

SEPARATE VIEWS OF COMMISSIONER ACTON

In more than seven years' service as a Commissioner, this is the first instance that I have felt compelled to present separate views regarding a Commission decision. This speaks not only to the deliberative process of the panel and consensus building that occurs among Commissioners, but also to the significance of this decision and gravity of the Postal Service's current situation.

The Postal Service remains in a state of financial crisis. No one with knowledge of the facts and circumstances can deny that this crisis exists. Liquidity concerns and dire forecasts as to the Postal Service's financial condition arose before the Great Recession. It appears likely that financial uncertainty will continue its reign into the foreseeable future. Granting the Postal Service some or all of the pricing relief it seeks in this docket may help in the short term, but does not alter that reality. The Postal Service, regardless of the outcome of this exigent rate request, will face liquidity challenges in the near term.

The underlying driver in the present situation is that the Postal Service must be enabled to address structural challenges in its business model. Many of these concerns it will be unable to effectively resolve without legislative action. That does not mean, however, that the Postal Service may lawfully move to address unrelated structural concerns by way of a tool ill-suited to the task – the extraordinary or exceptional circumstances rate adjustment. As noted in this record: “[e]xpanding the exigency provision from a limited escape valve into an all-purpose vehicle for recovering losses of all kinds would leave captive mailers without any effective protection at all.”¹

¹ Reply Comments of MPA –The Association of Magazine Media, The American Catalog Mailers Association, Inc., Direct Marketing Association, Inc., Alliance of Nonprofit Mailers, National Newspaper Association, Quad/Graphics, Inc., RR Donnelley, Software & Information Industry Association/American Business Media, and Time Inc., December 6, 2013, at 8.

The Postal Accountability and Enhancement Act² (PAEA) ushered in a host of worthy changes. Central among them was the introduction of the price cap in place of a system that allowed postal rates to be set to recover the cost of service.³ The advent of the price cap and PAEA reforms spurred Postal Service management to improve efficiencies by reducing costs and allowing flexibility to implement best business practices. Simultaneously the price cap provided the Postal Service's customers with more certainty as to the timing and amount of price increases.

While constructing a system whereby the Postal Service would be incentivized to behave more as a business and control its costs, the law also provided a safety valve, an emergency release to account for certain unusual occurrences. The Postal Service may, due to extraordinary or exceptional circumstances, request rates that pierce the inflation-based price cap. 39 U.S.C. 3622(d)(1)(E). The Commission must then determine if the proposed adjustment 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." *Id.*

In the system of ratemaking, the price cap is the rule, and the exigent rate provision the exception. This exception to the price cap is, and must therefore be, narrow. Order No. 547 at 67.

The Postal Service in this docket endeavors to use an exigent rate request, not as a precise and tailored instrument to make it whole for a discrete set of extraordinary or exceptional circumstances, but as a panacea to ameliorate underlying costs related to fundamental ongoing structural problems. I do not quibble that the Great Recession was an extraordinary or exceptional event. Likewise, I agree with all of my colleagues that the Postal Service was injured by the Great Recession. If I was a member of the Governors, and charged with approving management approaches within my control in

² Pub. L. No. 109-435, 120 Stat. 3198 (2006).

³ See Docket No. R2010-4, Order Denying Request for Exigent Rate Adjustments, September 30, 2010, at 10 (Order No. 547).

an effort to move the Postal Service forward, I may well have voted for this exigent proposal, to request piercing of the price cap by over four percent into perpetuity as a prophylactic remedy. But I am not a Governor. As a Commissioner, I am charged with administering those provisions of title 39 within the Commission's purview. My responsibility is to uphold the law as it is written, not as some would like it to be.

One of the duties of a Commissioner is to review the Postal Service's request for an exigent rate adjustment for consistency with 39 U.S.C. 3622(d)(2)(E). With the aid of the Commission's resources and my professional experience, I am tasked with determining whether the Postal Service's requested exigent adjustment is "due to" the extraordinary or exceptional circumstances of the Great Recession. Further, I must determine if the proposed adjustment is reasonable, equitable, and necessary under the best practices of honest, efficient, and economical management to maintain and continue the development of postal services of the kind and quality adapted for the needs of the United States.

The Commission previously instructed the Postal Service to "quantify the net financial impact of the exigent circumstances."⁴ That quantification is an upper-bound of what the Postal Service may request, and must "factor out the financial impact of non-exigent circumstances." *Id.* at 47-48. In this case, the Postal Service's analysis was not sufficient to "factor out the financial impact of non-exigent circumstances." With the body of evidence in the record before the Commission, I believe the amount calculated in this Order to be the most supportable quantification of the amount the Postal Service lost due to the discrete occurrence of the Great Recession using the data and methods available in this docket.

I recognize the Postal Service was adversely impacted by the extraordinary or exceptional circumstances of the Great Recession. I am aware too that it would in some sense be a convenient choice to allow the Postal Service to recover billions in

⁴ Docket No. R2010-4R, Order Resolving Issues on Remand, September 20, 2011, at 46 (Order No. 864).

additional revenues from mailers from now into eternity to offset a portion of the expense of existing structural constraints within the Postal Service's business model. The Postal Service proposes a perpetual recovery arrangement that may be revisited as part of the Commission's mandated 2017 review of the system of ratemaking.⁵

I believe, however, in following the law and limiting what the Postal Service may collect from mailers (who, it is key to note, have suffered also through the Great Recession) to those losses that are justifiably linked by supportable methods to the Great Recession. Further, I believe it is detrimental to the statutory objective of predictability and stability in rates, to tie ultimate resolution of an exigent recovery to a matter not yet before the Commission and unrelated to the discrete occurrence of the Great Recession. The Commission has a record before it, with input from the Postal Service, mailing stakeholders, and a representative of the general public, and it has a duty to resolve the issues presented in this docket within this docket.

There does indeed exist a so-called "new normal" that defines the business environment in the post-Great Recession world. The Postal Service's future, once it has been lawfully compensated for quantifiable losses due to the Great Recession, lies in its ability to adapt to this "new normal" environment as all sustainable businesses must.

The additional liquidity that the Postal Service so desperately needs cannot be endlessly extracted from mailers under the auspices of a narrow exception to the price cap. Rather, the postal model needs refinement that is beyond the scope of the price cap system (much less the narrow safety valve of the exigent provision). The Postal Service itself recognizes this need, and tacitly acknowledges that legislative reform may "obviate the need" for the exigent increase or mean that exigent rates are no longer

⁵ The Postal Service opines that it is hopeful that its proposed exigent rates will result in enough additional contribution to see it through 2017, referencing the Commission's review of the system of ratemaking under 39 U.S.C. 3622(d)(1)(E). See Renewed Exigent Request of the United States Postal Service, September 26, 2013, at 15 (Renewed Exigent Request).

“necessary” at some point in the future.⁶ Many of the likely adjustments to the system are familiar and being debated: re-amortization of the retiree health benefit liability, change to the frequency or mode of delivery, workforce flexibility, independent management of health benefits, and others.

The determined and bipartisan work of our leaders in Congress makes postal reform a realistic goal. The Commission is a unique resource of postal experience and expertise, and stands ready to continue to support Congress, the Postal Service, and the mailing industry in bringing needed reforms.

Commissioner Mark Acton

⁶ See Renewed Exigent Request at 6, 43; see *also* Reply Comments of the United States Postal Service, December 6, 2013, at 84.