

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17-1276, 20-1505, 20-1510, and 20-1521
(consolidated)

NATIONAL POSTAL POLICY COUNCIL, *et al.*,
Petitioners,
v.
POSTAL REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF ORDERS OF
THE POSTAL REGULATORY COMMISSION

INITIAL BRIEF

William B. Baker
Ayesha N. Khan
Potomac Law Group, PLLC
1300 Pennsylvania Avenue, N.W.-
Suite 700
Washington, DC 20004
(571) 317-1922

*Counsel for National Postal Policy
Council, Major Mailers Association, and
News Media Alliance*

Eric S. Berman
Matthew D. Field
Ian D. Volner
Elizabeth C. Rinehart
Venable LLP
600 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 344-4000

*Counsel for Alliance of Nonprofit
Mailers, Association for Postal
Commerce, MPA-The Association of
Magazine Media, and American
Catalog Mailers Association*

Dated: April 13, 2021

ownership interest in ANM. ANM is a trade association within the meaning of Circuit Rule 26.1(b).

Dated: December 18, 2020

Respectfully submitted,



Eric S. Berman
Matthew D. Field
Ian D. Volner
Elizabeth C. Rinehart
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-4661 (Berman)
(202) 344-8281 (Field)
esberman@venable.com
mfield@venable.com
idvolner@venable.com
lcrinehart@venable.com

Counsel for Petitioners

and has no corporate parent. No publicly traded entity has an ownership interest in PostCom. PostCom is a trade association within the meaning of Circuit Rule 26.1(b).

Dated: December 18, 2020

Respectfully submitted,



Eric S. Berman
Matthew D. Field
Ian D. Volner
Elizabeth C. Rinehart
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-4661 (Berman)
(202) 344-8281 (Field)
esberman@venable.com
mfield@venable.com
idvolner@venable.com
lcrinehart@venable.com

Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alliance of Nonprofit Mailers,
Association for Postal Commerce,
MPA – The Association of Magazine
Media,
American Catalog Mailers Association,
Petitioners,
v.
Postal Regulatory Commission,
Respondent.

Case No. 20-1510

RULE 26.1 DISCLOSURE STATEMENT OF
MPA – THE ASSOCIATION OF MAGAZINE MEDIA

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1,
MPA – the Association of Magazine Media (“MPA”) provides its disclosure
statement.

MPA is a membership organization of magazine publishers. MPA seeks to
promote the interests of its members, inter alia, by participating in administrative
and civil litigation concerning the rates of postage paid by magazine publishers.
MPA is organized as a nonprofit corporation under the laws of the state of New
York and has its principal place of business in the District of Columbia. MPA is
not publicly traded and has no corporate parent. No publicly traded entity has an

ownership interest in MPA. MPA is a trade association within the meaning of Circuit Rule 26.1(b).

Dated: December 18, 2020

Respectfully submitted,



Eric S. Berman
Matthew D. Field
Ian D. Volner
Elizabeth C. Rinehart
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-4661 (Berman)
(202) 344-8281 (Field)
esberman@venable.com
mfield@venable.com
idvolner@venable.com
lcrinehart@venable.com

Counsel for Petitioners

is not publicly traded and has no corporate parent. No publicly traded entity has an ownership interest in ACMA. ACMA is a trade association within the meaning of Circuit Rule 26.1(b).

Dated: December 18, 2020

Respectfully submitted,



Eric S. Berman
Matthew D. Field
Ian D. Volner
Elizabeth C. Rinehart
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-4661 (Berman)
(202) 344-8281 (Field)
esberman@venable.com
mfield@venable.com
idvolner@venable.com
lcrinehart@venable.com

Counsel for Petitioners

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NATIONAL POSTAL POLICY COUNCIL
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent.

Case No. 17-1276

NATIONAL POSTAL POLICY COUNCIL AND
MAJOR MAILERS ASSOCIATION,
Petitioners,

v.

POSTAL REGULATORY COMMISSION,
Respondent.

Case No. 20-1505

ALLIANCE OF NONPROFIT MAILERS, et al.,
Petitioners,

v.

POSTAL REGULATORY COMMISSION,
Respondent.

Case No. 20-1510

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent.

Case No. 20-1521

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the News Media Alliance submits the following corporate disclosure statement:

The News Media Alliance is a corporation. It does not have a parent company and no publicly held company owns more than 10% of News Media Alliance stock.

The News Media Alliance represents nearly 2,000 diverse news organizations in the United States and Canada—from the largest news groups and international outlets to local daily and weekly newspapers across the United States. Its members use the U.S. Postal Service for the delivery of newspapers and for the delivery of pre-printed advertising inserts.

Respectfully submitted,

/s/ William B. Baker (D.C. Bar No. 387715)
William B. Baker (Bar No.
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Avenue, N.W.
Suite 700
Washington, DC 20004
(571) 317-1922
wbaker@potomacclaw.com

Counsel for News Media Alliance

January 12, 2021

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NATIONAL POSTAL POLICY COUNCIL AND
MAJOR MAILERS ASSOCIATION,

Petitioners,

v.

POSTAL REGULATORY COMMISSION,

Respondent.

Case No. ___ - ___

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the National Postal Policy Council states:

The National Postal Policy Council is a corporation. It has no parent company and no publicly held company owns more than 10% of National Postal Policy Council stock.

Respectfully submitted,

/s/ William B. Baker (D.C. Bar No. 387715)

William B. Baker

POTOMAC LAW GROUP, PLLC

1300 Pennsylvania Avenue, N.W., Ste. 700

Washington, DC 20004

TEL: 571.317.1922

E-MAIL: wbaker@potomacclaw.com

Attorney for National Postal Policy Council

Dec. 18, 2020

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NATIONAL POSTAL POLICY COUNCIL AND
MAJOR MAILERS ASSOCIATION,

Petitioner,

v.

POSTAL REGULATORY COMMISSION,

Respondent.

Case No. ___ - ___

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Major Mailers Association states:

The Major Mailers Association is a corporation. It has no parent company and no publicly held company owns more than 10% of Major Mailers Association stock.

Respectfully submitted,

/s/ William B. Baker (D.C. Bar No. 387715)

William B. Baker

Potomac Law Group, PLLC

1300 Pennsylvania Avenue, N.W., Suite 700

Washington, DC 20004

TEL: 571.317.1922

EMAIL: wbaker@potomacclaw.com

Attorney for Major Mailers Association

December 18, 2020

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GLOSSARY

Commission	Postal Regulatory Commission
Mailers	Petitioners for this brief (consolidated cases 17-1276, 20-1505, 20-1510): Alliance of Nonprofit Mailers; Association for Postal Commerce; MPA - The Association of Magazine Media; American Catalog Mailers Association; Major Mailers Association; and National Postal Policy Council; and intervenor News Media Alliance.
Order 26	<i>Order Proposing Regulations to Establish a System of Ratemaking</i> , Docket No. RM2007-1, Order No. 26 (released Aug. 15, 2007).
Order 547	<i>Order Denying Request for Exigent Rate Adjustments</i> , Docket No. R2010-4, Order No. 547 (released Sept. 30, 2010).
Order 864	<i>Order Resolving Issues on Remand</i> , Docket No. R2010-4R, Order No. 864 (released Sept. 20, 2011).
Order 3673	<i>Advance Notice of Proposed Rulemaking on the Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products</i> , Docket No. RM2017-3, Order No. 3673 (released Dec. 20, 2016).
Order 4257	<i>Order on the Findings and Determination of the 39 U.S.C. §3622 Review</i> , Docket No. RM2017-3, Order No. 4257 (released Dec. 1, 2017).
Order 4258	<i>Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products</i> , Docket No. RM2017-3, Order No. 4258 (released Dec. 1, 2017).
Order 5337	<i>Revised Notice of Proposed Rulemaking</i> , Docket No. RM2017-3, Order No. 5337 (released Dec. 5, 2019).
Order 5763	<i>Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products</i> , Docket No. RM2017-3, Order No. 5763 (released Nov. 30, 2020).
Price Cap	“[A]n 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.” 39 U.S.C. §3622(d)(1).
The Act	The Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006).
USPS	United States Postal Service

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POSTAL REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to the Court’s order dated January 24, 2020 and Circuit Rules 15 and 28(a)(1) and Rule 28(a) of the Federal Rules of Appellate Procedure, Alliance of Nonprofit Mailers, Association for Postal Commerce, MPA - The Association of Magazine Media, American Catalog Mailers Association, National Postal Policy Council, Major Mailers Association, and News Media Alliance (together “Mailers”) hereby file their certificate as to parties, rulings and related cases in the captioned proceedings for review of an order issued by the Postal Regulatory Commission (the “Commission”).

1. Parties and Amici

1.1 The following are parties, intervenors, and *amici* before the Court in this proceeding:

Petitioners for this brief (consolidated cases 17-1276, 20-1505, 20-1510): Alliance of Nonprofit Mailers, Association for Postal Commerce, MPA - The Association of Magazine Media, American Catalog Mailers Association, Major Mailers Association, and National Postal Policy Council.

Respondent: Postal Regulatory Commission.

Intervenors: News Media Alliance has intervened in support of Petitioners in consolidated cases 17-1276, 20-1505, 20-1510 and joins in this brief. The United States Postal Service has intervened on behalf of Respondent in consolidated cases 17-1276, 20-1505, 20-1510 and will file a separate brief.¹

1.2 The following entities are parent companies and/or hold, directly or indirectly, a 10 percent or greater ownership interest in each of the Petitioners:

None.

2. Rulings Under Review

Petitioners seek review of the following order of the Commission:

¹ In consolidated case number 20-1521, the United States Postal Service has petitioned for review and the Postal Regulatory Commission is the Respondent. Alliance of Nonprofit Mailers, American Catalog Mailers Association, Association for Postal Commerce, MPA - The Association of Magazine Media, Major Mailers Association, and National Postal Policy Council have all intervened in case number 20-1521 on behalf of Respondent the Postal Regulatory Commission and will file a separate brief pursuant to the per curiam order issued by this Court on March 8, 2021.

Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products, Docket No. RM2017-3, Order No. 5763 (released Nov. 30, 2020) (“Order 5763”).

Order on the Findings and Determination of the 39 U.S.C. §3622 Review, Docket No. RM2017-3, Order No. 4257 (released December 1, 2017) (“Order 4257”).

3. Related Cases

To the best of Petitioners’ knowledge and belief, there are no other related proceedings pending before the Commission. There are no other related proceedings pending before this Court, or any other Federal or state court.

I. STATEMENT OF JURISDICTION

Petitioners challenge the Commission's Order 5763 (J.A. ____), a final order revising the system of postal ratemaking issued pursuant to 39 U.S.C. §3622(d)(3) and Order 4257, a predicate order of the Commission's final order.

This Court has jurisdiction to review the orders at issue under 39 U.S.C. §3663. Order 5763 was issued on November 30, 2020. Petitioners petitioned for review of the final order on December 18, 2020, within the 30-day period prescribed by 39 U.S.C. §3663.²

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Commission's interpretation of 39 U.S.C. §3622(d)(3) as giving it sweeping authority to override the requirements of §3622(d)(1), as well as other provisions within §3622, is consistent with the statute and Constitutional limitations.

2. Whether the Commission's rules authorizing USPS to increase rates by more than the rate of inflation are arbitrary and capricious and fail to promote the objectives of 39 U.S.C. §3622(b).

² Order 4257 was issued on December 1, 2017. Petitioner National Postal Policy Council petitioned for review of Order 4257 on December 29, 2017.

III. STATEMENT OF THE CASE

This appeal concerns whether the Commission was empowered to dismantle the heart of the sweeping postal reform enacted by Congress fifteen years ago in the Postal Accountability and Enhancement Act (the “Act”), Pub. L. No. 109-435, 120 Stat. 3198 (2006), and, if so, whether the Commission acted reasonably in promulgating a system which violates the statutory requirements Congress imposed on the regulatory system.

A. 2006 Postal Reform

Beginning with the first postal Act in 1792, Congress has set the standard governing rates for domestic and international mail. *See* An Act to Establish the Post-Office and Post Roads within the United States, Act of Feb. 20, 1792, ch. 7, §§9 & 10 (reprinted at <http://njpostalhistory.org/media/pdf/postact1792.pdf>). Congress continued to play that role in enacting the Postal Reorganization Act of 1970, in which Congress pegged postage rates at cost-of-service levels and created the Commission’s predecessor to administer that regime. *See Order on the Findings and Determination of the 39 U.S.C. §3622 Review*, Docket No. RM2017-3, Order No. 4257 at 23-24 (released Dec. 1, 2017) (“Order 4257”) (J.A. ____); *Carlson v. Postal Regulatory Comm’n*, 938 F.3d 337, 340 n.2 (D.C. Cir. 2019). Under this system, postal “[r]ates were set so that total estimated revenues would equal as nearly as practicable total estimated costs.” Order 5763 at 4 (J.A. ____)

By 2004, Congress recognized the cost-of-service system was not working, and that USPS was facing numerous challenges, including declining mail volumes, increasing delivery points, and electronic diversion from physical mail. *See, e.g.*, S. Rep. No. 108-318, at 2 (2004) (“Mail volume was falling”); H.R. Rep. No. 108-672, at 2 (2004) (same); S. Rep. No. 108-318, at 3 (2004) (recognizing the emerging threat of “electronic diversion of mail and its impact on the Postal Service”); H.R. Rep. No. 108-672, at 3 (2004) (same); 150 Cong. Rec. S6001 (daily ed. May 20, 2004) (statement of Sen. Carper) (same, and noting that electronic diversion was occurring while USPS was experiencing declines in mail density).

In Congress’s view, the challenges had been driven in large part by the cost-of-service structure, which gave “the Postal Service little incentive to cut costs, even though the cost of a growing delivery network coupled with falling mail volume and massive debt demands greater efficiency.” S. Rep. No. 108-318, at 6 (2004). Congress noted that USPS’s unlimited ability to increase rates commensurate with costs was contributing to the decline in mail volumes. Congress lamented that USPS increased rates three times in less than two years, beyond “the rate of inflation,” and noted that “[w]hen mail-dependant [*sic*] businesses experience these kinds of price increases, they often begin mailing less and jobs can be lost.” S. Rep. No. 108-318, at 2 (2004). Thus, Congress feared a

“death spiral in which escalating rates lead to lower volume, which in turn leads to even higher rates, which in turn causes the Postal Service to lose more business.”
See 109 Cong. Rec. S11674 (daily ed. Dec. 8, 2006) (statement of Sen. Collins).

Congress’s answer to these challenges was a policy mandate to incentivize USPS cost-cutting and efficient operations, rather than allow USPS to try to recover its losses by increasing prices. As Congress put it, the “long term financial viability of the Postal Service is addressed by requiring that the Postal Regulatory Commission maximize incentives for the Postal Service to reduce costs and increase efficiency,” and by imposing “downward pressure on costs through restrictions on price changes.” S. Rep. No. 108-318, at 8-9 (2004).

B. The Statute

The relevant provisions of the Act are codified at 39 U.S.C. §3622(a)-(d). Subsection (a) required the Commission to establish by regulation a ratemaking system for market-dominant mail.

Subsection (b) identifies 9 “objectives” that the system “shall be designed to achieve,” each working “in conjunction with the others.” They are, in relevant part: (1) “maximize incentives to reduce costs and increase efficiency”; (2) “predictability and stability in rates”; (3) “high quality service standards”; (4) “pricing flexibility”; (5) “adequate revenues” and “financial stability”; (6) “increase the transparency of the ratemaking process,” and (8) “just and

reasonable” rates. Subsection (c) enumerates 14 “factors” that the Commission “shall take into account” in creating or revising the system.

Subsection (d) contains the system’s “requirements,” the price cap first among them: the system “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.” 39 U.S.C. §3622(d)(1).

As the Commission has recognized, Congress established a hierarchy in the Act, with the requirements superseding the objectives and factors:

Section 3622 creates a hierarchy based on “requirements,” sections 3622(d) and (e), “objectives,” section 3622(b), and “factors,” section 3622(c). With the exception of an exigent rate request and use of banked pricing authority, the [Act]’s price cap mechanism in section 3622(d)(1)(A) takes precedence over the statutory pricing objectives and factors in sections 3622(b) and (c), even if some of these can be considered quantitative. Therefore, to the extent an objective or factor with a quantitative component can be seen as competing with the price cap, the price cap has primacy . . . [T]he objectives and factors, including those that can be regarded as quantitative operate within the context of the price cap; they are not on an equal footing with it.

U.S. Postal Regulatory Commission, *Annual Compliance Determination Report: Fiscal Year 2010* at 18-19 (Mar. 29, 2011) (“FY 2010 ACD”) (footnotes omitted).

Subsection (d)(3) requires Commission review of the regulatory system 10 years after the Act’s passage for compliance with the statutory objectives and factors:

If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

39 U.S.C §3622(d)(3).

C. The Price Cap's Central Role in the Statute

The Price Cap was the linchpin of Congress's policy goals of protecting the interests of USPS and its customers. As Senator Carper explained, the new system:

would allow retained earnings, provide the Postal Service significantly more flexibility in setting prices and streamline today's burdensome ratemaking process. To provide stability, predictability and fairness for the Postal Service's customers, rates would remain within an inflation-based cap to be developed by the Commission.

150 Cong. Rec. S6001 (daily ed. May 20, 2004).

The Commission has always understood the centrality of the Price Cap to the statutory scheme, noting that §3622(d) generally, and the Price Cap in particular, are “mandatory features that the Commission must include in the modern regulatory system.” *Order Proposing Regulations to Establish a System of Ratemaking*, Docket No. RM2007-1, Order No. 26 at 7 (released Aug. 15, 2007) (“Order 26”) (J.A. ____). It has heralded the Price Cap as “the single most important safeguard for mailers” in the 2006 law. *Order Denying Request for Exigent Rate Adjustments*, Docket No. R2010-4, Order No. 547 at 13 & 49-50

(released Sept. 30, 2010) (“Order 547”) (J.A.____). The Commission recognized the cap as the “centerpiece” of postal reform because it “ensures rate stability and predictability for the nation’s mail users, and provides incentives for USPS to reduce costs and operate efficiently.” *Id.* at 1. It further explained that the price cap model “benefitted ratepayers and other mail users” but also gave “the Postal Service . . . significant advantages in the form of pricing and management flexibility.” *Id.* at 12. It has recognized that “it would undermine the basic regulatory approach of the [Act] if the Postal Service could pierce the price cap routinely,” *see* Order 26 at 49-50, and “[t]he price cap plays the central role in implementing the purposes and policies of the [Act].” *Order Resolving Issues on Remand*, Docket No. R2010-4R, Order No. 864 at 32-33 (released Sept. 20, 2011) (“Order 864”).

This Court has recognized the dual benefits of the Price Cap:

[B]ecause market-dominant prices can be raised to track inflation regardless of the Postal Service’s actual costs, the Postal Service can keep savings it creates through cost cutting. On the other hand, if the Postal Service’s costs rise faster than the rate of inflation then, barring extraordinary circumstances justifying a rate increase, the Postal Service may not be able to cover its costs. Thus, the inflation-based price cap protects mailers from the “unreasonable use of the Postal Service’s statutorily-granted [and de facto] monopoly” power while creating new pricing flexibility, incentives for the Postal Service to reduce costs, and the opportunity for the Postal Service to earn a profit.

U.S.P.S. v. Postal Regulatory Comm'n, 785 F.3d 740, 745 (D.C. Cir. 2015) (citations omitted).

D. The Commission's 10-Year Review

1. Examination of the Existing System

The Commission began its 10-year review in December 2016 by inviting public comment on both how to define the 9 objectives and on how to measure whether they were achieved. *Advance Notice of Proposed Rulemaking on the Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 3673 (released Dec. 20, 2016) (“Order 3673”). The Commission issued its findings in December 2017 after a single round of comment, both settling on and applying these definitions and metrics. Order 4257 (J.A. ____). Relevant here, the Commission found that the ratemaking system successfully created stable and predictable rate adjustments, that it had reduced administrative burden and increased transparency, that it had given USPS pricing flexibility, that it had maintained just prices, and that it had enabled USPS to achieve short-term financial stability. Order 5763 at 7-8 (J.A. ____). However, the Commission also found that the system had not enabled USPS to attain medium- and long-term financial stability and was not successful in maintaining high quality service standards. *See generally* Order 4257 at 3-5 (J.A. ____). Notably, the Commission found that under the system “the incentives

to reduce costs and increase operational efficiency had not been maximized.”

Order 5763 at 9 (J.A. ____). The Commission concluded that the system overall failed to achieve the Act’s objectives. *Id.* at 7 (J.A. ____).

Regarding financial stability, the record shows USPS was experiencing improving revenue and earnings, increasing volume in highly profitable packages, and achieving positive operating income; USPS also held valuable real estate and \$8 billion in cash as of the end of Fiscal Year 2017. *See ANM et al. Comments* (Mar. 20, 2017) at 3-4 (J.A. ____). Indeed, despite steady declines in volume, USPS’s revenues had generally held steady every year. USPS FY2018 Form 10-K at 22, available at <https://about.usps.com/what/financials/10k-reports/fy2018.pdf>.

Rather than revenue declines, the Commission’s conclusion that USPS’s financial health was imperiled was instead based on USPS’s on-paper net losses and the \$59 billion deficit that it had accrued since the Act’s enactment. Order 5763 at 8 (J.A. ____); Order 4257 at 165-171, 247-49 (J.A. ____).

The deficit was due almost entirely to a Congressionally imposed obligation for USPS to aggressively prefund its retirees’ health benefit fund, which accounted for 93% of USPS’s accumulated deficit. Order 4257 at 171 (J.A. ____). Even so, USPS has not suffered any consequences for defaulting on its payments. *See ANM et al. Comments* (Feb. 3, 2020) at 24 (J.A. ____). Indeed, its pension and retiree health benefit funds had hundreds of billions of dollars in assets and were

better funded than most other government and private sector retirement funds. *See ANM et al. Comments* (Mar. 20, 2017) at 4-5 (J.A.____).

Against this backdrop, the Commission sought to grant USPS significant above-inflation pricing authority without imposing any cost restraint. In December 2017, the Commission proposed to give USPS above-inflation pricing authority of 2%, plus additional authority for noncompensatory mail products. *Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 4258 (released Dec. 1, 2017) (“Order 4238”) (J.A.____). In December 2019, the Commission modified its proposal to replace this across-the-board authority with rate authority targeted to alleged cost drivers. *Revised Notice of Proposed Rulemaking*, Docket No. RM2017-3, Order No. 5337 (released Dec. 5, 2019) (“Order 5337”) (J.A.____). The Commission identified declines in mail density—meaning, the number of mail pieces divided by the number of delivery points—as a driver of USPS’s net losses. *Id.* at 62 (J.A.____). The Commission proposed granting USPS above-inflation pricing authority based on this declining mail density and additional above-inflation authority to compensate USPS for its retirement health benefit and pension prefunding obligations. It retained proposed additional authority for non-compensatory classes. *See id.* at 174 (J.A.____).

In the Commission's final rules, the Commission adopted a density adjustment, a retirement adjustment, and a noncompensatory adjustment.³ The condition of USPS has only improved since then, despite not yet having used its additional rate authority. USPS earned positive net income of \$318 million in the quarter ending December 31, 2020, and reported holding \$15.171 billion in cash. USPS Form 10-Q, available at <https://about.usps.com/what/financials/financial-conditions-results-reports/fy2021-q1.pdf>.

The density and retirement factors are to be calculated by USPS each year and reviewed by the Commission. 39 C.F.R. §§3030.160 and 3030.181. In year one, the density adjustment alone will allow USPS to increase rates by 4.5%—more than double the Commission's assumption in the record—plus 1.062% for the retirement adjustment and 2% for noncompensatory products, a total of 7.562% above inflation. *See Determination of Available Market Dominant Rate Authority*, Docket. No. ACR2020, Order No. 5861 at 6 (released Apr. 6, 2021). Rate increases of this size would far exceed historical experience. That first-year density authority alone is nearly twice the maximum density authority that would

³ In both its 2017 and 2019 orders, the Commission proposed to give USPS even more above-inflation rate authority, conditioned on USPS meeting efficiency and service standard performance measures. *See* Order 4258 at 120 (J.A. ____); Order 5337 at 149-150 (J.A. ____). In its final rules, the Commission withdrew its performance-based proposal, which is now the subject of a separate rulemaking proceeding.

have been authorized in any year from 2013 through 2019, and nearly four times the average during that period. *See* Order 5337 at 80 (J.A.____).

USPS has indicated that it will file a notice of market-dominant rate changes using its expanded authority “on or about May 28, 2021.” *USPS Application for Waiver Under 39 CFR 3030.286*, Docket No. RM2021-5 (Mar. 26, 2021).

IV. SUMMARY OF ARGUMENT

Congress spoke clearly and unequivocally in the Act: the Commission was to craft a regulatory system that would keep USPS’s costs down and its prices reasonable, to both ensure USPS’s long-term viability and protect its monopoly customers. A price cap was a central “requirement” of the Commission’s rate-setting system. The Commission was to review that regulatory system 10 years hence to ascertain whether the system required modification. Nowhere in the Act, however, did Congress permit the Commission to dispense with the Price Cap or other statutory requirements.

In usurping the power to jettison the statutory requirements, the Commission essentially rewrote the statute. It claimed that the statutory requirements apply only to the “initial” ratemaking system and that the Act “expressly” grants the Commission the power to eliminate the Price Cap. Neither claim is true. Indeed, not only is that result inconsistent with the text of the statute, but it is belied by the longstanding role that Congress has played in this area. Furthermore, interpreting

the statute as the Commission did would place the statute in tension with separation of powers principles, because, stripped of everything except broad objectives, the statute lacks bottom-line limitations on the Commission's discretion.

Even assuming that the Commission's interpretation of the statute were both correct and permissible, the rules should still be vacated as arbitrary and capricious. First, the Commission's rules move the ratemaking system farther away from multiple objectives, violating Congress's mandate. Allowing significant above-inflation price increases weakens, rather than "maximize[s]," "incentives to reduce costs and increase efficiency" (Objective 1). Allowing price increases to fluctuate annually, above and beyond the Price Cap, eliminates the predictability and stability on which customers rely (Objective 2). The contemplated increases—clocking in at 7.562% above inflation—threaten to render rates unjust and unreasonable (Objective 8). And these massive authorized price increases will harm USPS's long-term financial stability (Objective 5) by causing volume declines—the "death spiral" that Congress feared. The Commission acted arbitrarily and capriciously by adopting a system that cannot reasonably be said to serve those statutory objectives.

Second, the Commission's rules will exacerbate the very problem they were ostensibly designed to fix. The Commission identified declines in mail density as

a key impediment to USPS achieving net income. Order 5763 at 76 (J.A. ____); Order 5337 at 62-63 (J.A. ____). But its authorization of price increases 7.5% above inflation in year one alone will accelerate further declines in mail density. That the “solution” worsens the perceived problem is arbitrary and capricious.

Finally, the Commission ignored evidence regarding USPS’s finances in crafting its rules, including increases in year-over-year revenues, that USPS *has* achieved net income, and that the pandemic had measurably improved the financial health of USPS while magnifying the density rule’s impact beyond the Commission’s expectations.

The Commission has acted beyond its statutory authority. Even so, the Commission’s final rules fail to understand the current market for postal services and its response to rate increases. Because the final rules contravene statutory requirements and do not result in a system that achieves the statutory objectives, the rules are arbitrary and capricious, and must be vacated.

V. STANDING

The Mailers have standing under 39 U.S.C. §3663 because they are “adversely affected or aggrieved” by Orders 4257 and 5763. The order allows USPS to raise rates on market-dominant mail products faster than the rate of inflation and thereby collect billions of dollars more in postage from customers, including Mailers, than would be permitted under the preexisting Price Cap.

The trade associations have representative standing on behalf of their members. *Am. Library Ass'n v. F.C.C.*, 401 F.3d 489 (D.C. Cir. 2005).

VI. ARGUMENT

A. Standard of Review

Under the Administrative Procedure Act (“APA”), a court is required to set aside an order that is “‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or that is ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.’” *Carlson*, 938 F.3d at 343 (quoting 5 U.S.C. §706(2)(A), (C)). A reviewing court must “conduct a ‘searching and careful’ inquiry into the record in order to assure itself that the agency has examined the relevant data and articulated a reasoned explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Farmers Union Cent. Exch., Inc. v. F.E.R.C.*, 734 F.2d 1486, 1499 (D.C. Cir. 1984) (citations and footnote omitted); *see also Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). While an agency may “depart from a prior policy or line of precedent . . . it must acknowledge that it is doing so and provide a reasoned explanation.” *La. Pub. Serv. Comm’n v. F.E.R.C.*, 772 F.3d 1297, 1303 (D.C. Cir. 2014) (citations omitted). Finally, an agency acts arbitrarily when it ignores substantial challenges to its fundamental premises,

dismisses its precedent without discussion, and adopts rules inconsistent with its reasoning. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015).

B. The Commission's Rules Are *ultra vires* and Constitutionally Infirm

The Act does not give the Commission authority to allow USPS to jettison the Price Cap. And even if the statute otherwise lent itself to that interpretation, it should be avoided because it would place the Act in tension with separation-of-powers principles.

1. The Unambiguous Text of the Act Mandates a Price Cap

Discerning a statute's meaning starts with its text. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2017). "Unless otherwise defined, statutory terms are generally interpreted in accordance with the ordinary meaning" (*BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)), and when the text is unambiguous, it will carry the day. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 n.9 (2018); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (When the language of the statute is clear, "that is the end of the matter.").

The Act is straightforward. In a section titled "Requirements," it provides that the "system for regulating rates and classes for market-dominant products *shall* include an annual limitation on the percentage changes in rates . . . that will be equal to the change in the Consumer Price Index for All Urban Consumers." 39

U.S.C. §3622(d)(1)(A) (emphasis added). It reiterates, in §3622(d)(1)(D), that the system for regulating rates “shall . . . establish procedures whereby the Postal Service may adjust rates not in excess of the annual limitations under subparagraph (a).” The word “requirement” speaks for itself. Likewise, the word “shall” is ‘the language of command.’” *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (citations omitted). Thus, Congress unambiguously directed the Commission to ensure that postal rate increases do not exceed the rate of inflation.

The final rules nevertheless permit USPS to increase rates by more than the rate of inflation. According to the Commission, the “requirements” apply only to what it called the “initial” system that it established under 39 U.S.C. §3622(a), not to the regulatory system it has adopted years later under 39 U.S.C. §3622(d)(3) in the Order under review. Order No. 5763 at 47-51 (J.A. ____ - ____). But the word “initial” does not appear anywhere in §3622. Section 3622(d)(1) instead speaks expansively, governing “[t]he system for regulating rates and classes for market-dominant products.” No provision distinguishes between an “initial” and subsequent system.

The Commission, however, claimed that §3622(d)(3) grants it the “express” authority to ignore the price cap requirement of §3622(d)(1). Order 5763 at 40, 42 (J.A. ____, ____). But an “express” provision, by definition, is one written into

the statute, and the text of §3622(d)(3) includes no such statement; indeed, §3622(d)(3) does not reference §3622(d)(1)(A) or the Price Cap at all.

By contrast, Congress did “expressly” authorize the Commission to abrogate the Price Cap elsewhere in the statute. *See* 39 U.S.C. §3622(d)(1)(E) (permitting above-inflation rate increases in extraordinary or exceptional circumstances “notwithstanding any limitation set under subparagraphs (A) and (C)”); 39 U.S.C. §3622(d)(2)(C)(iii)(IV) (authorizing banked rate authority, which “may not exceed the annual limitation under paragraph (1) by more than 2 percentage points”). Congress plainly knew how to authorize an override of the Price Cap. It could have written §3622(d)(3) to authorize the Commission to modify or adopt an alternative system “*notwithstanding any limitation set under subparagraph (d)(1)(A).*” Or it could have stated in §3622(d)(1)(A) that the Price Cap applies to the “initial system” or the “system preceding the 10-year review.” But it did not. Simply put, if Congress intended for the Price Cap to sunset 10 years hence, or to give the Commission discretion to override it in conjunction with its 10-year review, it would have said so. *See* 2A Norman & Shambie Singer, *Sutherland Statutes and Statutory Construction* §46:1 (7th ed. 2014); *see, e.g., Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (“If Congress had intended to limit fee awards to timely petitions, it could easily have done so.”).

The Commission reasoned that if “all of the provisions within section 3622 relate to the same ‘system’ of ratemaking,” then “all aspects of the ‘system’ are subject to review and, if necessary to achieve the statutory objectives, potential modification or replacement.” Order 5763 at 43 (J.A.____). In reaching that conclusion, the Commission emphasized differences between the language of §3622(a) and the language in §3622(d)(3), focusing on the Commission’s authority under the latter to “make such modification *or adopt such alternative system* for regulating rates and classes for market-dominant products as necessary to achieve the objectives.” Order 5763 at 51 (J.A.____) (emphasis added). In the Commission’s view, modification connotes moderate change to a system, while the second option contemplates its wholesale replacement. *Id.*

But this interpretation ignores an important over-arching statutory premise: In *all* instances—the initial establishment of the system under §3622(a), modifications to the system under §3622(d)(3), and the adoption of an alternative system under §3622(d)(3)—only the “system” . . . *established under*” the statute is subject to change. The statute itself does not establish a system; instead, §3622(a) directs *the Commission* to “by regulation establish . . . a modern system for regulating rates and classes for market-dominant products.” Throughout the statute, the word “established” refers to the Commission’s rulemaking. *See, e.g.*, §3622(a) (the Commission “shall . . . by regulation establish . . .”); §3622(d)(1)(B)

(directing Commission to “establish” a schedule of predictable rate changes).

Thus, the authority conferred by §3622(d)(3) empowers the Commission to revise the *regulatory* system that *it* established, but not to rewrite the statute itself. Yet it is the statutory requirements the Commission claims the authority to change.

Congress’s choice of the word “under” (as opposed to “by”) in the phrase “*established under* this section” in §3622(d)(3) further supports that conclusion. (emphasis added) The term “under” means “subject to” or “governed by” (*Ardestani v. I.N.S.*, 502 U.S. 129, 135 (1991)), so the system to be “established *under* this section” must refer to the regulatory system created by the Commission and *governed by* that section, not the statutory framework enacted by Congress that the regulations implement. *Cf. King v. Burwell*, 576 U.S. 473, 496 (2015) (referring to State establishing health Exchanges “under” statutory authority). If Congress intended to empower the Commission with expansive authority to override the mandatory provisions in §3622(d) and §3622(e)—instead of merely revising its own regulations—Congress would have written §3622(d)(3) to authorize the Commission to review the system “created *by* this section.” Again, that is not what Congress did.

The Commission sought to avoid this problem by asserting that the requirements of §§3622(d)(1) and (d)(2) may be discarded simply because §3622(d)(3) follows them sequentially. Order 5763 at 42-43 (J.A. ____). But the

Commission cited no authority for the proposition that a third-in-order provision somehow supersedes the prior two.⁴ Likewise, the Commission's interpretation lacks any support in the plain language or structure of the statute.

2. The Legislative History Does Not Support the Commission's Interpretation of the Statute.

In interpreting the statute to allow it to override the Price Cap, the Commission also relied on the statute's legislative history. Order No. 5763 at 61-63 (J.A. ____). That history, however, is a slender reed because, as even the Commission acknowledges, “[p]aragraph (d)(3) first appeared in th[e] final version [of the bill], and it was not addressed in any hearings or committee reports.” *Id.* at 62 (J.A. ____). So the Commission relied on a single floor statement by Senator Collins in which she opined that the Commission's §3622(d)(3) review authority would encompass the power to override the price cap. *See id.* at 62-62 (J.A. ____). But “‘Floor statements’ from members of Congress, even from a bill’s sponsors, ‘cannot amend the clear and unambiguous language of a statute.’” *Nat’l Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 12 (D.C. Cir. 2009) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 456-57 (2002)). Indeed, “when the statutory text is clear, legislative history should not be used to muddy its meaning.” *Carlson*, 938 F.3d at 350.

⁴ Nor would such a proposition authorize the Commission to override §3622(e) (*cf.* Order No. 4257 at 10 (J.A. ____)), which follows §3622(d)(3).

3. The Commission's Interpretation is Unreasonable in Light of the Purpose and History of the Act as Recognized in Its Own Decisions

A court may defer to an agency's interpretation of an ambiguous statute only when the interpretation is reasonable. *Cf. Chevron*, 467 U.S. 837 (1984).⁵ Even if the language of the Act were ambiguous, the purpose and history of the Act, and Congress's longstanding role in this area, render it unreasonable for the Commission to have concluded that it had the power to jettison the Price Cap.

Prior to the current docket, the Commission recognized both the limits placed on USPS's pricing authority by the Act and the centrality of that limit to executing Congress's policy choices. *See* Order 26 at 7, 49-50; Order 547 at 1, 13, & 49-50; Order 864 at 32-33; FY 2010 ACD at 19 (recognizing "the price cap is the signal feature distinguishing the modern system from the cost-of-service approach under the [Postal Reorganization Act]" and that it was developed to "focus management's attention on cost control"). *See also U.S.P.S.*, 785 F.3d at 745 (quoting S. Rep. No. 108-318, at 19 (2004)).

Order 5763's interpretation of the Act is irreconcilable with the Commission's prior understanding of the price cap and the function Congress intended it to perform within the statute. Yet as unlikely as it is to think Congress

⁵ The question of whether ambiguity exists is for the court, which owes no deference to the agency on this issue. *American Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005).

would have authorized the Commission to abandon the key component of the statute, the Commission went even farther, claiming that §3622(d)(3) gives it authority to rewrite “all aspects of the ratemaking system under section 3622, including the price cap provision at paragraphs (d)(1) and (d)(2) and the workshare discount provisions in subsection (e).” Order 5763 at 37 (J.A.____); *see also id.* at 69 (J.A.____). The *only* limit on the modified or alternative system the Commission recognized is that it “must be necessary to achieve the statutory objectives in subsection (b).” *Id.* at 46 (J.A.____). The Commission’s reading of §3622(d)(3) would reverse the hierarchy of the statute and write the bulk of §3622 out of the United States Code, leaving only 9 broad objectives to govern postal ratemaking.

It defies reason that Congress would have abdicated its longstanding role as the metric-setter for postal rates—and that it would have authorized the Commission to abandon the statutory requirement that the committee reports, prior Commission statements, and this Court have recognized as the centerpiece of the statute—let alone that it would have done so *sub silentio*.

4. The Commission’s Interpretation Places the Statute in Constitutional Jeopardy.

“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Two doctrines that circumscribe Congress’s authority to delegate legislative power to the Executive—the non-delegation doctrine and the Presentment Clause—are implicated here.

The non-delegation doctrine requires Congress to lay down “an intelligible principle to which the person or body authorized to [act] is directed to conform” when conferring decision-making authority upon agencies. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. U. S.*, 276 U.S. 394, 409 (1928)). Congress must “clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *Amer. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 105 (1946); accord *Gundy v. U. S.*, 139 S. Ct. 2116, 2129 (2019) (Congress must make “clear to the delegee the general policy he must pursue and the boundaries of his authority”) (internal citations omitted). The nondelegation doctrine should be applied principally “[by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.” *Mistretta v. U.S.*, 488 U.S. 361, 373 n.7 (1989).

In contrast, Congress cannot delegate power to the executive branch if the statute “sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion.” *A.L.A. Schechter Poultry Corps. v. U.S.*,

295 U.S. 495, 541 (1935). Thus, the Court has held unconstitutional a delegation to the President because the law neither declared a policy nor set a standard for the Executive's action nor required any finding by the President in exercising that authority. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935). Similar principles animate the Presentment Clause of the Constitution, which provides that a bill shall not become law without the agreement of both houses of Congress and the President. U.S. Const., Art. 1, §7, cl. 2. Although Congress may allow the Executive to waive application of a statute in particular circumstances, the authority to do so must be expressly stated in, and circumscribed by, the statute. *Republic of Iraq v. Beaty*, 556 U.S. 848, 861 (2009). That ensures that the President executes Congress's policy judgments, not his own.

Allowing the Commission to eliminate or modify the congressionally established Price Cap as part of its 10-year review, with no guidance or limits as to what alternative can replace it, would entail just such a standardless delegation. Under the Commission's interpretation of §3622(d)(3), its role is not simply to fill in regulatory details to implement a policy legislated by Congress or engage in fact-finding on which congressional policy turns. Rather, the Commission claims authority to unilaterally *change* a legislated congressional policy and to replace it with one of its own.

The Commission cites the 9 objectives in §3622(b) as providing the “intelligible principle” to guide it once the price cap requirement, factors, and workshare provisions have been removed from the statute. Order 5763 at 24 (J.A. ____). But those provisions are nothing more than “a broad range of objectives” and “general aims” that are insufficient to satisfy separation-of-powers principles. *See Schechter*, 295 U.S. at 534-535, 541-543. They do not “clearly” delineate anything or set any “boundaries” at all. *Amer. Power & Light*, 329 U.S. at 105 (emphasis added); *accord Gundy*, 139 S. Ct. at 2129. Indeed, the Commission has itself acknowledged that “[t]ension is inherent between most of these qualitative standards.” *Order Adopting Analytical Principles Regarding Workshare Discount Methodology*, Docket No. RM2009-3, Order 536 at 36 (released Sept. 14, 2010) (J.A. ____).

The objectives’ lack of clarity is illustrated by the fact that the Commission devoted the first round of its docket below to trying to determine what they mean. *See* Order 3673 at 10 (J.A. ____) (inviting comment on proposed “preliminary definitions” of the “objectives” and metrics to measure them). Accepting the Commission’s interpretation would thus require this Court to endorse the Constitutionality of a statute that delegates to the Commission the authority to define the intelligible principle governing its discretion. If there are limits on

Congress's authority to delegate legislative functions to the Executive, they are found here.

In policing the boundaries between legislative and executive authority, the Supreme Court has stated that “[t]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.” *Whitman*, 531 U.S. at 475. USPS's role as a “basic and fundamental service” having the mission to “bind the Nation together through the personal, educational, literary, and business correspondence of the people” through service to all communities counsels against allowing the Commission to act without definite and clear limits established by Congress. 39 U.S.C. §101(a).

C. The Final Rules Are Arbitrary and Capricious

1. The final rules depart from the statutory objectives and the Commission's findings about the prior system

The Commission found that the price cap system had resulted in predictable and stable rates (Objective 2), reduced administrative burden and increased transparency (Objective 6), provided USPS with pricing flexibility (Objective 4), and maintained just prices (Objective 8). Order 5763 at 7 (J.A.____). It further found the system achieved Objectives 7 and 9. *Id.* at 8 (J.A.____). It even found that the system had allowed USPS to achieve short-term financial stability (Objective 5). *Id.* But it also found that one of the “primary failings” of the

system was that it had not maximized incentives to reduce costs and increase efficiency (Objective 1). *Id.* at 26.

The Commission's new system, by allowing USPS to raise prices significantly above inflation and in unpredictable amounts, is irrational in two ways: (1) it will upset the prior system's successes in achieving multiple objectives; and (2) it will aggravate the failure to achieve other objectives. Easing the restrictions on USPS pricing authority weakens, not "maximize[s]," "incentives to reduce costs and increase efficiency." Rendering the price increases subject to annual modification and significant changes that will be known only at the time of filing eliminates the predictability and stability provided to mailers by the Price Cap. *See ANM et al. Comments* (Feb. 3, 2020) at 18-22 (J.A. ____ - ____); Order 4257 at 144 (finding the existing system achieved rate stability because the magnitude of rate changes could be consistently forecast and there were no sudden or extreme fluctuations) (J.A. ____); Order 5763 at 311 (J.A. ____). The sheer magnitude of the increases on USPS customers could render rates unjust and unreasonable. The transparency of the rate-setting process is lessened by changing the rate ceiling from a publicly-posted inflation index that ratepayers can track month-by-month to complicated density and retirement authority formulas, the outputs of which will be revealed once a year and evaluated by the Commission

during the months-long annual compliance process. Order 5763 at 17-18

(J.A.____, ____).

The Commission justified these changes as necessary to allow USPS to achieve medium- and long-term financial stability. But in response to criticism that it focused on Objective 5 to the near-exclusion of all other Objectives, the Commission claimed that since “the near-term financial instability is a source of imminent peril,” it needed to provide additional pricing authority first “and then evaluate how the longer-term financial stability issues should be addressed, in conjunction with the other objectives.” Order 5763 at 348 (J.A.____). The Commission did not reconcile this claim of “near-term financial instability” with its finding in Order 4257 that USPS had already achieved “short-term financial stability.” *Id.* at 8 (J.A.____). Nor did it explain how maximizing incentives for efficiency relates solely to longer term financial issues rather than incentivize USPS to reduce costs and improve its financial position immediately.

The Commission further dismissed concerns that excessive price increases will harm ratepayers the Commission is charged with protecting and drive away volume by referring “generally” to its findings in Order 4257 and emphasizing, without further discussion, the need to address Objective 5. Order 5763 at 313 (J.A.____). Thus, by allowing USPS to exceed the Price Cap, the Commission has imperiled the balance that was central to the Act’s structure—and created a system

that no longer achieves the objectives it found were met by the prior system—
“each of which shall be applied in conjunction with the others.” §3622(b).

The Commission’s failure to acknowledge how its new system reduces incentives for efficiency warrants special attention because increasing these incentives was a primary motivation behind the Act. The final rules weaken existing incentives by allowing USPS to raise rates 7.562% above inflation. This change in incentives is straightforward and obvious. USPS can now achieve retained earnings with higher cost growth than under the previous system.

The Commission nevertheless claimed that above-inflation authority “does not reduce USPS’s incentives to increase efficiency and reduce costs” because USPS still retains 100% of the costs it saves by improving efficiency. Order 5763 at 304 (J.A. ____); *see also id.* at 85-87 (J.A. ____ - ____). But as Dr. Robert Willig explained below, the savings generated by productivity improvements “falls to the bottom line in the form of higher retained earnings” in all price cap systems. Willig Decl. at ¶ 27 (J.A. ____). But the new system weakens the incentive for efficiency, compared to the former system, because USPS can now raise prices to retain more earnings with fewer cost reductions.

In Order 4257, the Commission found that “incentives to reduce costs and increase operational efficiency had not been maximized” under the system. Order 4257 at 221-226 (J.A. ____ - ____). But the Commission never directly examined

the power of the incentives created by a price cap system; it looked only to whether USPS actually responded properly to those incentives through improved efficiency or reduced costs. Indeed, it stated that if cost reductions had not been achieved, it would not evaluate “whether the system maximized incentives.” Order 4257 at 134 (J.A. ____). Because the Commission never properly examined the level of incentives provided by limiting price increases to inflation, it failed to grasp how allowing price increases to exceed inflation would change those incentives.

Congress recognized that if USPS is to achieve financial stability, it must improve its efficiency. Order 5763 weakens USPS’s incentives to do so while undermining several other objectives the Commission found the existing system was achieving. The Commission has revised its system of ratemaking to make it less likely to achieve the objectives, and its rules are therefore arbitrary and capricious.

2. The density factor focuses exclusively on per-piece losses while ignoring per-piece gains, and will allow USPS to grossly over-recover costs

The density rule is intended to mitigate the impact on USPS of the combined forces of declining mail volume and growth in delivery points. The Commission determined that “[w]hen volume declines, the remaining costs of servicing the growing network are spread among fewer mailpieces, resulting in an unavoidable increase in per-unit costs in the short- and medium-term,” Order 5763 at 92

(J.A. ____); the Commission intends the density authority to compensate for this per-unit increase. But not only does the authority overcompensate for the actual impact of declining density on USPS finances, it will accelerate volume decline and exacerbate the cause of that impact.

a. The Density Factor Arbitrarily Omits Any Consideration of Revenue

Although the factor addressed “lost” revenue per delivery point, the formula itself ignores per-unit *revenue* per delivery point. The only components of the density factor are costs, volumes, and delivery points. But as the mix of delivered mail shifts more towards packages (which generate higher per-unit revenue than letters), those pieces contribute more revenue per delivery point, largely offsetting the negative effect of declining volume in lower revenue mail. *See ANM et al. Comments* (Feb. 3, 2020) at 45-46 (J.A. ____ - ____).

Thus, as the Commission’s Public Representative commented, the formula “does not take into account that not all mail volume declines are equally harmful to the Postal Service’s financial stability.” Docket No. RM2017-3, *Comments of the Public Representative on Revised Notice of Proposed Rulemaking* (Feb. 3, 2020) at 14 (J.A. ____). And USPS had advocated “revenue-weighted volume” in which it “attempted to account not only for changes in mail volume overall, but also for changes in mail volume mix.” *Id.* at 10 (citing Docket No. RM2017-3, *Initial Comments of the United States Postal Service in Response to Order No. 4258* at 73

(Mar. 1, 2018) (J.A. _____). This is relevant because the composition of the mailstream has changed since the Act was passed, as more profitable First-Class Mail and packages now comprise a larger proportion of the mailstream than in previous years. Docket No. RM2017-3, *Comments of The National Postal Policy Council et al.* at 34 (Feb. 3, 2020) (J.A. _____). By ignoring how the unit contributions vary widely among types of mail, the density factor cannot take into account the relative unit contribution from the volume that has left the system compared to that which remains.

The Commission ignored per-piece revenue in its density formula, stating that “factoring in revenue (or contribution) would not comport with the necessity of compensating the Postal Service for unavoidable increases in per-unit costs.” Order 5763 at 95 (J.A. _____). But that is a description, not a response. Not only are the costs not “unavoidable”—USPS influences both delivery costs and density through cost management and pricing—but the issue is whether it is reasonable to ignore per-unit revenues when attempting to recover per-unit costs. By failing to take per-unit revenue (contribution) into account, the density factor ignores the most direct factor relevant to per-unit cost recovery—per-unit revenue.

The only rationale the Commission offered for ignoring per-unit revenue was that “incentives for efficiency that the density-based rate authority preserves would be weakened if additional rate authority were tied to revenue or

contribution” because “calculating the density-based authority as a particular revenue or contribution level would inadvisably tie the amount of authority to the Postal Service’s pricing decisions.” Order 5763 at 95 (J.A.____). The Commission did not explain this any further.

But volumes are *always* tied to USPS’s pricing decisions whether the rates incorporate a density factor or not. Furthermore, the Commission does not explain why taking per-unit revenue into account is “inadvisable” other than to say that focusing on the increase in per-unit institutional costs preserves USPS’s incentive to decrease costs wherever possible. But the Commission did not even try to explain how its stated rationale would be achieved by its design of the density factor, which will readjust every year to reflect actual density-related costs that USPS failed to reduce in the immediately preceding year. This “true up” feature eliminates the incentive. The Commission also misconstrued the argument that it should consider per-piece revenue by saying that mail mix changes are captured indirectly by the institutional *cost* ratio. Order 5763 at 94-95 (J.A.____).

Regardless of whether costs are covered implicitly through the calculation of the factor, revenues are not. The Commission ignored that the density factor would grossly over-recover delivery costs measured both by USPS data and its own long-approved costing methodology,

At no point did the Commission quantify the impact of the change in density on postal finances or the adjustment that might be necessary to offset it. Instead, it adopted the density factor without addressing substantial comments that the costs it sought to recover were far less than the factor would generate.

First, the record demonstrated that increases in delivery points are not a significant driver of postal costs. *See ANM et al.* Feb. 3, 2020 Comments at 44-49 (J.A.____ - ____); *ANM et al.* Mar. 20, 2017 Comments at 30 (relying on USPS analysis indicating that increasing delivery points added just \$75 million to USPS costs each year, or just 0.1% of total costs) (J.A.____).

Second, the Commission failed to address comments that the density factor would over-recover essentially the same costs as measured by a long-approved methodology. Commenters noted that the factor would have produced about \$259 million in rate authority due solely to the increased number of delivery points (declining volume would increase that number). *NPPC et al.* Feb 3, 2020 Comments at 32 (FY2019 data) (J.A.____). That amount was nearly twice the costs of new delivery points as determined by the Commission's long-established "roll forward" methodology for calculating the very same type of costs that the density factor is intended to recover. By that methodology, the annual cost of new delivery points is \$136 million, \$123 million less than calculated by the factor. *Id.* at 30-33 (J.A.____ - ____). Commenters noted that if the formula fails to produce

realistic numbers in the simple (constant volume) case, it is unreasonable to think it would be accurate when volumes change. *Id.*

The Commission may change how it estimates some costs. But it must acknowledge that it is doing so. An agency must “display awareness that it *is* changing position” when “new policy rests upon factual findings that contradict those which underlay its prior policy.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). At the least, the Commission should have explained why its new proposal results in a non-volume variable cost that diverges so materially from the result of the rollforward model upon which the Commission and USPS have both relied heavily in the past.

Instead, the Commission missed the point, stating that the density factor approximates the “expected” increase in per-unit cost as density declines. Order 5763 at 86 (J.A. ____). But there is nothing “expected” about it; it is a retroactive-looking true-up that uses the prior year’s volumes and delivery points to set rates going forward. By failing to acknowledge and address the substantial difference between the costs calculated by its long-standing methodology and the costs calculated through the density factor, the Commission has not provided a reasoned explanation. “An unexplained inconsistency with an earlier position renders a changed policy arbitrary and capricious.” *Children’s Hosp. Ass’n of Tex. v. Azar*, 933 F.3d 764, 773 (D.C. Cir. 2019).

b. The Density Authority Will Accelerate, Not Remedy, Declines in Density

The Commission identified declining mail density as one of two “primary obstacles” to USPS’s ability to achieve net income. Order 5763 at 17 (J.A. ____). Its final rules will accelerate, rather than reverse, that decline. Since delivery points will continue to grow as new addresses are created, mail density can only grow if volume trends reverse. The density authority, however, will only make the situation worse.

As the Commission acknowledged, price and volume are inversely related: as prices increase, volumes decline. Order 5763 at 93 (J.A. ____). The density authority operates such that in every year that volume per delivery point declines, USPS will receive additional rate authority, allowing it to raise prices even higher. Higher rates will induce even more volume loss—leading to a self-reinforcing cycle of more rate authority causing higher volume loss. The retirement rate authority (which also lacks a ceiling) and non-compensatory authority will inflate rates further, driving still more volume away.

The Commission expressed no concern about the implications of these potential rate increases on future volumes and density. In fact, the Commission provided no analysis of what impact its proposals are likely to have on mail volume—a notable omission given that the problem that it is purportedly addressing stems from declining volume.

Nor did the Commission address substantial evidence presented by commenters that that its proposals could significantly accelerate volume decline. Using USPS's own figures, and without accounting for the self-reinforcing nature of the density authority, mailers' experts projected the cumulative price increases in the ranges presented by the Commission "could increase cumulative volume losses at the class level by an additional 4.7% to 8.5% over the next five years." Brattle Decl. at ¶ 39 (J.A. ____).⁶

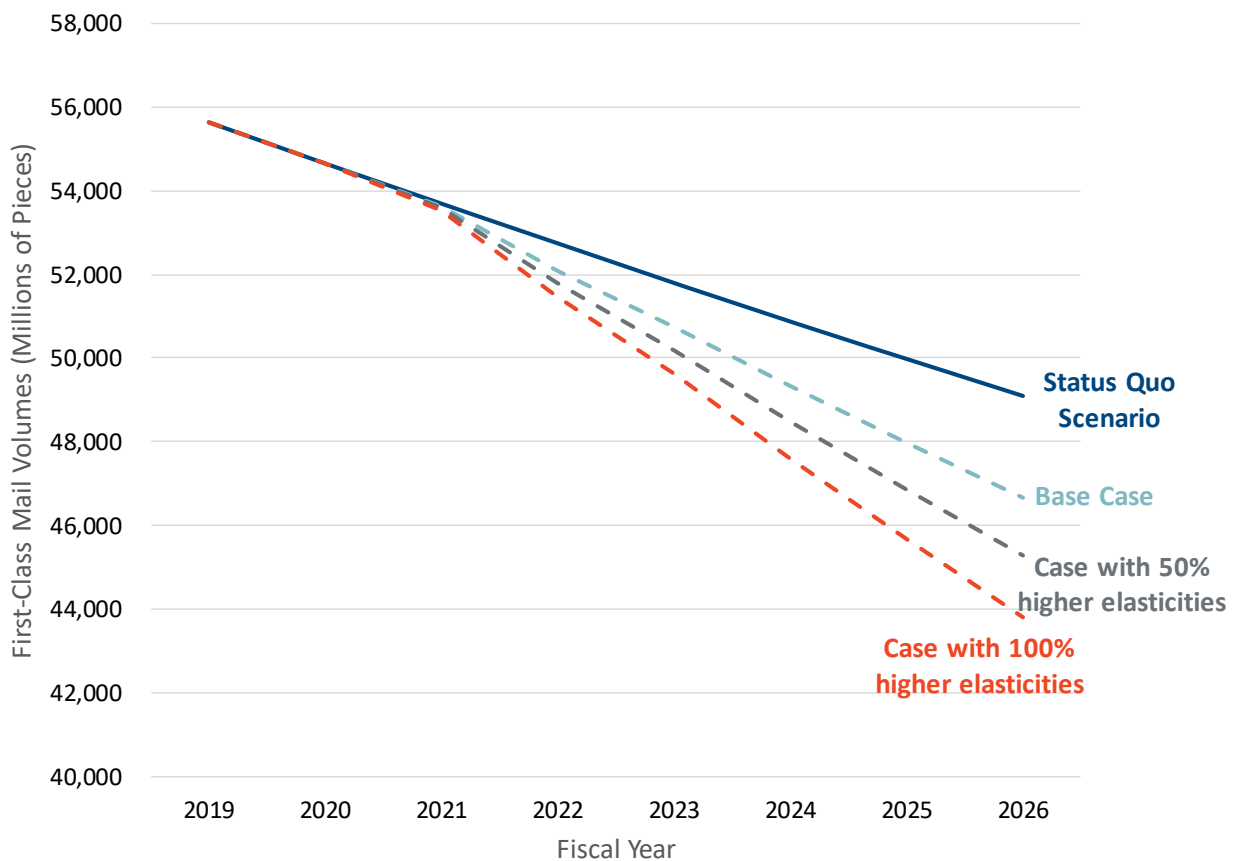
These estimates likely understate the impact because—due to the price cap—there have been essentially no "real" price increases since 2007. NPPC *et al.* Feb 3, 2020 Comments at 23 (J.A. ____); Brattle Decl. at ¶ 42 (J.A. ____). And because this was a period of low inflation, even the nominal increases were small. *See* Brattle Decl. at ¶ 43 ("[A]s prices move outside the range over which the data are calibrated, the estimated elasticity parameters are necessarily less reliable.") (J.A. ____). The Commission made no attempt to explain how a period without real price increases is relevant to a period of above-inflation rate increases.

If price increases significantly outpace inflation under the new rules, they may induce more drastic mailer responses. Mailer experts modeled projections

⁶ This analysis assumed USPS would exercise the proposed performance-based rate authority as well. *Id.* While that authority has been withdrawn, the increase in the actual density authority over projected amounts more than makes up for the missing 1% of rate authority in the final rules, and the analysis remains sound.

assuming 50% or 100% greater price-responsiveness than USPS's estimates. Their analysis demonstrated that volumes could decline between 51% to 111% more for First-Class Mail versus the expectation under the existing price cap, 62% to 131% more for Marketing Mail, and 18% to 37% more for Periodicals, depending on whether elasticity remains static or increases. ANM *et al.* Feb. 3, 2020 Comments at 33-35 (J.A. ____ - ____).

This analysis is illustrated below for First-Class mail, where the "Status Quo" line represents volume decline under the Price Cap, and the "Base Case" applies USPS's elasticity estimates to average predicted price increases of CPI+3.17% for compensatory products:



ANM *et al.* Feb. 3, 2020 Comments at 34 (J.A. ____); Brattle Decl. at ¶ 50 (J.A. ____).

The Commission did not address these projections at all, thereby “entirely fail[ing] to consider an important aspect of the problem,” *State Farm*, 463 U.S. at 43, and ignoring a “compelling argument” by the losing parties, *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 216 (D.C. Cir. 2011). This “‘failure to respond meaningfully’ to objections raised by a party renders [the agency’s] decision arbitrary and capricious.” *BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163, 168 (D.C. Cir. 2014) (citations omitted).

Rather than address these projections, the Commission assumed the problem away. It asserted that, “in its experience,” market-dominant mail has been relatively price-inelastic during the Act’s era (and before) and that therefore any decline in volume would likely be offset by higher net revenue. Order 5763 at 82. But that ignored the substantial reasons, summarized above, why it could not rely on past experience and fails to address how the rules will accelerate volume decline even if historic price elasticities hold.

It further relied on USPS’s “discretion to decide how much of the density-based rate authority to use on a year-to-year basis” and trusted that USPS would not use that authority if *USPS* “decides that doing so would be counterproductive.” Order 5763 at 83 (J.A. ____); *see also* Order 5337 at 123-24 (explaining that the full amount of performance-based rate authority “is not required to be used or exhausted by the Postal Service” and that “the Postal Service must exercise business judgment to determine the appropriate level of rate increases in light of various considerations, including the effect on mail volumes”) (J.A. ____ - ____). But the Commission did not reconcile that deference with its finding that the density factor was “necessary to provide additional revenue to offset the density-driven increase in per-unit costs.” *See* Order 5763 at 93 (J.A. ____). Nor did the Commission explain how providing additional rate authority to USPS will improve its finances if USPS chooses not to use it.

Moreover, in deferring to USPS, the Commission rejected its statutory responsibility to protect mailers subject to the postal monopoly from serving as a USPS piggybank. This abdication by the Commission of its regulatory role is impermissible. *See E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1042 (9th Cir. 2007) (explaining that F.E.R.C. cannot “abdicate its authority and, without any oversight, leave rate setting entirely to the markets remaining within F.E.R.C.’s jurisdiction” absent a change in law). While the Commission assures mailers that USPS “is attentive to not allowing rates to increase too sharply, notwithstanding its market power,” Order 5763 at 314, this Court has long been skeptical of such claims. *See Farmers Union*, 734 F.2d at 1530 (rejecting “presumed market forces” as the principle constraint on regulated rates).

Ultimately, the Commission did not assess how much volume loss its rules will induce because it believed that “any induced volume loss is a necessary consequence of providing the offsetting revenue, rather than a reason to reduce the amount of density-based rate authority.” Order 5763 at 93 (J.A. ____). In other words, the Commission’s solution was to continually provide more rate authority to USPS so that it can recover the per-unit cost increases caused by volume losses induced by this rate authority. *Id.*

The contrast to Congress’s policy could not be clearer. It facilitates the exactly the “death spiral” Congress enacted the price cap to forestall. *See* 109

Cong. Rec. S11674 (daily ed. Dec. 8, 2006) (statement of Sen. Collins). The new authorities are the opposite of a cap; they have no ceiling; the more that mail volume falls, the higher the rates to be charged to an ever-dwindling amount of mail. *See* Docket No. RM2017-3, *Comments of the News Media Alliance* at 7 (Jan. 31, 2020) (J.A. ____). Creating a self-perpetuating vicious cycle is not reasoned decisionmaking. And it is notably contrary to the Commission’s *own* previous determination in this very proceeding, where it determined “that it would be inappropriate to design a system that lacks a mechanism to limit the magnitude of price adjustments.” *Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 4258 at 34 (released Dec. 1, 2017) (“Order 4258”) (J.A. ____); *see also* Order 5763 at 312 (J.A. ____); Order 4257 at 103 (J.A. ____).

c. The Commission Failed to Revisit Its Conclusions in Light of Changed Circumstances

Finally, the Commission ignored evidence demonstrating that density and other new rate authorities are not necessary to achieve financial stability, even in a time of declining mail density. The Commission’s determination that the preceding system failed to meet the statutory objectives was based primarily on its conclusion—rendered in 2017—that the system was not preserving USPS’s financial health. Order 4257 at 4 (J.A. ____); *see also* Order 5763 at 26 (J.A. ____).

But much has changed since that time, with a pandemic having as profound an effect on USPS as it has had on every other aspect of American life. On one hand, the pandemic has accelerated the decline in market-dominant mail volume which, in turn, generated unanticipatedly high density-based rate authority. Docket No. RM2017-3, *Supplemental Comments of MPA et al.* at 6, 8-9 (July 2, 2020) (J.A. ____). On the other hand, the pandemic has spurred massive volume increases in profitable packages, improving USPS's financial condition overall. *Id.* at 5-6 (J.A. ____). Yet the Commission declined to refresh its record and evaluate new, relevant facts, instead finding that “nothing specific to the pandemic undermines the findings [it] made in Order No. 4257.” Order 5763 at 26 (J.A. ____).

That finding fails for two reasons. First, the Commission said that all the findings it made in Order 4257 in 2017 “remain applicable today, because the existing ratemaking system remains in place.” *Id.* (J.A. ____). But that is a *non sequitur*. *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (holding that “conclusory statements will not do; an agency's statement must be one of reasoning”) (citations omitted). While the ratemaking system may have remained in place, the conditions on the ground had entirely changed while USPS's finances remained stable, and even improved. The Commission's findings in Order 4257 would have predicted the opposite. The Commission's refusal to

consider any new facts that contradicted its previous conclusion alone violates the APA.

Second, that conclusion failed “to reasonably reflect upon the information contained in the record and grapple with contrary evidence.” *Fred Meyer Stores, Inc. v. N.L.R.B.*, 865 F.3d 630, 638 (D.C. Cir. 2017). When presented with financial data from mid-2020 showing that USPS had earned higher year-over-year revenues and improved its cash position, the Commission insisted that “[t]he Postal Service’s finances remain unstable.” Order 5763 at 26 (J.A. ____). But to support this conclusion, the Commission cited to older data from 6 months before the pandemic began (*id.* at nn.27 & 28 (J.A. ____, ____)), and more than 9 months before Mailers and other ratepayers requested that the Commission refresh its record to reflect the significant change in circumstances. By citing to stale data to substantiate its findings about USPS’s financial condition, the Commission “offered an explanation for its decision that runs counter to the evidence before the agency.” *U. S. Sugar Corp. v. E.P.A.*, 830 F.3d 579, 606, (D.C. Cir. 2016) (quoting *State Farm*, 463 U.S. at 43).

VII. CONCLUSION

In abandoning the Price Cap, the Commission has violated the statute and acted arbitrary and capriciously. The Commission’s authorization of new rate authorities should be vacated.

Respectfully submitted,

/s/ Eric S. Berman

Eric S. Berman

Matthew D. Field

Ian D. Volner

Elizabeth C. Rinehart

Venable LLP

600 Massachusetts Avenue, N.W.

Washington, D.C. 20001

(202) 344-4000

William B. Baker

Ayesha N. Khan

Potomac Law Group, PLLC

1300 Pennsylvania Avenue, N.W.

Suite 700

Washington, DC 20004

(571) 317-1922

*Counsel for Petitioners National Postal
Policy Council and Major Mailers
Association, and Intervenor News
Media Alliance.*

*Counsel for Alliance of Nonprofit
Mailers, Association for Postal
Commerce, MPA-The Association of
Magazine Media, and American
Catalog Mailers Association.*

CERTIFICATE OF COMPLIANCE

1. This brief complies with Circuit Rule 32(e)(2) because it contains 9986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and 14-point Times New Roman.

/s/ Matthew D. Field
Matthew D. Field

Dated: April 13, 2021

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 13th day of April, 2021, served a copy of the foregoing document electronically through the Court's CM/ECF system on all registered counsel.

/s/ Liz Clark Rinehart

Liz Clark Rinehart

STATUTORY AND REGULATORY ADDENDUM

5 U.S.C. §706(2)(A) & (C) Add-1

39 U.S.C. §3622 Add-2

39 C.F.R. §3030.160 Add-9

39 C.F.R. §3030.181 Add-10

39 U.S.C. §101(a) Add-12

5 U.S.C. §706(2)(A) & (C)

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

39 U.S.C. §3622

§3622. Modern rate regulation

(a) Authority generally.--The Postal Regulatory Commission shall, within 18 months after the date of enactment of this section, by regulation establish (and may from time to time thereafter by regulation revise) a modern system for regulating rates and classes for market-dominant products.

(b) Objectives.--Such system shall be designed to achieve the following objectives, each of which shall be applied in conjunction with the others:

- (1) To maximize incentives to reduce costs and increase efficiency.
- (2) To create predictability and stability in rates.
- (3) To maintain high quality service standards established under section 3691.
- (4) To allow the Postal Service pricing flexibility.
- (5) To assure adequate revenues, including retained earnings, to maintain financial stability.
- (6) To reduce the administrative burden and increase the transparency of the ratemaking process.
- (7) To enhance mail security and deter terrorism.
- (8) To establish and maintain a just and reasonable schedule for rates and classifications, however the objective under this paragraph shall not be construed to prohibit the Postal Service from making changes of unequal magnitude within, between, or among classes of mail.
- (9) To allocate the total institutional costs of the Postal Service appropriately between market-dominant and competitive products.

(c) Factors.--In establishing or revising such system, the Postal Regulatory Commission shall take into account--

- (1) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

- (2) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to each class or type of mail service through reliably identified causal relationships plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
- (3) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
- (4) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;
- (5) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;
- (6) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;
- (7) the importance of pricing flexibility to encourage increased mail volume and operational efficiency;
- (8) the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classifications and services of mail;
- (9) the importance of providing classifications with extremely high degrees of reliability and speed of delivery and of providing those that do not require high degrees of reliability and speed of delivery;
- (10) the desirability of special classifications for both postal users and the Postal Service in accordance with the policies of this title, including agreements between the Postal Service and postal users, when available on public and reasonable terms to similarly situated mailers, that--
 - (A) either--
 - (i) improve the net financial position of the Postal Service through reducing Postal Service costs or increasing the overall contribution to the institutional costs of the Postal Service; or

(ii) enhance the performance of mail preparation, processing, transportation, or other functions; and

(B) do not cause unreasonable harm to the marketplace.

(11) the educational, cultural, scientific, and informational value to the recipient of mail matter;

(12) the need for the Postal Service to increase its efficiency and reduce its costs, including infrastructure costs, to help maintain high quality, affordable postal services;

(13) the value to the Postal Service and postal users of promoting intelligent mail and of secure, sender-identified mail; and

(14) the policies of this title as well as such other factors as the Commission determines appropriate.

(d) Requirements.--

(1) In general.--The system for regulating rates and classes for market-dominant products shall--

(A) 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 the Postal Service files notice of its intention to increase rates;

(B) establish a schedule whereby rates, when necessary and appropriate, would change at regular intervals by predictable amounts;

(C) not later than 45 days before the implementation of any adjustment in rates under this section, including adjustments made under subsection (c)(10)--

(i) require the Postal Service to provide public notice of the adjustment;

(ii) provide an opportunity for review by the Postal Regulatory Commission;

(iii) provide for the Postal Regulatory Commission to notify the Postal Service of any noncompliance of the adjustment with the limitation under subparagraph (A); and

(iv) require the Postal Service to respond to the notice provided under clause (iii) and describe the actions to be taken to comply with the limitation under subparagraph (A);

(D) establish procedures whereby the Postal Service may adjust rates not in excess of the annual limitations under subparagraph (A); and

(E) notwithstanding any limitation set under subparagraphs (A) and (C), and provided there is not sufficient unused rate authority under paragraph (2)(C), establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances, provided that the Commission determines, after notice and opportunity for a public hearing and comment, and within 90 days after any request by the Postal Service, that such 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.

(2) Limitations.--

(A) Classes of mail.--Except as provided under subparagraph (C), the annual limitations under paragraph (1)(A) shall apply to a class of mail, as defined in the Domestic Mail Classification Schedule as in effect on the date of enactment of the Postal Accountability and Enhancement Act.

(B) Rounding of rates and fees.--Nothing in this subsection shall preclude the Postal Service from rounding rates and fees to the nearest whole integer, if the effect of such rounding does not cause the overall rate increase for any class to exceed the Consumer Price Index for All Urban Consumers.

(C) Use of unused rate authority.--

(i) Definition.--In this subparagraph, the term “unused rate adjustment authority” means the difference between—

(I) the maximum amount of a rate adjustment that the Postal Service is authorized to make in any year subject to the annual limitation under paragraph (1); and

(II) the amount of the rate adjustment the Postal Service actually makes in that year.

(ii) Authority.--Subject to clause (iii), the Postal Service may use any unused rate adjustment authority for any of the 5 years following the year such authority occurred.

(iii) Limitations.--In exercising the authority under clause (ii) in any year, the Postal Service--

(I) may use unused rate adjustment authority from more than 1 year;

(II) may use any part of the unused rate adjustment authority from any year;

(III) shall use the unused rate adjustment authority from the earliest year such authority first occurred and then each following year; and

(IV) for any class or service, may not exceed the annual limitation under paragraph (1) by more than 2 percentage points.

(3) Review.--Ten years after the date of enactment of the Postal Accountability and Enhancement Act and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

(e) Workshare discounts.--

(1) Definition.--In this subsection, the term “workshare discount” refers to rate discounts provided to mailers for the presorting, prebarcoding, handling, or transportation of mail, as further defined by the Postal Regulatory Commission under subsection (a).

(2) Scope.--The Postal Regulatory Commission shall ensure that such discounts do not exceed the cost that the Postal Service avoids as a result of workshare activity, unless--

(A) the discount is--

(i) associated with a new postal service, a change to an existing postal service, or with a new work share initiative related to an existing postal service; and

(ii) necessary to induce mailer behavior that furthers the economically efficient operation of the Postal Service and the portion of the discount in excess of the cost that the Postal Service avoids as a result of the workshare activity will be phased out over a limited period of time;

(B) the amount of the discount above costs avoided--

(i) is necessary to mitigate rate shock; and

(ii) will be phased out over time;

(C) the discount is provided in connection with subclasses of mail consisting exclusively of mail matter of educational, cultural, scientific, or informational value; or

(D) reduction or elimination of the discount would impede the efficient operation of the Postal Service.

(3) Limitation.--Nothing in this subsection shall require that a work share discount be reduced or eliminated if the reduction or elimination of the discount would--

(A) lead to a loss of volume in the affected category or subclass of mail and reduce the aggregate contribution to the institutional costs of the Postal Service from the category or subclass subject to the discount below what it otherwise would have been if the discount had not been reduced or eliminated; or

(B) result in a further increase in the rates paid by mailers not able to take advantage of the discount.

(4) Report.--Whenever the Postal Service establishes a workshare discount rate, the Postal Service shall, at the time it publishes the workshare discount rate, submit to the Postal Regulatory Commission a detailed report that--

(A) explains the Postal Service's reasons for establishing the rate;

(B) sets forth the data, economic analyses, and other information relied on by the Postal Service to justify the rate; and

(C) certifies that the discount will not adversely affect rates or services provided to users of postal services who do not take advantage of the discount rate.

(f) Transition rule.--For the 1-year period beginning on the date of enactment of this section, rates and classes for market-dominant products shall remain subject to modification in accordance with the provisions of this chapter and section 407, as such provisions were last in effect before the date of enactment of this section. Proceedings initiated to consider a request for a recommended decision filed by the Postal Service during that 1-year period shall be completed in accordance with subchapter II of chapter 36 of this title and implementing regulations, as in effect before the date of enactment of this section.

39 C.F.R. §3030.160**§3030.160 Applicability.**

(a) This subpart allocates rate authority to address the effects of decreases in the density of mail as measured by the sources identified in §3030.161. The calculation of the additional rate authority corresponding to the change in density is described in §3030.162.

(b) The Postal Service shall file a notice with the Commission by December 31 of each year that calculates the amount of density rate authority that is eligible to be authorized under this subpart.

(c) The Commission shall review the Postal Service's notice and determine how much, if any, rate authority will be authorized under this subpart. Any rate authority allocated under this subpart:

(1) Shall be made available to the Postal Service as of the date of the Commission's determination;

(2) Must be included in the calculation of the maximum rate adjustment authority in the first generally applicable rate adjustment filed after the Commission's determination; and

(3) May be used to generate unused rate authority, if unused, within 12 months of the Commission's announcement.

39 C.F.R. §3030.181**§3030.181 Applicability.**

(a) This subpart allocates additional rate authority to provide the Postal Service with revenue for remittance towards the statutorily mandated amortization payments for supplemental and unfunded liabilities identified in §3030.182. As described in §3030.184, for retirement obligation rate authority to be made available, the Postal Service must annually remit towards these amortization payments all revenue collected under this subpart previously. The full retirement obligation rate authority, calculated as described in §3030.183, shall be phased in over 5 fiscal years, taking into account changes in volume during the phase-in period. If combined with an equal rate increase on Competitive products, the compounded rate increase resulting from retirement obligation rate authority is calculated to generate sufficient additional revenue at the end of the phase-in period to permit the Postal Service to remit the entire invoiced amount of its amortization payments.

(b) Until the conclusion of the phase-in period, the Postal Service shall file a notice with the Commission by December 31 of each year that calculates the amount of retirement obligation rate authority that is eligible to be authorized under this subpart.

(c) The Commission shall review the Postal Service's notice and determine how much, if any, rate authority will be authorized under this subpart. Any rate authority allocated under this subpart:

- (1) Shall be made available to the Postal Service as of the date of the Commission's determination;
- (2) Must be included in the calculation of the maximum rate adjustment authority in the first generally applicable rate adjustment filed after the Commission's determination;
- (3) Shall lapse if not used in the first generally applicable rate adjustment filed after the Commission's determination;
- (4) Shall lapse if unused, within 12 months of the Commission's determination, however this paragraph (c)(4) shall not prohibit the Postal Service from making a stand-alone adjustment to one or two generally applicable rate cells, if such a case were to be followed by a broader rate adjustment in the class later in the same fiscal year; and

(5) May not be used to generate unused rate authority, nor shall it affect existing banked rate authority.

39 U.S.C. §101(a)**§101. Postal policy**

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.
