Mailers Hub News

October 2024 Summary *From the October 7 and 21 issues*

[October 7] ***USPS Seeks Advisory Opinion on Service Reductions***

Although everyone knows the Postal Service will implement its plans regardless of what the Postal Regulatory Commission advises, the USPS nonetheless is following the required process and seeking an advisory opinion from the PRC on its latest round of service reductions. Filed October 4, the request, styled editorially as *Operational and Service Standards Changes to Meet Statutory Requirements for Reliable, Efficient, High Quality Service and Financial Sustainability Through an Integrated Mail and Package Network*, the 55-page document and accompanying workpapers explained how the USPS is reorganizing its processing network, eliminating afternoon collections at most post offices, and redefining service standard calculations.

Throughout, the USPS spun its proposal, as the filing's title stated, as enabling service and financial goals, even though many might argue that "high quality service" would not result, and that challenges to "financial sustainability" go well beyond whatever savings may result from the proposal. Repeating DeJoy's claims that his predecessors failed to operate an efficient network, the filing explained the proposed revisions:

> "The Postal Service's current network has not been appropriately adjusted to account for volume and mail mix changes, including the substantial decline in Single-Piece First-Class Mail and increase in package volume, leading to significant inefficiencies. These initiatives will comprehensively transform these operations to fix the problems that exist today and create a network that enables the integrated movement of mail and packages in a precise and cost-effective manner far into the future.
>
> "Specifically, we intend to systematically redesign and invest in our outmoded processing facilities to create a network of Regional Processing and Distribution Centers (RPDCs) and Local Processing Centers (LPCs), which deploy standardized and logically sequenced operating plans and schedules for the movement of mail and packages, more sortation equipment, optimized transportation routes, and improved operating tactics to increase throughput, gain productivity, and increase asset utilization across the country. Through this process, we will also eliminate unnecessary annexes and contracted facilities that have been deployed throughout the country in an ad hoc fashion."

DeJoy's obsession with filling trucks was shown in the passage about eliminating afternoon collections:

> "…we intend to implement on a nationwide basis the Regional Transportation Optimization (RTO) initiative, which rationalizes our regional transportation network (i.e., trips between the retail/delivery network and the processing network) by eliminating routes and increasing truck utilization, and which will also improve the efficiency and velocity of the processing network."

Later in the document, the Postal Service argues

> "Our current local transportation network is dictated by our current service standards and business rules, and by legacy thinking based upon a bygone era of significant single-piece letter mail volumes. Overall, this network constrains the transportation for a regional geography and results in inefficient transportation with limited ability to reduce the number of truck trips or optimize truck capacity. This is due to the fact that transportation is predicated on the principle that originating mail must get to the processing network on the day it is collected from customers, no matter how far away from the processing network it is entered."

Clearly, DeJoy has upended the view that the USPS must – first – provide service, replacing it with the notion that providing service is conditioned on its being "efficient" (under his criteria). As he's stated before, reduced service for customers who are at a distance from his processing centers is a "price that has to be paid"; he doesn't want his operations waiting for their mail, as indicated in the filing:

> "… by no longer requiring all mail to wait for the volumes collected from the furthest away Post Offices, we will be able to accelerate the mail that is within the 50-mile radius of a RPDC through processing."

Another part of the Postal Service's proposal is revising how service standards are calculated so that there's no apparent delay for mail impacted by RTO. Simply put, the Postal Service is proposing to "start the clock" differently for mail from an RTO origin compared to other mail.

Another element of its service standard changes would involve the transit time between facilities, specifically adding four hours to the time associated with a service commitment, e.g., a three-day standard would apply to mail with a transit time of 24 hours, not the current 20 hours.

Though this creates the appearance of improved service, it doesn't factor is the originating and destinating times, i.e., the time to reach and be processed at the origin plant, and the time to be processed, dispatched, and delivered at destination. Though this new way of calculating service might suit the Postal Service's purposes, it may not be matched by how customers experience and evaluate USPS service.

For "turnaround" mail, the impact of RTO was clear:

> "… processing facilities that cancel Single-Piece First-Class Mail on automated equipment will have a 2-day standard for turnaround Single-Piece First-Class Mail originating from 5-digit ZIP Codes 50 miles or less from the cancellation location. If the originating volume is from a 5-digit ZIP Code beyond 50 miles of the cancellation location, the turnaround standard for Single-Piece First-Class mail will be 3 days."

Almost as an aside, the USPS noted two other changes.

It "will not count Sundays or holidays as transit days for volume entered on a Saturday or the day before a holiday." The Postal Service asserted that "this approach helps to enable us to improve our operational efficiency while providing customers with reliable service expectations." Also, it will "change the Service Performance Measurement system to enable measurement at the 5-Digit ZIP Code level, rather than the 3-Digit ZIP Code level." The agency claimed that "this more granular service performance measurement will be more understandable to our customers and provide them with greater performance visibility."

The Postal Service devoted seven pages to its argument that the proposal meets statutory requirements "by better balancing adequate service with efficiency and financial sustainability," though its arguments understandably presented only its own perspective. Clearly, whether the balance is what it should be is subjective.

Overall, the filing was another thinly-veiled promotion for the PMG's 10-Year Plan, presenting more rosy promises for improvements as more of The Plan's elements are implemented. As with any promotional material, benefits are defined in the context of the advocate's perspective, and any negative impacts are explained away. Regardless, the essence of the proposal is clear: reduce service and spin it in a way that makes it sound like a good thing.

Though the PMG has told legislators that changes to the processing network will be deferred until after the election, the filing makes it clear that the service standard changes will be implemented early next year:

> "… the Postal Service would not implement the service standard changes within the scope of this Request any sooner than 90 days after the filing of this Request."

As noted earlier, the Postal Service is requesting an advisory opinion solely to conform with a legal requirement. Though it claims it will consider the opinion, it likely will repeat past practice and do exactly what it plans to do, so ratepayers should expect the planned reductions in service and related changes to take effect the first weekend in January 2025.

[October 9] ***USPS Officially Revises Price Increase Schedule***

Though it obviously can alter its plans, the Postal Service nonetheless has provided the Postal Regulatory Commission with a revised official schedule detailing its planned semi-annual price increases over the next three years. In a notice filed September 23 – the Monday after cancelling a price increase next January – the USPS stated that

> "Subject to the approval of the Governors, the Postal Service next expects to implement price changes for all Market Dominant classes in July 2025, with the filing occurring in April 2025. Likewise, subject to the approval of the Governors, the Postal Service expects that in 2026 and 2027, it will change prices for all Market Dominant classes in both January and July, with filings occurring the preceding October and April, respectively.
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> "The Postal Service intends in all cases to be judicious in the use of available pricing authority, but it anticipates that the changes for Market Dominant classes may apply most or all pricing authority available on the date of filing, given our legal obligation to be financially self-sufficient, our progress under the Delivering for America Plan and its fundamental goals of providing excellent service while still achieving financial sustainability, and our current and anticipated financial condition."

The official schedule is required by PRC rules; compliance was provided by the first and second paragraphs. The third paragraph offered nothing beyond the *de rigeur* invocation of Postmaster General Louis DeJoy's Plan and his talking points supporting the continued extraction of revenue from ratepayers.

[October 9] ***PRC Approves Temporary Price Increase***

In an order issued October 3, the Postal Regulatory Commission approved the temporary increase in competitive product prices that the Postal Service had requested in a September 5 filing. The increases noted in that filing are:

Product Name	Average Price Increase (percent)
Domestic Competitive Products	
Priority Mail Express	4.9
Retail	4.9
Commercial (Base and Plus)	4.9
Priority Mail	5.5
Retail	5.3
Commercial (Base and Plus)	5.6
USPS Ground Advantage	6.4
Retail	6.2
Commercial	6.5
Limited Overland Routes	10.3

Consistent with its legal role in competitive product price filings, the PRC found that the revised prices cover their attributable costs, are not benefitting from cross-subsidization by market-dominant products, and "collectively make an appropriate contribution to the recovery of the Postal Service's total institutional costs." (The commission noted that competitive products as a whole are projected to have contribution that covers 32.9% of institutional costs in FY 2025, well above the required 9.6%

minimum contribution for FY 2025.

The USPS request was barely a month before the agency wanted the revised rates to take effect, yet the PRC rendered a decision in time. The revised rates took effect October 8; the prior rates will return at 12am CST on January 19, 2025.

[October 21] ***Quick Update on California SB 1096***

Commercial mail producers are worrying about SB 1096, a California law taking effect on January 1 that seems to impose a notice requirement on advertising mail. We got some insight from our legal advisors as Brann & Isaacson:

> "The good news is that the law is not as broad as advertised in the notice you forwarded. The key point is that a 'covered person' required to provide the specific notice of solicitation is someone who sells 'a consumer financial product or service' to a California resident. The notice [that was posted] overstates the scope of the law to suggest it applies to all forms of solicitation, including for the sale of goods or non-financial services. In the context of advertising mail for *consumer financial products and services*, I agree that the law would apply to a generic 'Resident' solicitation that targets a specific address."

We'll have a full article with more details about SB 1096 in the next (November 4) issue of *Mailers Hub News.*

[October 21] ***Michigan Jumps on the Direct Mail Sales Tax Bandwagon***

Until now, companies that purchased direct mail destined for Michigan from producers located outside of the Wolverine State could rest assured that their purchases would not be subject to Michigan sales tax. However, a recent decision from the Michigan Court of Appeals puts that assurance into question. In *AAA Life Insurance Company v. Department of Treasury*, the Michigan Court of Appeals ruled that a Michigan-based purchaser who exercised sufficient control over the design of direct mail purchased from an out-of-state direct mailer was subject to Michigan use tax on the purchase. No. 365613, 2024 WL 3075127 (Mich. Ct. App. June 20, 2024).

AAA Life Insurance (AAA) contracted with a Missouri company, American Direct Marketing Resources, LLC (ADMR) to provide mailings across the United States, including into Michigan. ADMR produced and distributed all mailings through USPS from outside of Michigan. Under an earlier ruling of the court, *Sharper Image Corp. v. Dep't of Treasury*, 550 N.W.2d 596 (Mich. App. 1996)[1], this was enough to ensure AAA was not subject to tax on the mailings, even on those distributed to Michigan.

This court, however, was not content to let the status quo stay in place. It focused on how involved AAA was in the process of creating these mailings. Employees at AAA's headquarters in Michigan would work with ADMR to brainstorm marketing ideas while AAA's analytics employees (also in Michigan) would determine target audiences for the advertising campaigns. Once AAA and ADMR agreed on the broad direction of the advertising ADMR would create proofs which were sent back to AAA for final approval. AAA then decided whether or not to complete the campaign.

This raised the question whether AAA exercised sufficient control over the mailings to trigger Michigan's use tax on mailings distributed in Michigan, notwithstanding the *Sharper Image* decision. The court noted Michigan levies its use tax on "every person in this state … for the privilege of using, storing, or consuming tangible personal property" in Michigan. MCL 205.93(1) It also noted that Michigan defined taxable "use" as:

> "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." MCL 205.92(b).

The Michigan use tax statute requires (1) an exercise of power over tangible personal property and (2) that control is exercised within Michigan.

The court of appeals decided that AAA's involvement with the production process was an exercise of power over tangible personal property because AAA had the "authority to inform and direct aspects related to distribution of property," even though ADMR had the responsibility for actual distribution. The court ignored the fact that AAA never actually ordered any corrections to ADMR's proofs in the audit period. Instead, the fact that AAA had the contractual ability to order ADMR to change the proofs before mailing them out to the direct mail recipients was enough.

Second, the court ruled that the fact the actual products were created and sent via USPS from outside of Michigan was irrelevant, because AAA exercised power over the direct mailings from within the state. Because AAA's headquarters was located in Michigan, AAA made decisions (or at least could have made decisions) about the direct mailing from Michigan, and therefore "used" the direct mailings in Michigan. As a result, the court upheld the assessment against AAA of use taxes imposed on direct mailings distributed in Michigan.

If your customers have operations in Michigan, you should review the contracts you have with them to evaluate what level of creative control over the production process your customers retain.

From there, consider revising the contract to minimize or otherwise eliminate the control to ensure that mailings distributed into Michigan remain non-taxable under the *Sharper Image* decision. Or, if the customer must retain creative control over direct mailings and your organization itself has sufficient nexus with Michigan, begin collecting and remitting tax on the mailings distributed to the state.

The momentum is now building for state sales tax actions against direct mailers. As we highlighted in an earlier article, Michigan joins North Carolina in its enforcement efforts. The unfortunate reality in state taxes is that once one or two states find success in assessing an industry, other states may jump on the bandwagon and begin issuing use tax assessments against in-state companies completing direct mailings. Keep your eyes peeled for developments in other states.

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[1] In full disclosure, B&I represented Sharper Image in this earlier case.

This article was produced exclusively for Mailers Hub by Jamie Szal and Matthew Pick of Brann & Isaacson.

[October 21] ***PRC Publishes Schedule for Service Standard Change Docket***

Intervention Deadline:	
Filing of Notice of Intervention	October 21, 2024
Discovery Deadlines for the Postal Service's Direct Case:	
Last Filing of Discovery Requests	November 5, 2024
Filing of the Postal Service's Answers to Discovery	November 12, 2024
Deadlines in Preparation for Hearing (assuming no rebuttal case):	
Filing of Notice Confirming Intent to Oral Conduct Cross-Examination	November 25, 2024
Filing of Request to Present Oral Argument	November 25, 2024
Filing of Notice of Designations (Parties)	November 26, 2024
Filing of Notices of Designated Materials (Postal Service)	December 2, 2024
Rebuttal Case Deadlines (if applicable):	
Filing of Notice Confirming Intent to File a Rebuttal Case	November 27, 2024
Filing of Rebuttal Case	December 4, 2024
Surrebuttal Case Deadlines (if applicable):	
Filing of Motion for Leave to File Surrebuttal Case	December 6, 2024
Filing of Response to Motion for Leave to File Surrebuttal Case	December 10, 2024
Filing of Surrebuttal Case (if authorized)	December 13, 2024
Hearing Dates:	
Hearings (with no Rebuttal Case)	December 4 to 6, 2024
Hearings (with Rebuttal Case, but no authorized Surrebuttal Case)	December 11 to 13, 2024
Hearings (with Rebuttal Case and authorized Surrebuttal Case)	December 18 to 20, 2024
Briefing Deadlines:	
Filing of Initial Briefs (with no Rebuttal Case)	December 12, 2024
Filing of Reply Briefs (with no Rebuttal Case)	December 19, 2024
Statement of Position Deadline:	
Filing of Statement of Position (with no Rebuttal Case)	December 12, 2024
Advisory Opinion Deadline:	
Filing of Advisory Opinion	January 31, 2025

In Order No. 7695, issued October 9, the Postal Regulatory Commission published the procedural schedule for Docket N2024-1 (left), the Postal Service's October 4 request for an advisory opinion on further reductions in service standards.

Notices of intervention, i.e., the intent to officially participate in the proceeding, had to be filed by today. Several industry groups have already filed to intervene; Mailers Hub filed its notice of intervention on October 18. (A party filing later can file a concurrent motion for late acceptance.)

Discovery requests must be filed by November 5, with the Postal Service's responses due a week later. Notices related to formal hearings and the hearings themselves would span from late November through late December, with the deadlines for the submission of briefs or statements of position.

The PRC scheduled the release of its advisory opinion for no later than January 31, 2025.

Though there's no expectation that the USPS won't implement the reductions as planned – the PRC can't enforce an *advisory* opinion – the process should at least afford an opportunity to get the agency to provide more useful details (as opposed to the PR spin of its filing). Moreover, given the unpopularity of the USPS proposal and recent political concerns over it, the PRC's opinion and the Postal Service's later actions might inspire legislators in the new Congress next year.