

October 13, 2022

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The Hon. Erica A. Barker  
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Postal Regulatory Commission  
901 New York Avenue, NW  
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***Re: Motion for Reconsideration of Response to the Postal Service's Proposed Changes to Accepted Analytical Principles***

Dear Secretary Barker:

This letter constitutes a motion for reconsideration, pursuant to Commission rule of practice 3010.165, to the letter from your office dated October 7, 2022 to Mr. Richard Cooper.<sup>1</sup> Mr. Cooper's letter notified the Commission of the Postal Service's plans to make two changes to established regulatory costing methodologies to address what it describes as "financial effects" associated with the enactment of the Postal Service Reform Act of 2022 (PSRA).<sup>2</sup> As you know, the Postal Service plans to "omit from the Reallocated Trial Balance (and hence the CRA and the ACR) the \$57.0 billion negative expense" associated with the elimination of the retiree health benefit (RHB) prefunding obligations when it files its annual compliance report for fiscal year 2022. In addition, the Postal Service plans to not accrue RHB normal costs in FY 2022 even though its employees will earn such benefits for their work during the year.

We were disappointed to see the Commission summarily "approve" the Postal Service's plan to disregard the \$57 billion negative expense in the FY 2022 ACR via a reply letter with minimal analysis, without adherence to Commission rules and regulatory precedent or established principles, without public comment, and regardless of the impact of such action on mailers. The undersigned mailers ask the Commission to rescind the October 7 letter, invite the Postal Service to initiate a proper proceeding, and, if the Commission nonetheless chooses to address the merits,

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<sup>1</sup> See Letter to Richard T. Cooper, USPS Managing Counsel for Corporate and Postal Business Law (October 7, 2022), available at <https://www.prc.gov/docs/123/123096/Response%20Letter.pdf>.

<sup>2</sup> See Letter to Erica A. Barker, PRC Secretary and Chief Administrative Officer (August 12, 2022), available at <https://www.prc.gov/docs/122/122469/Ltr%20re%20PSRA%20Effects%20ACR%20CRA.pdf>.

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reverse the purported approval of the proposed disregarding of the \$57 billion negative expense in the ACR.

Both of the Postal Service's proposed changes raise important procedural and substantive concerns, and the Commission's acceptance-by-letter of one of those changes amplifies our concerns. Under rule 3010.165, this motion renders the Commission's October 7 letter<sup>3</sup> nonfinal until final disposition of this motion.

**First**, the Commission's acceptance of the Postal Service's treatment of the elimination of \$57 billion in debt is *ultra vires*. The Commission acknowledges that this constitutes a proposed change to accepted analytical principles, and that Commission rules do not allow changes to such principles by means of a unilateral letter notice.<sup>4</sup> The Commission nevertheless ignored its own rules and purportedly "approved" the Postal Service's proposed treatment via a reply letter.

The Commission's action exacerbates the procedural flaws inherent in the Postal Service's August 12 letter. Commission regulations neither allow the Postal Service to declare by fiat a change to accepted principles in a letter to the Commission, nor do they permit the Commission to "approve" or "accept" such proposed changes in a reply letter. Annual compliance reports *must* use accepted analytical principles;<sup>5</sup> before the Commission approves changes to these principles it should issue a notice of proceeding, publish a notice of that proceeding in the Federal Register, and afford interested parties an opportunity to comment on the proposed changes.<sup>6</sup> The governing regulations contain no exception to these requirements for so-called "unique, non-recurring events," and yet the Commission appears to have created such an exception out of whole cloth without any consideration of the potential prejudice to mailers. Indeed, it did so even though the Postal Service did not request a waiver of the Commission's regulations regarding changes in analytical principles or even acknowledge that those regulations applied to its request. Rather, the Commission unilaterally and summarily treated the Postal Service letter as a request for waiver of these regulations, then granted that request without providing opportunity for comment.

**Second**, the Commission's October 7 letter fails to address the Postal Service's intention to not accrue RHB normal costs in FY 2022. It is unclear whether the Commission "approves" of this plan as well, and we do not assume approval from silence. But this proposed change similarly

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<sup>3</sup> The October 7, 2022 letter in substance appears to be an "order" as defined by 5 U.S.C. §551(6). We also note that the Commission has failed to apply 39 C.F.R. §3010.102, which provides for assignment of a docket number to "all matters that come before the Commission" – which certainly includes the correspondence to and from Mr. Cooper.

<sup>4</sup> See Barker Letter, at 2 ("Ordinarily, the Postal Service would be required to submit a petition to initiate a proceeding to consider proposed changes to analytical principles.").

<sup>5</sup> See C.F.R. § 3050.10 ("In its annual periodic reports to the Commission, the Postal Service *shall use only accepted analytical principles.*") (emphasis added).

<sup>6</sup> See *id* at § 3050.11 (describing Commission's role in reviewing proposed changes to an accepted analytical principle).

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would reverse long-established costing methodologies and cannot be enacted via a unilateral letter notice to the Commission.

The Commission's October 7 letter results in the unlawful approval of one of the Postal Service's proposals and uncertainty with respect to the other proposal. Transparency, consistency, and due process compel the Commission to rescind its October 7 letter.

After rescinding its letter, the Commission should require the Postal Service to file petitions to change accepted analytical principles pursuant to Rule 3050.11 before adopting such changes in the ACR. While these issues will arguably only become ripe when the Postal Service actually applies the changed principle in the ACR docket, we are concerned it will be impractical to address the propriety of these changes in that docket. Not only will the Commission's and commenters' focus be directed to numerous other issues in that docket, but the application of this principle will substantially impact the preparation of the Cost and Revenue Analysis (CRA) and its associated workpapers. Because modifying and refileing these reports would cause substantial delay and administrative burden, the Commission should fully address the issues raised by the Postal Service's proposal prior to the commencement of the ACR. It cannot simply rubber-stamp a Postal Service proposal through the issuance of a reply letter outside of an established proceeding.

### ***The Commission's October 7 Letter Is Arbitrary, Capricious, and Lacks a Reasonable Basis***

#### *Approving the Omission of \$57 billion in Negative Expenses from the CRA Exceeds the Commission's Authority*

Although the Commission claims that it "must ensure accurate, robust, and consistent data are used as inputs to reports to it,"<sup>7</sup> its actions here would be inconsistent with previous Commission findings and inaccurate.

Prior-year RHB costs have been considered institutional costs in every previous Annual Compliance Review. Furthermore, in the past two years, these costs have been part of the institutional costs used to calculate the density factor, and thus those costs are embedded in current rates. The Postal Service's proposed treatment of prior-year RHB costs is thus a reversal of how such obligations have been treated by the Commission. It is no more inappropriate to take into account the impact of the PSRA's cancellation of \$57 billion in RHB obligations than it was to account for the accrual of such costs in the first place.

During the PAEA-mandated ten-year review, both the Postal Service and the Commission treated accrued (but unpaid) RHB obligations as real costs. The Commission insisted on including the RHB obligations in its analysis of the Postal Service's medium- and long-term financial

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<sup>7</sup> See Barker Letter at 1.

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stability; indeed, the accumulated deficit largely comprised of RHB expenses was key to the Commission's finding that the Postal Service failed to achieve long-term financial stability under the old rate system.<sup>8</sup> The Commission explained:

*It is consistent with Commission precedent to consider the statutory obligations of the Postal Service.* In Commission financial reports, the Commission disaggregates the statutory obligations as non-operating expenses (similar to the short-term analysis below) in order to facilitate an in-depth analysis, but includes the obligations in the net income/loss figure (identical to the medium-term analysis that follows). *Similarly, the RHB obligation is treated as part of total costs in the annual CRA report* and the Form 10-K financial statements filed with the Commission, both of which are sources of data in the Commission's financial stability analysis below.<sup>9</sup>

If precedent requires that the Commission consider the statutory obligations of the Postal Service, then it also requires that the Commission consider statutory provisions that repeal Postal Service obligations. And if RHB funding obligations are included in total costs in the CRA, then RHB cancellations must be accounted for as negative costs in the CRA.

The Commission's approval of the Postal Service's plan to ignore the \$57 billion cancellation is doubly improper – both as an *ultra vires* action that is not authorized by the Commission's rules and also as an unsupported departure from prior Commission findings.

As to the first point, the Commission is acting outside of its own regulatory authority by fashioning a new standard for when the Postal Service must initiate a formal proceeding to consider changes to accepted analytical principles. Under this new standard, “[c]hanges in analytical principles that are not due to, [sic] unique, and non-recurring occurrences (*i.e.*, statutory change) are required to follow the established process for initiating a procedure to consider changes in analytical principles consistent with [the] Commission's regulations.”<sup>10</sup> Presumably, then, the Commission believes that the Postal Service need *not* follow the established process for changing analytical principles when those changes are due to “unique and non-recurring occurrences.” This newly announced “unique and non-recurring” exception is nowhere found in the regulations, and there is no basis for it. If the Commission wishes to promulgate such an exception, then it must issue a notice of proposed rulemaking and allow interested parties to comment on its proposal.

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<sup>8</sup> See Order No. 4257, Docket No. RM2017-3 (Dec. 1, 2017) at 171 (“The accumulated deficit of \$59.1 billion includes \$54.8 billion in expenses related to prefunding the RHB.”).

<sup>9</sup> See *id.* at 158 (emphasis added).

<sup>10</sup> See Barker Letter at 4.

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Otherwise, it has simply re-written its own regulations without Congressional authority and without APA due process measures.

Moreover, the Commission's deviation from past practice is inadequately explained. The Commission dedicates merely two sentences to speculation that accounting for the \$57 billion negative expense "would create nonsensical results," "potentially interfere with the regulatory purposes of the CRA," and "would also distort trend analysis and comparisons to past or future years' CRA results."<sup>11</sup> These thin rationalizations do not rise to the level of "full and rational explanation" that is required to uphold a change in regulatory policy.<sup>12</sup> They also lack merit. There is nothing "nonsensical" about accounting for the cancellation of prior year RHB obligations after including those same obligations as costs in previous dockets. And concerns about the Postal Service's cost and revenue trends cannot override accuracy, particularly when the USPS reports adjusted financial figures regularly.

*Approving the Omission of \$57 billion in Negative Expenses from the CRA Will Harm Market-Dominant Mailers Subject to the Postal Service's Density Rate Authority*

The Commission's approval of the Postal Service's plan will not merely violate Commission precedent and accounting policy. It will have real-world negative impacts on market-dominant mailers that the Commission appears to not have considered in its October 7 letter.

One direct impact will arise because of the way the Postal Service's density rate authority is calculated under the Commission's revised regulations. We expect that the plan will subject market-dominant mailers to more than \$400 million in density-based rate authority to which the Postal Service would not be entitled if it accounted for the cancellation properly, an amount that will remain in the rate base in perpetuity. In other words, the October 7 letter prejudices mailers by imposing hundreds of millions of dollars in density-based rate authority without having solicited any comment from the affected mailing public.

In Docket No. RM2017-3, the Commission adopted 39 C.F.R. § 3030.160 *et seq.* as new regulations to govern the Postal Service's density rate authority. Under these regulations, the Postal Service's density rate authority shall be calculated using several inputs, including

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<sup>11</sup> *Id.* at p. 3.

<sup>12</sup> *See, e.g., Great Lakes Gas Transmission L.P. v. FERC*, 984 F.2d 426, 433 (D.C. Cir. 1993) ("A full and rational explanation is especially important to this court when the condition imposed reflects a shift in FERC's policy"); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 799 (1990) (determining that where the agency "made no effort to explain the apparent inconsistency between" the decision on review and its prior analyses, "its order is invalid on that basis alone"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (finding that an agency changing its course by rescinding a rule must supply a reasoned analysis for the change); *Erie Boulevard Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("An agency decision that departs from agency precedent without explanation is [ ] arbitrary and capricious.").

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“[i]nstitutional costs and total costs from the Cost and Revenue Analysis report, filed with the Postal Service’s section 3652 report.”<sup>13</sup> The formula for calculating the density authority entails applying the Postal Service’s institutional cost as a percentage of its total cost to the change in density from the prior fiscal year.<sup>14</sup> The density rate formula precludes the authority from being less than zero. And for the past two fiscal years, the Commission has included prior-year RHB costs in the institutional costs used in the density authority calculations.<sup>15</sup>

Following the release of the Postal Service’s August preliminary financials, we estimate that the Postal Service will have density authority in the next market dominant rate case of between 1.0 and 1.2 percent *if the Postal Service is permitted to ignore the -\$57 billion payment cancellation*. If, on the other hand, the Postal Service properly accounts for the negative \$57 billion cost reversal, then its institutional costs for FY 2022 will be negative and its density authority will be zero. Thus, the Postal Service’s proposal presents two immediate problems for the upcoming ACR: (1) the plan will distort the data needed for calculation of density rate authority; and (2) the plan – if implemented – would levy at least a one percent surcharge on approximately \$40 billion in market dominant revenues, or more than \$400 million on market dominant mailers.

*The Commission Failed to Address the Postal Service’s Plan to Not Accrue RHB Normal Costs, Which Also Violates Precedent and Would Impact Avoided Cost Calculations*

Quantitatively, the Postal Service’s decision to disregard the PSRA’s removal of \$57 billion in debt from its balance sheet is the more prominent proposal described in the August 12 letter. But it is not the only one: the Postal Service also intends to not accrue RHB normal costs in FY 2022 even though its employees will earn such benefits for their work during the year. The Commission’s October 7 letter does not address this proposal, which should be rejected for similar reasons.

The Postal Service has long accrued retiree health benefit normal costs, which are built into the established costing methodologies used to calculate attributable costs as well as costs avoided by worksharing. The Postal Service knows this full well. While the PSRA repealed a funding obligation – albeit perhaps only temporarily until FY2025 when the statutory “top off” payments may begin – RHB normal costs continue to accrue daily as postal employees perform their jobs.

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<sup>13</sup> See 39 C.F.R. § 3030.161(c).

<sup>14</sup> *Id.* at 3030.162.

<sup>15</sup> In addition, current rates are based in part on two density factors (calculated using FY 2020 and FY 2021 data) which each included institutional costs consisting of the non-payment of prior-year retiree health benefit costs. If the Postal Service’s treatment of the cancellation of the \$57 billion debt is accepted, fairness requires that to the extent that current rates authorized by those two density factors are based upon that \$57 billion, those amounts should be subtracted from the rate base as well.

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Nothing in the PSRA affected the labor contracts or work hours that cause those costs to be accrued. Under established costing methodologies, based on the Postal Service's accrual accounting, these costs should be accrued – and have been for years – regardless of whether the Postal Service makes any payments to the Treasury to fund them.

Thus, the Postal Service's normal cost accrual proposal likewise violates existing policy and should not be countenanced by the Commission (even tacitly). Additionally, the Postal Service's failure to accrue and attribute RHB normal costs will cause it to understate its costs for FY2022 and, thus, understate the costs avoided by worksharing. Consequently, this could erroneously indicate that some workshare discounts are out of compliance with Commission regulations. This error could cause the Commission to order unnecessary reductions in certain workshare discounts.

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We appreciate both the Postal Service's and the Commission's decisions to publish their correspondence on this issue on the Commission's website in advance of the next ACR in order to apprise the public of impending changes. However, changes of this magnitude cannot be announced by the Postal Service and summarily approved by letter from the Secretary – they must be subject to the Commission's rules of practice and appropriate due process standards of review.

We urge the Commission to rescind its October 7 letter. Both the Postal Service and the Commission should comply with the Commission's rules for changing accepted analytical principles in the Postal Service's annual compliance reporting.

Sincerely,

*[signatures on next page]*

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