

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

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| _____ )                           |                     |
| Costing Treatment of Retirement ) | Docket No. RM2023-1 |
| Debt Removal )                    |                     |
| _____ )                           |                     |

**REPLY OF MAILER ASSOCIATIONS TO  
RESPONSE OF THE UNITED STATES POSTAL SERVICE  
IN OPPOSITION TO GCA PETITION FOR RECONSIDERATION  
AND INITIATION OF PROCEEDING**

(November 21, 2022)

The undersigned Mailer Associations represent a significant portion of market-dominant mailers and were signatories to the October 13, 2022, motion for reconsideration (“Motion”) of the Commission’s approval of the Postal Service’s change in accepted analytical principles.

Our interest in this docket is two-fold: first, as USPS customers, our members will be harmed by the Postal Service’s refusal to account for \$-57 billion in cancelled costs in the FY 2022 Annual Compliance Review, as well as the Postal Service’s failure to accrue and attribute retiree health benefit (RHB) normal costs, for the reasons explained in our Motion.<sup>1</sup> Second, as stakeholders in the postal regulatory ecosystem, our members are further impacted by the Commission’s failure to require the Postal Service to follow established regulations and, moreover, the Commission’s creation of a new exception to its own regulations without complying with the Administrative

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<sup>1</sup> See Mailer Associations’ Mot. for Reconsideration (Oct. 13, 2022) at 5-7 (explaining that the omission of \$57 billion in negative costs from the ACR will subject mailers to over \$400 million in density rate surcharges, and that the failure to accrue and attribute RHB normal costs could result in lower workshare discounts).

Procedure Act. Thus, the Mailer Associations file this reply to the Postal Service's November 10, 2022 opposition.

***The Postal Service's Procedural Arguments are Meritless***

The procedural posture of this matter is quite unusual due to the Postal Service's and the Commission's "regulation by letter" tactics. On August 12, 2022, the Postal Service unilaterally declared in a letter to the Commission that the USPS plans to omit \$57 billion in negative expenses from the ACR and that it plans to not accrue RHB normal costs in FY 2022, in response to the PSRA's cancellation of any payment required from the Postal Service under 5 U.S.C. § 8909a – *i.e.*, the Postal Service Retiree Health Benefits Fund. On October 7, 2022, the Commission approved the proposed omission of the negative \$57 billion from the FY 2022 ACR via reply letter.

The Postal Service asserts that these letter exchanges were "perfectly adequate" for establishing a new analytical principle.<sup>2</sup> They were not. The Postal Service also asserts that its failure to follow the Commission's rules was defensible because its letter "was submitted electronically" and was "posted on the Commission's Daily Listings."<sup>3</sup> Again, this was not compliant. Those steps alone do not open a docket. Nor, because the Postal Service's original letter did not even acknowledge that it was seeking a change in analytical principles, could it have provided notice to the public that the Commission would rule on such a request, much less do so without following its own rules.

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<sup>2</sup> See USPS Response at 4.

<sup>3</sup> *Id.* at 2.

The Postal Service's letter announcement that it planned to ignore the cancellation of accrued prior-year RHB costs in the FY 2022 ACR clearly constituted a proposed change in accepted analytical principles.<sup>4</sup> This required the Postal Service to have submitted a petition to the Commission to initiate a docketed proceeding.<sup>5</sup> At the very least, the Postal Service should have requested a waiver of the Commission's regulations regarding a proposed change in accepted analytical principles. The Postal Service did neither.

Even the Commission itself recognized that the Postal Service's August 12 letter sought changes in accepted analytical principles. The Postal Service disputes this, claiming that a "[c]lose reading of the Commission response letter indicates that the Commission never reached that conclusion."<sup>6</sup> The Mailer Associations did read the Commission's letter closely. "Ordinarily," it states, "the Postal Service would be required to submit a petition to initiate a proceeding to consider proposed changes to analytical principles."<sup>7</sup> Moreover, the "Commission expects changes in analytical principles that are not due to similar extremely rare occurrences will follow the proper procedures."<sup>8</sup>

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<sup>4</sup> An "accepted analytical principle" is the one used by the Commission in the immediately preceding Annual Compliance Determination, unless a principle has been revised in the interim pursuant to notice and comment rulemaking. 39 C.F.R. §§3050.10 & 3050.11.

<sup>5</sup> 39 C.F.R. § 3050.11(a).

<sup>6</sup> USPS Response at 3. The Postal Service highlights the fact that the Commission did not identify specific analytical principles that would change. This is immaterial and, regardless, the Mailer Associations identified such principles in our Motion. See Mailer Associations' Mot. for Reconsideration at 3, 6-7.

<sup>7</sup> Barker Letter at 2.

<sup>8</sup> *Id.*

The Postal Service's argument on this point thus misses the mark. The Commission *did* conclude that the Postal Service's proposed treatment constitutes a change in analytical principles. The problem is that, despite reaching this conclusion, the Commission nevertheless determined that the Postal Service need not follow the "proper procedures" in this "extremely rare" instance. But there is no exception to 39 C.F.R. § 3050.11 for "extremely rare occurrences," nor for "unique and non-recurring" events. *That* is why the Mailer Associations seek reconsideration of the Commission's decision and request that the October 7 letter be rescinded.

The Commission's failure to follow its own regulations and its refusal to require the Postal Service to follow the proper procedures is not justified by the Postal Service's characterization of the Commission's action as an interpretive rulemaking. An interpretative rulemaking lacks "the force and effect of law"<sup>9</sup> and thus cannot change the substance of a regulation. Furthermore, to borrow the Postal Service's phrase, a "close reading" of the October 7 letter reveals that the Commission *did not* purport to "interpret" its regulations; instead, the Commission simply decided that the Postal Service (and the Commission itself) was not bound by the Commission's regulations altogether by creating a brand-new exception to its rules for unique events. Nor do these allegedly "highly unusual" circumstances start and end in FY 2022, as the Postal Service claims.<sup>10</sup> If the Postal Service is permitted to ignore the negative \$57 billion cost

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<sup>9</sup> Interpretative rule "lacks the force and effect of law." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S.Ct. 2051 (2019); see also *National Council for Adoption v. Blinken*, 4 F.4<sup>th</sup> 106 (D.C. Cir. 2021) ("an interpretative rule explains 'pre-existing legal obligations or rights' rather than 'creating legal effects'").

<sup>10</sup> USPS Response at 4.

reversal and generates approximately one percent density rate authority, that price increase will be built into the market-dominant rate base and remain there forever.

The Postal Service's criticism of the timing of the Mailer Associations' Motion is puzzling. After intentionally circumventing the rules for seeking a change in analytical principles, the Postal Service chastises mailers for not promptly engaging in extra-regulatory communications. Mailers cannot be blamed for expecting the Commission to adhere to its own rules by opening a docket and inviting public comment on the Postal Service's proposal to change the substance of the Annual Compliance Report. When the Commission approved the Postal Service's proposed treatment – *i.e.*, once there was Commission action to reconsider – the Mailer Associations filed their Motion in less than one week. Three weeks later, the Greeting Card Association filed its petition with the Commission to initiate a formal docket – something that the Postal Service should have done months ago.

Furthermore, the Postal Service's claim (at 9) that “there simply is no time to conduct and conclude any such proceeding and still leave anything approaching sufficient time for the Postal Service to use the outcome to guide its preparation and submission of the ACR pursuant to the required statutory schedule” deserves no weight. The Commission's rules plainly provide that a motion for reconsideration renders the underlying action non-final. 39 C.F.R. §3010.165(c). If the Postal Service has continued since October 13 to prepare the ACR in a way that disregards the established methodologies, it has done so in defiance of Commission regulations and at its own risk.

### ***The Postal Service's Substantive Arguments Fare No Better***

The Postal Service apparently continues to believe that Congressional mandates must be considered when doing so benefits the USPS narrative (*i.e.*, when doing so allows the monopolist to claim financial ruin and the need for additional rate authority) but should be ignored when regulatorily convenient. The Postal Service's Opposition still fails to justify this inconsistency.

The Postal Service dismissively faults mailers for “myopically” raising concerns about the effects of its treatment of the PSRA RHB cost cancellation on density rate authority – effects that the Postal Service characterizes as “hypothesized.”<sup>11</sup> There is nothing “myopic,” however, about captive USPS customers informing the postal regulator that a change to analytical principles will likely result in a \$400 million tax on market-dominant mailers. This is precisely why the Commission's regulations require that changes to accepted analytical principles be subjected to a notice or petition and the opportunity for stakeholders to comment on the proposal. Moreover, the harms about which the Mailer Associations complain are hardly “hypothesized” – indeed, the Postal Service appears to be champing at the bit to impose the additional density rate authority that its improper PSRA costing treatment will engender.<sup>12</sup>

The Postal Service claims that there is “no connection between cancellation of prior unpaid prefunding amounts and the purposes behind provision of density

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<sup>11</sup> USPS Response at 6.

<sup>12</sup> *Id.* at 7 (“it would be the *preclusion* of density authority (caused by including the \$57 billion reversal) rather than the *allowance* of density authority (as a completely rational side effect of removing the \$57 billion reversal) that would constitute interference with and disruption of appropriate regulatory functions.).

authority.”<sup>13</sup> Of course there is: the accrual of unpaid RHB costs was a key determinant in the Commission’s conclusion during the ten-year review that the then-regulatory system did not allow the Postal Service to achieve medium and long-term financial stability. Consequently, the Commission enacted revised regulations that granted the Postal Service above-CPI rate authority (including density authority). Moreover, an amortized portion of the unpaid retiree benefits were included in the institutional cost totals used in every calculation of the density factor to date. Those costs are embedded in current rates and, if the Postal Service’s approach were accepted, should be backed out before any new authority could be granted.

In any event, the cancellation of \$57 billion in unpaid RHB costs cleans the Postal Service’s balance sheet and changes the analysis of whether it needs additional pricing authority to be financially stable. The density authority is designed in part to recover growing institutional costs in an era of declining volume; the PSRA reduced these institutional costs, as indicated in the accounting treatment of these funds. The inclusion or omission of accrued RHB costs in the ACR is directly relevant to the calculation of the Postal Service’s institutional costs and, ultimately, the propriety of its density authority.

Finally, with respect to the Postal Service’s plan not to accrue RHB normal costs in FY 2022, the Postal Service writes that the issue is not whether such costs continue to accrue but whether the Postal Service receives an invoice from OPM obligating it to make payments for such benefits to the Treasury.<sup>14</sup> This is simply not true.

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<sup>13</sup> *Id.* at 6-7.

<sup>14</sup> *Id.* at 8.

The proposal to exclude RHB normal costs is not a “unique and non-recurring event” and presumably for that reason it was not addressed in the Commission’s October 7 letter. The proposal is unambiguously a change in an accepted analytical principle. The proposed recurring annual treatment of RHB “normal costs” is directly contrary to the current methodology of recognizing when and how the costs are earned (true economic costs), as opposed to the payment schedule. The critical factor for accrual accounting under which the Postal Service operates is when the cost is accrued – not when OPM sends an invoice or the invoice gets paid. Those costs accrue whenever postal employees work; the PSRA did not amend the labor agreements. That for a few years the premiums will be paid by amounts previously funded is utterly immaterial, as more such costs accrue daily and are part of the economic cost of providing postal services.

The Postal Service does not argue that excluding RHB normal costs would improve the quality, accuracy or completeness of the cost models as required by the Commission’s rules. In fact, the Postal Service does not even dispute that the proposed change is contrary to generally accepted accounting principles for accrued costs. Rather, it simply asserts without explanation that these objections are not to the “regulatory treatment proposed for the ACR/CRA.”<sup>15</sup>

This objection seems intentionally obtuse. The cost accrual rules underlie the economic definition of costs. In practical terms, the Postal Service’s proposal to zero

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<sup>15</sup> The Postal Service’s concern that adhering to the established methodology might undermine the appropriate share calculation is ironic, considering that the Service has argued repeatedly that the Commission should abolish any minimum institutional cost contribution from Competitive products.



out “normal costs” every year going forward will have real world, negative recurring impacts that will degrade rather than improve the regulatory cost models. The change would immediately distort the modeled costs avoided for workshare discounts by as much as 6.6% per year and violate the statutory cost attribution requirements under 39 U.S.C. §§ 3622, 3631 and 3633 by systematically excluding accrued costs. Omitting them from the ACR would understate the costs avoided by such worksharing.

### **Conclusion**

As explained in the Mailer Associations’ Motion, the Commission should reverse the position taken in its October 7 letter and direct the Postal Service to either apply its existing analytical principles or petition for a change in those principles prior to incorporating those changes in its Annual Compliance Report. To the extent the Commission acts in this docket, it should grant the Greeting Card Association’s petition for reconsideration for the reasons discussed above and in the Motion.

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