; National Academy of Public Administration, *Evaluation of the United States Postal Service* 23-26 (July 1, 1982); President’s Commission on the United States Postal Service, *supra* (July 2003) at 6-8.

¹³ See National Bureau of Economic Research, “Business Cycle Expansions and Contractions,” www.nber.org/cycles/cyclesmain.html (site visited January 5, 2010).

serves to bar recovery of losses from providing services that the United States does not need.

The Public Representative has not even attempted to satisfy these standards. Rather, he has simply *assumed* that no significant savings from rationalization of the Postal Service's current capacity, plant size and configuration, labor complement, and terms and conditions of employment are possible, and that all cost-saving changes in the level of service provided to customers would make them worse off. Absent a showing that these assumptions are true, there is no basis under Section 3622(d)(1)(E) for approving an exigent rate increase.

III. 39 U.S.C. §§ 3653 AND 3622 ARE NOT INDEPENDENT RATEMAKING STANDARDS, AND DO NOT AUTHORIZE THE COMMISSION TO CHANGE RATES THAT COMPLY WITH OTHER PROVISIONS OF TITLE 39.

The Public Representative, apparently recognizing that the authority to initiate an exigent rate case rests exclusively with the Postal Service, argues that the Commission can bypass 39 U.S.C. § 3622(d)(1)(E) and prescribe an above-CPI rate increase under the annual compliance review mechanism of 39 U.S.C. § 3653 or the complaint mechanism of 39 U.S.C. § 3662. See Public Forum Tr. 82-85 (statements of Public Representative). “Once the Commission finds that the [existing] rates are unlawful or noncompliant, then the findings under 3662 kick into effect, and there, the Commission has apparently unlimited authority.” *Id.* at 83.

Sections 3653(c) and 3662(c), however, are merely mechanisms for enforcing ratemaking requirements codified elsewhere in Title 39, not independent ratemaking standards in their own right. See 39 U.S.C. § 3652(a)(1) (issue in annual compliance

determinations is whether Postal Service products “complied with all applicable requirements for this title”); *id.*, § 3653(b)(1) (issue is whether “any rates or fees in effect” during the previous year “were not in compliance with applicable provisions of this chapter (or regulations promulgated thereunder)”); *id.*, § 3662(a) (requiring complainant to show that the Postal Service “is not operating in conformance with the requirements of” certain enumerated sections of Title 39). Hence, Sections 3653 and 3662 do not authorize the Commission to raise otherwise-lawful rates to levels that would be unlawful because they would exceed the applicable caps.

CONCLUSION

For the foregoing reasons, the Commission should decline to impose the above-CPI rate increases proposed by the Public Representative.

Respectfully submitted,

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