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
ALLIANCE OF NONPROFIT MAILERS, et al, Intervenors.	

MOTION OF PETITIONERS 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 FOR STAY AND EXPEDITIOUS CONSIDERATION

Table of Contents

I. INTRODUCTION 1

II. BACKGROUND 3

III. MOTION FOR STAY 5

A. LEGAL STANDARD 5

B. MOVANTS ARE LIKELY TO PREVAIL ON THE MERITS 5

1. The CPI Price Cap is a Non-Discretionary and Binding Feature of Any Ratemaking System. 6

2. The Statutory Interpretation Adopted by the Commission Places the Statute in Substantial Constitutional Jeopardy..13

C. MOVANTS WILL SUFFER IRREPARABLE INJURY ABSENT A STAY 16

D. A STAY WOULD NOT IMPOSE SERIOUS HARM ON ANY PARTY........................18

E. A STAY IS IN THE PUBLIC INTEREST 20

IV. IF A STAY IS DENIED, EXPEDITIOUS CONSIDERATION IS REQUESTED 21

V. CONCLUSION..22

I. Introduction

The Alliance of Nonprofit Mailers, the American Catalog Mailers Association, the Association for Postal Commerce, MPA – The Association of Magazine Media, the Major Mailers Association, and the National Postal Policy Council ("Movants") respectfully request that this Court stay the implementation of final rules issued by the Postal Regulatory Commission ("Commission") that enlarge the ratemaking authority of the United States Postal Service ("Postal Service") over market-dominant postal products. *See* Order No. 5763, *Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products* , PRC Docket No. RM2017-3 (Nov. 30, 2020) & Order No. 4257, *Order on the Findings and Determination of the 39 U.S.C. 3622 Review* (Dec. 1, 2017). If upheld, the new rules would subject Movants (and anyone else in the nation who mails market-dominant products) to rate increases far in excess of the statutory limit that has been in effect since 2006.

The new rules are *ultra vires*. They violate Congress's mandate that the market-dominant ratemaking system "shall" include a cap on annual price increases equal to changes in the Consumer Price Index ("CPI") for All Urban Consumers. The Commission has previously recognized the CPI cap as the "centerpiece" of its authorizing legislation, but now attempts to write it out of the statute. Movants are likely to succeed on the merits of their Petition because the Commission's actions exceed its statutory authority.

Moreover, Movants will be irreparably harmed in the absence of a stay: they will be forced to pay higher rates, compelled to reduce their mailings (irreparably damaging their missions, programs, beneficiaries, customers, and financial stability), and are precluded by statute from recovering the overcharges even if the rules are later found unlawful. Conversely, the Postal Service would not suffer substantial harm if a stay were to issue. Three years ago, the Commission determined that the Postal Service had achieved short-term financial stability, and the Service's performance on relevant financial metrics has since improved substantially. Its status as a viable public service is in no danger here. Finally, the public interest favors a stay, both because the public has an interest in the Commission's adherence to its statutory mandate, and because of the public benefits resulting from continued access to affordable print magazines, newsletters, greeting cards, invoices, and charitable services funded by direct mail campaigns, all of which will diminish if the challenged rules are implemented.

Movants requested a stay from the Commission on December 28, 2020, and the Commission denied the motion on January 19, 2021. *See* Order No. 5818, *Order Denying Stay*, PRC Docket No. RM2017-3 (Jan. 19, 2021). Movants attach a copy of that order as Exhibit 1 to this motion. Movants now request a stay from this Court.

If the Court denies Movants' request, we ask that the Court expedite a decision on the merits as quickly as practicable to minimize harm to the public that would ensue from implementation of the unlawful rates authorized by the Commission.

II. Background

Congress enacted the Postal Accountability and Enhancement Act (the "Act"), Pub. L. 109-435, 120 Stat. 3198, in 2006. The Act directs that the Commission "shall . . . 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." 39 U.S.C. §3622(a). The Act further provides that the system established by the Commission "shall be designed to achieve" nine "objectives," and that "in establishing or revising such system, the Postal Regulatory Commission shall take into account" fourteen statutorily prescribed "factors." 39 U.S.C. §§ 3622(b) & (c).

Next, the Act imposes statutory "requirements" that the system must meet, first and foremost being a price cap limiting average postal rate increases to annual changes in the CPI:

> (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;

39 U.S.C. §3622(d)(1)(A) (emphasis added).

Congress also required the Commission to review the ratemaking system that it created under §3622(a) ten years later to determine if the system requires adjustment:

> Ten years after the date of enactment . . . 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.

39 U.S.C. §3622(d)(3).

The Commission initiated this ten-year review in December 2016 and, in December 2017, concluded that the existing ratemaking system had not achieved all of the objectives in section 3622(b). *See* Order No. 4257 at 275. On November 30, 2020, in Order No. 5763 (at 4-6, 32-68), the Commission concluded that it had the authority to adopt a new ratemaking system that was not subject to the Act's "requirements" and adopted rules allowing the Postal Service to increase rates for market-dominant products at levels well in excess of CPI.

Movants have petitioned this Court to set aside Order Nos. 4257 and 5763 on the basis that the Commission's findings and rules violate the Act, rest on authority that Congress did not and could not constitutionally delegate, and are arbitrary and capricious.

III. Motion for Stay

A. Legal Standard

A motion for stay shall be granted if the movants demonstrate: (i) that the movant is likely to prevail on the merits; (ii) that the movant is likely to suffer irreparable injury absent relief; (iii) that other parties will not suffer harm if relief is granted; and (iv) that a stay is in the public interest. *See Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

B. Movants Are Likely To Prevail on the Merits

"When reviewing a rule under the [Administrative Procedure Act, this Court] will 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 v. Postal Regulatory Comm'n*, 938 F.3d 337, 343 (D.C. Cir. 2019) (quoting 5 U.S.C. §§706(2)(A) & (C)).

Here, there is a substantial likelihood that Movants will prevail on appeal because the Commission lacks the statutory authority to allow the Postal Service to increase rates by more than the annual change in the Consumer Price Index. The Commission's interpretation not only contravenes the statute's plain language, but it would support such expansive and unbounded authority that it would place the Act in constitutional jeopardy.[1]

1. The CPI Price Cap is a Non-Discretionary and Binding Feature of Any Ratemaking System.

Any effort to discern a statute's meaning must start with the language of the statute itself. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2017). When that language is unambiguous, it will carry the day. *See, e.g., Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S.Ct. 617, 634, n.9 (2018).

Here, in a section titled "Requirements," the Act unambiguously 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)," *i.e.*, the CPI cap.

---

[1] In their briefing on the merits, Movants intend to demonstrate that even if the Commission had the authority to abrogate the statutory CPI price cap, Orders 4257 and 5763 are arbitrary and capricious.

"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). 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). Congress's choice of these words mandates that the regulatory system limit market-dominant price increases to inflation.

Notwithstanding this directive, the Commission claims "express" authority to allow above-inflation rate increases in §3622(d)(3), which mandates the ten-year review undertaken in Docket No. RM2017-3. Order No. 5763 at 40-42. That section makes no reference, "express" or otherwise, to §3622(d)(1)(A) and the price cap. Rather, it states that if the Commission finds that the system of ratemaking it promulgated pursuant to §3622(a) is not achieving the Act's objectives (as it did in Order No. 4257), "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).

The Commission claims that in authorizing it to review the "system" and modify or adopt an alternative "system," §3622(d)(3) authorized the Commission to review, modify, or outright replace the statutory requirements of §3622(d)(1) and §3622(d)(2) and the workshare provisions of §3622(e). Order No. 5763 at 43. That is, the Commission claims the authority to review and modify *statutory* *requirements*, not just the regulations whose scope is bounded by the statute itself. *See id.* ("[T]he provisions at paragraphs (d)(1) and (d)(2) are part of the system subject to review and potential modification or replacement under paragraph (d)(3).") Setting aside for now the constitutional problems raised by this argument, this reading misconstrues the meaning of the term "system" as used in the Act.

Nowhere in the Act did Congress itself establish a "system" of ratemaking. Instead, Congress delegated that task to *the Commission* to "establish . . . a modern system for regulating rates and classes for market-dominant products." 39 U.S.C. §3622(a). The Commission promulgated rules establishing this "system" pursuant to this authority in Order No. 26, Docket No. RM 2007-1 (Aug. 15, 2007) and has modified these rules (and thus the "system") from time to time. It is this regulatory "system" that 3622(d)(3) directed the Commission to review in RM2017-3, not the provisions of the statute. And, if the Commission finds that system wanting, it can change or replace the system—but not the provisions of the statute.

In other words, while §3622(d)(1) requires any regulatory system established by the Commission to maintain a CPI-based price cap, §3622(d)(1) *itself* is not part of the "system." It is a statutory provision limiting the discretion the Commission may exercise in designing the regulatory system. It imposes the §3622(d)(1) requirement on "*[t]he* system"—as in *any* system—"for regulating rates and classes" that the Commission establishes by regulation.

The Commission acknowledges that "all of the provisions within section 3622 relate to the same 'system' of ratemaking" but erroneously concludes that "all aspects of the 'system' are subject to review and, if necessary to achieve the statutory objectives, potential modification or replacement." Order No. 5763 at 43. Not so. While the Commission can review all aspects of the regulatory system (and indeed, is required to do so by §3622(d)(3)), it can only adopt a modified or alternative regulatory system that comports with the text of the statute—all of which remains unaltered by the Commission's review.

In applying the plain-meaning rule, courts interpret a statute straightforwardly and conclude that if the legislature had intended some different meaning than what was written, it would have said so. *See* 2A Norman & Shambie Singer, *Sutherland Statutes and Statutory Construction* §46:1 (7th ed. 2014); *see also Sebelius v. Cloer*, 569 U.S. 369, 376 (2013).

Indeed, when Congress contemplated above-inflation rate increases in the present Act, it said so. The statute provides only two exceptions to the CPI cap, both of which *explicitly* modify the cap requirement. *See* 39 U.S.C. §3622(d)(1)(E) (permitting above-CPI rate increases in extraordinary or exceptional circumstances "notwithstanding any limitation set under subparagraphs (A) and (C)" *and* §(d)(2)(C) (authorizing use of banked rate authority "subject to the annual limitation under paragraph (1)"). Thus, in plain language specifically referencing the price cap provision, this section authorizes the Commission to allow above-inflation rate increases in limited circumstances.

Accordingly, if Congress had intended to limit the price cap and the other "requirements" to the initial ten-year period, it could easily have done so by, for example, providing that the price cap applies to the "initial system." Or, §3622(d)(3) could have read, "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, *notwithstanding any limitation set under subparagraph (d)(1)(A).*" *Cf.* 39 U.S.C. §3622(d)(1)(E). But it does neither. It strains credulity to believe that Congress would allow the Commission to eliminate what the Commission itself has called the Act's "centerpiece"—the CPI cap—during this review without once mentioning the cap in §3622(d)(3). *See* Order No. 547, *Order Denying Request for Exigent Rate Adjustments*, PRC Docket No. R2010-4, at 1 (Sept. 20, 2010). "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001).

The purportedly hidden elephant is large indeed. The Commission not only claims the authority to establish a new system of ratemaking that ignores section 3622(d)(1), it asserts that the system no longer needs to account for the factors in

§3622(c), nor comply with §3622(e)'s workshare discount requirements. Order No. 5763 at 69, 361-62. The Commission claims that the *only* limit on the modified or alternative system is that the changes it incorporates "must be necessary to achieve the statutory objectives in subsection (b)." *Id*. at 46. The Commission's reading of §3622(d)(3) would write the bulk of §3622 out of the United States Code, leaving only the nine vague objectives of §3622(b) to govern postal ratemaking.

The Commission's expansive view of its (d)(3) authority is also evident from its attempt to circumvent this Court's recent *Carlson* decision. In *Carlson*, this Court specifically held that "the Commission must apply the relevant objectives and factors to individual rate adjustments," rejecting as "contrary to the plain language of the statute" the Commission's argument that it could defer considering the effect of the PAEA's objectives and factors on individual rate changes until after such changes took effect. 938 F.3d at 344, 350. In Order No. 5763, the Commission asserts that §3622(d)(3) empowers it to readopt its position struck down by *Carlson*, again interpreting §3622(d)(3) as conferring an extraordinary power to rewrite unambiguous mandatory statutory requirements.

Not even the floor statement of Senator Collins, on which the Commission heavily relies, Order No. 5763 at 61-63, can support such a radical outcome. Senator Collins suggested that the Commission's §3622(d)(3) review authority would encompass the power to replace the price cap while expressing her preference for a permanent price cap. *See id*. at 62 (quoting 152 Cong. Rec. S11,674, S11,675 (Dec. 8, 2006). But nothing in Senator Collins' statement suggests that §3622(d)(3) allows the Commission to ignore the factors of §3622(c) or the workshare provisions of §3622(e). Moreover, "'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 Manufacturers 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)). Thus, Senator Collins' statement does not provide a valid basis to disregard the statutory text, and even on its terms does not endorse the broad authority to rewrite the statute the Commission has claimed.

The Commission's interpretation also contradicts its own prior recognition of the price cap's importance. Since the Act's passage, the Commission has held that the price cap is "central" and "indispensable" to the system of ratemaking, *see* Order No. 547 at 13, 49-50; is "the single most important safeguard for mailers" in the 2006 Act, *see id*. at 13 ; and is a "mandatory feature[]" of the modern regulatory scheme. *See* Order No. 26, *Order Proposing Regulations to Establish a System of Ratemaking*, PRC Docket No. RM2007-1, at 7 (Aug. 15, 2007). The Commission has previously recognized that "it would undermine the basic regulatory approach of the [Act] if the Postal Service could pierce the price cap routinely", Order 547 at 49-50, and "[t]he price cap plays the central role in implementing the purposes and policies of the [Act]." Order No. 864, *Order Resolving Issues on Remand*, PRC Docket No. R2010-4R, at 32-33 (Sept. 20, 2011). Congress would not have empowered the Commission to jettison the central feature of the Act, the one feature that ties all of the text together, let alone to have done so *sub silentio*.

Ultimately, the Commission's reading would abandon the central role Congress has played in Postal Regulation since this nation's founding. Congress set postal rates directly throughout our nation's history until it passed the Postal Reorganization Act of 1970, at which time it created the Commission's predecessor and instructed that body to set cost-of-service postal rate levels. *See* Order No. 4257 at 2-3, 23-24. And in 2006, Congress replaced the cost-of-service regime with, for market-dominant products, a price cap tied to the rate of inflation. At every turn, Congress has assumed the role of setting the metric for postal rates. Given that history, it would defy common sense to think that, in enacting the Act, Congress intended, ten years hence, to abdicate that role to the Commission, let alone that it would have done so without explicitly saying so.

2. The Statutory Interpretation Adopted by the Commission Places the Statute in Substantial Constitutional Jeopardy.

Even if the Act lent itself to the Commission's interpretation, that interpretation should be avoided. "[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. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Here, accepting the Commission's interpretation of the statute would place the Act in tension with both the Presentment Clause and the non-delegation doctrine. The elimination of the price cap requirements of the statute would mean there is no "intelligible principle" remaining to guide future rate regulation, and if §3622(d)(3) allows the Commission to ignore all but one section of the statute, Congress has improperly delegated the authority to amend or repeal the Act to the Executive.

Under the Presentment Clause, a bill shall not become law without first passing both houses of Congress and being "presented" to the President, who shall sign it if he approves it, or veto it if he does not. U.S. Const., Art. 1, §7, cl. 2. In *Clinton v. City of New York*, 524 U.S. 417, 439 (1998), the Supreme Court struck down the line-item veto as contrary to the Presentment Clause because it "would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature." *Id.* at 448-49.

Interpreting §3622(d)(3) of the Act to allow the Commission, after ten years, to disregard the price cap of §3622(d)(1), the factors of §3622(c), and the workshare requirements of §3622(e) would mean that the Commission was free to write the statute from scratch, establishing a system of ratemaking and workshare regulations that meets none of the conditions Congress specified in the Act, aided solely by the general and sometimes conflicting aims of the objectives. Having the Commission—an arm of the Executive—substitute its policy decisions for those of Congress is precisely what the Presentment Clause prohibits.

Such a broad grant of authority would also implicate the nondelegation doctrine. While "[i]n recent years, [the Supreme Court's] application of the nondelegation doctrine principally has… [consisted of] 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), this case represents just such a situation.

Under the nondelegation doctrine, when Congress confers decision-making authority upon agencies, it must lay down "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The "objectives" set forth in §3622(b) are decidedly not *requirements*; they are nothing more than a set of loose and conflicting general aims. If the price cap and other "requirements" in §3622(d)(1) were no longer applicable to the system the Commission was permitted to adopt under §3622(d)(3) of the Act, there would be no bottom-line rule to govern the Commission's action. Moreover, without §3622(e) in place, there would be no standards at all to govern workshare discounts.

In sum, the Commission's view that it has *carte blanche* authority to repeal statutory requirements and rewrite the Act guided only by vague objectives is unconstitutional and should be avoided.

C. Movants Will Suffer Irreparable Injury Absent A Stay

If the Commission's final rules are not stayed, Movants will suffer injury that is "actual and not theoretical" and of a nature "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Order No. 5763 provides the Postal Service with three categories of above-CPI rate authority: (1) "density" authority to impose price increases when mail volume per delivery point declines; (2) "retirement" authority to charge higher rates designed to help the Postal Service meet its retirement prefunding obligations; and (3) "noncompensatory" authority to charge an additional two percentage points for mail products that do not cover their costs. *See* Order No. 5763 at 72-74, 100-101, and 181-83.

On December 31, 2020, the Postal Service notified the Commission that the new authorities would allow it to increase rates by 4.5 percent for the density adjustment, 1.062 percent for the retirement adjustment, and 2 percent for noncompensatory products – total authorized rate authority of 7.562 percent above inflation. The Postal Service also stated that it "intends to utilize the additional pricing flexibility" granted it. *See Postal Service Notice of Calculations of Future Rate Authorities* ("Cooper Letter") (Dec. 31, 2020) (Exhibit 2).

Movants' members purchase both compensatory and noncompensatory postal products, and increases of this scale will seriously harm the businesses and nonprofit organizations that Movants represent. There is ample evidence of this harm in the administrative record. Mailers would have suffered grave impacts from earlier Commission proposals that would have granted the Postal Service *far lesser amounts* of above-CPI rate authority than do the final rules. Those harms included reduced mail volumes from commercial mailers, shuttered magazine titles, staff layoffs, and nonprofit missions being "greatly impair[ed]." *See* Comments of ANM *et al.*, PRC Docket No. RM2017-3 (Mar. 20, 2017) at 66-69 (Exhibit 3); Comments of ANM *et al.*, PRC Docket No. RM2017-3 (Mar. 1, 2018) at 64-71 (Exhibit 4); Comments of ANM *et al.*, PRC Docket No. RM2017-3 (Feb. 3, 2020) at 19-20; 26-39 (Exhibit 5).

The impact of rate increases threatened by the Postal Service would be harsher still, charging market-dominant mailers approximately *two hundred million* dollars per month above inflation at current volume levels, or $2.3 billion annually. And mailers will bear this harm quite soon: the Commission's rules allow the Postal Service to file a price adjustment "out-of-sequence" as soon as March 2021, with those higher prices becoming effective as early as June. *See* Order No. 5763 at 276. *Accord Nat'l Parks Conservation Assoc. v. United States Forest Serv.*, Civ. No. 15-

cv-01582 (APM), 2016 WL 420470, at *9 (D.D.C. Jan. 22, 2016) (injury imminent if harm to occur "in the next several months").

Furthermore, this harm is irreparable: once the new rates go into effect, Movants would be unable to recover overcharges even if the rate increases were later found to have been unlawful because "[n]o mailer may be reimbursed for any amount paid under any rate or fee which, after such payment, is determined to have been unlawful." 39 U.S.C. §3681. When a movant will be unable to sue to recover any monetary damages against a government agency in the future, such "financial loss can constitute irreparable injury." *Texas Children's Hosp.*, 76 F. Supp. 3d at 242 (additional citation omitted).

In sum, Movants face irreparable injury because their damages are non-theoretical and imminent, would be severely damaging to their businesses and organizations, and would be unrecoverable once paid.

D. A Stay Would Not Impose Serious Harm on Any Party

The only entity affected by a stay of the Order pending judicial review would be the Postal Service, and only so far as it could not invoke new pricing power until the lawfulness of the Commission's rules is determined. The Postal Service would remain free to file rate adjustments subject to the CPI price cap and could freely adjust rates for unregulated services. Most importantly, the Postal Service will continue to operate and generate billions of dollars in revenue.

The Commission has already found that the Postal Service has achieved short-term financial stability under the existing system, having the ability "to meet its operational needs using mail revenue, unused borrowing authority, and accumulated cash reserves." Order No. 4257 at 161-166. It reached this conclusion even though the Postal Service had no available borrowing authority for the fiscal years 2012 through 2016. *Id.* The Postal Service's cash reserves at the end of Fiscal Year 2016 were $8.077 billion.

The Postal Service is in far better financial condition by these metrics today; at the end of 2020, it had $16.052 billion in cash on hand (Monthly Statement of the Public Debt of the United States, Dec. 31, 2020, at 12); $1 billion available in borrowing authority; and access to an additional $10 billion for COVID-19 related expenses through the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. Law 116-136, which does not need to be repaid. *See* Consolidated Appropriations Act, H.R. 133, sec. 801 (Dec. 27, 2020).

Simply put, the Postal Service will not run out of cash anytime soon. It has generated billions of dollars in net cash from operations during each of the past several fiscal years while subject to the CPI price cap. And it projects having $9.6 billion in unrestricted cash at the end of FY2021, as well as $4 billion in borrowing authority and access to the $10 billion relief grant. *See* FY2021 Integrated Financial Plan, United States Postal Service, at 9. Imposition of a stay will not disrupt the

Postal Service's operations or ability to generate revenue during the pendency of this action.

E. A Stay is in the Public Interest

As a preliminary matter, "[w]hen the alleged action by the government violates federal law, the public interest factor generally weighs in favor of the plaintiff." *Western Watersheds Project v. Bernhardt*, 391 F.Supp.3d 1002, 1026 (D. Or. 2019); *see also Ramirez v. U.S. Immigration & Customs Enf't*, 310 F.Supp.3d 7, 33 (D.D.C. 2018) ("there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate."). As demonstrated above, the Commission has exceeded its statutory authority and Order 5763 is contrary to law. For this reason alone, the public interest favors a stay.

In assessing the request for a stay, the Court "should pay particular regard for the public consequences." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). The Commission's new rules govern the pricing authority that the Postal Service commands over roughly 130 billion pieces of mail, nearly three-fifths of the operating revenues of an organization with the mandate to offer a "fundamental service" to the nation "at fair and reasonable rates." *See* USPS FY2020 10-K Annual Report at 1, 4. Absent a stay, the higher postage rates will harm all market-dominant mailers and will emphatically harm nonprofit and periodicals mailers—categories that Congress has recognized provide unique value to the public. *See* 39 U.S.C. §§

3622(c)(11); 3626. While this prospect poses considerable harm to Movants, the public interest also speaks to the public at large: every person who reads print newspapers or magazines, sends greeting cards, or benefits from charitable programs funded by direct mail campaigns is affected.

IV. If a Stay is Denied, Expeditious Consideration is Requested

Movants have satisfied the criteria for a stay. However, if the Court disagrees, then Movants believe that an expeditious resolution to this appeal would be in the public interest. *See* D.C. Circuit Handbook of Practice and Internal Procedures 34 (2020) ("When the Court disposes of a motion for stay or injunction pending appeal, it may at the same time expedite the case to minimize possible harm to the parties or the public."). Expedited consideration is appropriate where "delay will cause irreparable injury" and "the decision under review is subject to substantial challenge." *Id*. "The Court also may expedite cases in which the public generally, or in which persons not before the Court, have an unusual interest in prompt disposition." *Id*. at 34.

These standards are met here because, as discussed above, the Mailer Petitioners and all other persons that use the mail will be subjected to irreparable harm insofar as they are required to pay above-CPI rate increases authorized by the new rule and, as set forth above, the Commission's Order is, at a minimum, subject to substantial challenge. The significant impact the Postal Service's exercise of its new rate authority would have on Movants and the public justifies completion of the Court's review as expeditiously as practicable to prevent or limit the exercise of this authority.

This Court has granted expedition where necessary to allow review to be completed before a burdensome rule takes effect. *See, e.g, Alliance of Nonprofit Mailers v. Postal Regulatory Comm'n,* No. 14-1009 (March 19, 2014) (setting case for argument within six months). The same urgency is present here.

V. Conclusion

Movants are likely to prevail on their challenge that the Commission lacks legal authority to allow market-dominant postage rates to exceed the statutory CPI price cap. Use by the Postal Service of the additional rate authorities created in Orders No. 5763 would impose irreparable harm on Movants and the broader public. These harms outweigh any reasonably expected harm a stay would cause to the Postal Service, whose cash position is far better today than when the Commission began its review.

Accordingly, this Court's standards for a stay are satisfied. Movants also urge the Court to set a schedule for briefing and oral argument that will allow for resolution on the merits at the earliest practicable time.

[*Signatures on next page*]

DATED: January 27, 2021

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) 344-4661 (Berman)
(202) 344-8281 (Field)
esberman@venable.com
mfield@venable.com
idvolner@venable.com
lcrinehart@venable.com

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

William B. Baker
Ayesha N. Khan
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Avenue, N.W., Suite 700
Washington, D.C. 20004
(571) 317-1922
wbaker@potomaclaw.com

Attorneys for Petitioners National Postal Policy Council and Major Mailers Association

ADDENDUM

Certificate of Parties and Corporate Disclosure Statements

In accordance with D.C. Cir. Rules 27(a)(4) and 28(a)(1), Petitioners certify that the following persons are parties, movant-intervenors, or amici curiae in this Court:

1. Parties

Petitioners: National Postal Policy Council, Major Mailers Association, Alliance of Nonprofit Mailers, MPA-The Association of Magazine Media, Association for Postal Commerce, American Catalog Mailers Association, and the United States Postal Service.

Respondent: Postal Regulatory Commission

2. Movant-Intervenors

Alliance of Nonprofit Mailers

MPA-The Association of Magazine Media

Valpak Franchise Association, Inc.

Association for Postal Commerce

United States Postal Service

3. Amici Curiae

At present, no parties have moved for leave to participate as *amici curiae*.

In accordance with FRAP 26.1 and D.C. Cir. Rule 26.1, Petitioners National Postal Policy Council (NPPC), Major Mailers Association (MMA), Alliance of

Nonprofit Mailers (ANM), Association for Postal Commerce (PostCom), MPA-The Association of Magazine Media (MPA), and the American Catalog Mailers Association (ACMA) each certify that none of them have any parent companies, and there are no parent companies that have a 10 percent or greater ownership interest in them.

NPPC is an association of large business users of letter mail, primarily the Automation rate category in First-Class Mail, with member companies from the telecommunications, banking and financial services, insurance, subscription service, and mail services industries.

MMA membership is comprised of companies that serve the communications, utilities, insurance, banking, financial services, healthcare, government, and cable/satellite industries. Despite some diversion to electronic channels, these industries still rely primarily on the Postal Service for delivery of their statements, invoices, remittance payments, and other business communications.

ANM is a membership organization of charities and other nonprofit organizations that rely on the mail to raise funds, build membership, distribute publications, and disseminate information. ANM seeks to promote the interests of its members, *inter alia*, by participating in administrative and civil litigation concerning the rates of postage paid by nonprofit organizations.

PostCom is a membership organization comprised of direct marketing firms, printers, letter shops, suppliers, and others who use or support the use of mail for business communication and commerce. Members of PostCom are customers, competitors, or licensees of the Postal Service for both postal and nonpostal services and products that are the subject of the Commission order under review.

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.

ACMA is a trade association established under Section 501(c)(6) of the Internal Revenue Code that represents the interests of businesses, individuals, and organizations engaged in and supporting cataloging. ACMA seeks to promote the interests of its members, *inter alia*, by participating in administrative and civil litigation concerning the rates of postage paid by its member organizations.

/s/ Eric S. Berman
Eric S. Berman

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

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,191 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Eric S. Berman
Eric S. Berman

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

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021, a true and accurate copy of the foregoing Motion was filed electronically with the Clerk of Court using the CM/ECF system, which sent notification of such filing to all counsel of record. The undersigned hereby certifies that all parties of record were notified by telephone prior to the filing of this motion.

/s/ Eric S. Berman
Eric S. Berman

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

EXHIBITS

Exhibit 1	Order No. 5818, *Order Denying Stay*, PRC Docket No. RM2017-3 (Jan. 19, 2021)
Exhibit 2	*Postal Service Notice of Calculations of Future Rate Authorities* ("Cooper Letter") (Dec. 31, 2020)
Exhibit 3	Comments of Alliance of Nonprofit Mailers, Association for Postal Commerce, and MPA – The Association of Magazine Media, PRC Docket No. RM2017-3 (Mar. 20, 2017)
Exhibit 4	Comments of Alliance of Nonprofit Mailers, American Catalog Mailers Association, Inc., Association for Postal Commerce, Idealliance and MPA-The Association of Magazine Media, PRC Docket No. RM2017-3 (Mar. 1, 2018)
Exhibit 5	Comments of the Alliance of Nonprofit Mailers, the Association for Postal Commerce, MPA – The Association of Magazine Media, the American Catalog Mailers Association, the Direct Marketing Association of Washington, The Nonprofit Alliance, the Envelope Manufaturers Association, the Saturation Mailers Coalition, and the Continuity Shippers Association, PRC Docket No. RM2017-3 (Feb. 3, 2020)

EXHIBIT 1

Postal Regulatory Commission
Submitted 1/19/2021 2:36:43 PM
Filing ID: 115864
Accepted 1/19/2021
ORDER NO. 5818

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners: Robert G. Taub, Chairman;
Ashley E. Poling, Vice Chairwoman;
Mark Acton;
Ann C. Fisher; and
Michael Kubayanda

Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products — Docket No. RM2017-3

ORDER DENYING STAY

(Issued January 19, 2021)

I. INTRODUCTION

On December 28, 2020, six parties jointly moved the Commission to stay the effective date of final rules recently promulgated by the Commission in this docket pending review by the United States Court of Appeals for the District of Columbia Circuit.[1] For the reasons discussed below, the Motion is denied.

[1] Motion for Stay Pending Judicial Review by the Alliance of Nonprofit Mailers, the Association for Postal Commerce, MPA – The Association of Magazine Media, National Postal Policy Council, Major Mailers Association, and the American Catalog Mailers Association, December 28, 2020 (Motion).

II. BACKGROUND

Pursuant to 39 U.S.C. § 3622(d)(3), the Commission in December of 2016 initiated a review of the ratemaking system for Market Dominant postal products in order to determine if that system had achieved the 9 statutory objectives specified by the Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3198 (2006), taking into account the 14 statutory factors also specified in that statute.[2] On December 1, 2017, the Commission released its findings, in which it concluded that the Market Dominant ratemaking system had not achieved the PAEA's statutory objectives, taking into account the statutory factors.[3] Accordingly, pursuant to 39 U.S.C. § 3622(d)(3), the Commission began the task of "by regulation[ ] mak[ing] modification[s] or adopt[ing] [an] alternative system . . . as necessary to achieve the objectives."[4] Following a Notice of Proposed Rulemaking[5] and a Revised Notice of Proposed Rulemaking,[6] that process ultimately culminated in a final order on November 30, 2020, in which the Commission adopted rule revisions that were designed to rectify the shortcomings of the existing ratemaking system identified in Order No. 4257 and to facilitate achievement of the PAEA's statutory objectives.[7]

---

[2] *See* 39 U.S.C. § 3622(d)(3) ("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).")

[3] Order on the Findings and Determination of the 39 U.S.C. § 3622 Review, December 1, 2017 (Order No. 4257).

[4] *See* 39 U.S.C. § 3622(d)(3) ("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.").

[5] Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products, December 1, 2017 (Order No. 4258).

[6] Revised Notice of Proposed Rulemaking, December 5, 2019 (Order No. 5337).

[7] Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products, November 30, 2020 (Order No. 5763).

Movants have sought review of Order Nos. 4257 and 5763 in the Court of Appeals.[8] They argue that the Commission should stay the effective date of the final rules, which took effect on January 14, 2021.[9] The Postal Service opposes the Motion.[10]

III. COMMISSION ANALYSIS

An agency may postpone the effective date of action taken by it, pending judicial review, when justice so requires. *See* 5 U.S.C. § 705. In analyzing such a motion, the Commission uses the four-part preliminary injunction test articulated in *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).[11] That test sets forth four factors to be considered: (1) the likelihood of success on the merits; (2) whether irreparable harm will occur to the requesting party if relief is not granted; (3) whether irreparable harm will occur to other parties if relief is granted; and (4) the public interest.[12] The Commission discusses each of these factors below.

A. The Likelihood of Success on the Merits

Courts place particular emphasis on the first *Jobbers* factor, the moving party's likelihood of success on the merits, often treating it as dispositive and declining to

---

[8] Motion at 1-2. *See* Clerk's Order, No. 17-1276 (D.C. Cir. filed Dec. 29, 2020) (consolidating Case Nos. 17-1276, 20-1505, and 20-1510).

[9] Order No. 5763 at 370 (stating that revised rules are to take effect 30 days after publication in the *Federal Register*); System for Regulating Market Dominant Rates and Classifications, 85 Fed. Reg. 81124 (December 15, 2020).

[10] Opposition of the United States Postal Service to Motion for Stay Pending Judicial Review, January 4, 2021 (Postal Service Opposition).

[11] *See* Docket No. R2013-11, Order Denying Stay and Establishing Schedule for Reporting Requirements, May 2, 2014, at 7-8 (Order No. 2075) (adopting the *Jobbers* test as the standard for evaluating motions under 5 U.S.C. § 705).

[12] *Jobbers*, 259 F.2d at 925; *see also Mills v. Dist. of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009).

consider the other factors if it is not met.[13] Movants argue that they are likely to prevail on the merits of their appeal for two reasons. First, they maintain that the Commission exceeded its statutory authority in promulgating the rule revisions it adopted in Order No. 5763. Motion at 2-5. Second, they maintain that the final rules adopted by the Commission are arbitrary and capricious. *Id.* at 5-7.

1. The Commission's Statutory Authority

With respect to the Commission's statutory authority, Movants characterize Order No. 5763 as having found that "the requirements of [paragraphs] (d)(1) and (d)(2) . . . may be discarded . . . because [paragraph] (d)(3) follows them sequentially." Motion at 3. They argue that this violates the plain language of 39 U.S.C. § 3622 and that there is "no authority holding that the third-in-order requirement in a statute somehow supersedes the prior two." *Id.*

Movants assert that the PAEA requires any ratemaking system established by the Commission under section 3622, whether promulgated under subsection (a) or under paragraph (d)(3), to limit price increases to no greater than CPI-U. *Id.* at 2-3. Movants argue that nothing in the PAEA expressly empowers the Commission to revoke specific provisions within section 3622, such as the price cap provisions contained in paragraphs (d)(1) and (d)(2). *Id.* at 3-4. Movants maintain that while paragraph (d)(3) requires the Commission to review its initial implementing regulations after 10 years, any revisions to those regulations are subject to the same requirements that applied when they were initially promulgated pursuant to subsection (a). *Id.* Movants argue that "Congress demonstrated that it knew precisely how to allow the

---

[13] *See, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019) (citations omitted); *Greater New Orleans Fair Housing Action Center v. United States Dep't of Housing & Urban Development*, 639 F.3d 1078, 1083 (D.C. Cir. 2011) (citations omitted).

Commission to authorize above-CPI pricing authority . . . ." if it had been Congress's intent to do so. *Id.* at 3.

Movants argue that the Commission's interpretation of section 3622 is constitutionally impermissible because "Congress cannot grant an agency the ability to amend or repeal statutes."[14] Movants also argue that certain statements made by Senator Susan Collins as to the legislative intent behind section 3622(d)(3), which the Commission cited to in Order No. 5763 and in prior orders, cannot override the PAEA's text, and, in any event, do not support the Commission's interpretation of section 3622.[15]

The Postal Service responds that Movants misrepresent the Commission's analysis of its statutory authority in Order No. 5763 by focusing solely on the sequencing of the paragraphs within subsection (d) and ignoring the Commission's much more extensive analysis with respect to section 3622's plain language and structure. Postal Service Opposition at 3-4. The Postal Service asserts that Movants' statutory interpretation of section 3622 is incorrect, as are their arguments regarding the constitutionality of the Commission's interpretation of section 3622 and the use of Senator Collins' statements. *Id.* at 3-5.

Commission analysis. Movants' arguments were all specifically addressed in Order No. 5763 and in prior orders. Movants misrepresent the Commission's interpretation of section 3622 as having been based primarily on the sequencing of the paragraphs within subsection (d) of section 3622. In actuality, the Commission's interpretation of section 3622 was grounded first and foremost in the statute's plain language. Paragraph (d)(3) plainly states that:

> Ten years after the date of enactment of the [PAEA] . . . the Commission shall review the [ratemaking] system . . . established under [section 3622]

---

[14] Motion at 4-5 (citing *Clinton v. State of New York*, 524 U.S. 417, 438-99 (1998); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)).

[15] Motion at 4-5 (citing *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

> to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines . . . that the system is not achieving the objectives . . . , taking into account the factors . . . , the Commission may, by regulation, make such modification or adopt such alternative system . . . as necessary to achieve the objectives.

39 U.S.C. § 3622 (d)(3). Giving the words in this provision their ordinary and unambiguous meaning in the absence of specific statutory definitions, the Commission interpreted paragraph (d)(3) to say that if the Commission's required review of the ratemaking system determined that the ratemaking system was not achieving the PAEA's statutory objectives, taking into account the statutory factors, then the Commission had discretion to, by regulation, either make changes to the existing ratemaking system or replace the existing ratemaking system with a different ratemaking system. Order No. 5763 at 40-42. The Commission noted that the only limit paragraph (d)(3) placed on the Commission's ability to make such changes was that they must be "necessary" to achieve the statutory objectives. *Id.* at 42, 46.

Based on both the text and structure of section 3622, the Commission explained that paragraph (d)(3)'s scope unambiguously extends to all aspects of the existing ratemaking system under section 3622. *Id.* at 42. The Commission found that the consistent use of the word "system" throughout section 3622 indicated that all of the provisions of section 3622 formed part of the same "system" of ratemaking that was subject to modification or replacement under paragraph (d)(3). *Id.* at 42-43. The Commission found that this conclusion was *confirmed* by the structure of subsection (d), in which paragraph (d)(3)'s review provision follows the price cap provisions set out in paragraphs (d)(1) and (d)(2), but that was far from the only basis for the Commission's conclusion. *Id.* at 43. That conclusion was also based on textual differences between paragraph (d)(3) and subsection (a), as well as section 3622's overall structure, in which any regulatory action taken under paragraph (d)(3) is premised on a finding that the ratemaking system established under subsection (a)—which was required to include certain mandatory features including the price cap provisions that Movants are particularly concerned with—has failed to achieve the statutory objectives, taking into account the statutory factors. *Id.* at 43-45.

The Commission also specifically addressed the argument that paragraphs (d)(1), (d)(2), and (d)(3) are *each* requirements of the ratemaking system, and that the scope of the Commission's authority under paragraph (d)(3) is limited to the scope of the Commission's authority under subsection (a). *Id.* at 48, 51-55. The Commission found that this argument ignored the actual text of section 3622, including the consistent use of the word "system" and the fact that paragraph (d)(3) does not place any limit on the Commission's authority to promulgate a modified or alternative ratemaking system other than that such changes must be necessary to achieve the statutory objectives. *Id.* at 48, 52-53. The Commission also found that this argument ignored textual and structural differences between paragraph (d)(3) and subsection (a), as well as the overall structural context of section 3622. *Id.* at 48, 54-55.

The Commission also specifically addressed the argument that if Congress had intended to permit the price cap to be abrogated, it would have done so explicitly. As the Commission has explained, it was unnecessary for paragraph (d)(3) to include a sunset provision with respect to the CPI-U price cap provisions or otherwise to explicitly reference them because paragraph (d)(3) does not automatically remove the CPI-U price cap (or any other feature of the existing ratemaking system). *Id.* at 49-50. Congress's provision that the Commission *may* make modifications to the existing ratemaking system or adopt an alternative ratemaking system *as necessary to achieve* the PAEA's statutory objectives is both permissive and highly dependent on the findings from the Commission's required review of the existing ratemaking system. If the Commission had found that the existing ratemaking system was achieving the PAEA's statutory objectives, taking into account the statutory factors, the Commission's authority under paragraph (d)(3) would not have been invoked and the existing ratemaking system would have remained unchanged. *Id.* Similarly, if the Commission had found that the ratemaking system was not achieving the statutory objectives, taking into account the statutory factors, but that failure was not attributable to the CPI-U price cap provisions, then there would have been no need to address those provisions.

The Commission also specifically addressed Movants' constitutional arguments. With regard to the Presentment Clause, the Commission first noted that the promulgation of rules by an administrative agency does not constitute a legislative act. Order No. 5337 at 53-54. Paragraph (d)(3) does not repeal anything; it expressly *authorizes* the Commission to, by regulation, take action to execute the law by remedying a failure to achieve the PAEA's statutory objectives, including, if necessary, by adopting an alternative to the existing CPI-U price cap system. Order No. 5763 at 56-57. The Commission also found that cases such as *Clinton* are distinguishable from the instant case, particularly because under the PAEA, the Commission's discretion in promulgating regulations pursuant to paragraph (d)(3) is circumscribed by the 9 statutory objectives set out in section 3622(b).[16]

Finally, the Commission specifically addressed Movants' arguments concerning Senator Collins' statement in Order No. 5763 and prior orders. The Commission found that floor statements by key individuals, such as legislative sponsors, can help illuminate the purpose of a piece of legislation.[17] The Commission also found that Senator Collins' statement confirmed that the congressional sponsors of the PAEA

---

[16] Order No. 5337 at 54-55. *MCI*, which Movants cite in their Motion, is similarly distinguishable. In that case, the Supreme Court found that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI*, 512 U.S. at 229. That case, however, involved a statute that required regulated entities to file tariffs with a regulatory body, but authorized the regulatory body to "modify any requirement made by or under . . . this section . . . ." *Id.* at 224. The question was whether the regulatory body's ability to make such "modifications" permitted it to dispense with the requirement that regulated entities file tariffs at all. *Id.* at 220. The Court found that it could not, because the tariff-filing requirement formed the "heart of" the statute in question. *Id.* at 229.

Unlike the statute at issue in *MCI*, which permitted modifications to a requirement but not abrogation of the requirement itself, the PAEA expressly contemplates that the requirements of the ratemaking system promulgated in its initial form under subsection (a) are subject to modification or replacement under paragraph (d)(3) if the Commission finds, after reviewing the ratemaking system 10 years after the PAEA's enactment, that the ratemaking system as promulgated under subsection (a) has failed to achieve the PAEA's statutory objectives, taking into account the statutory factors.

[17] Order No. 5763 at 64-65; Order No. 5337 at 45 (citing *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976)).

contemplated that the Commission would have broad discretion following its statutory review of the ratemaking system—including deciding whether to maintain the price cap in its existing form, modify it, or replace it. Order No. 5763 at 62-64. Importantly, Senator Collins' statement was not the sole or even the primary basis for the Commission's interpretation; it merely served to confirm the reasonableness of the Commission's interpretation to the extent that section 3622 might be construed as ambiguous. Order No. 5763 at 61-65.

Throughout each step of this proceeding, the Commission has exhaustively responded to comments addressing its legal authority, including comments lodging the same objections that Movants raise in this Motion. *See* Order No. 4258 at 4-25; Order No. 5337 at 16-58; Order No. 5763 at 32-71. The Commission has comprehensively evaluated section 3622 pursuant to the framework set out in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and found that paragraph (d)(3) unambiguously grants the Commission the authority to modify or replace any part of the ratemaking system, including the CPI-U price cap provisions, as necessary to achieve the PAEA's statutory objectives. *See* Order No. 4258 at 14-25; Order No. 5337 at 33-44; Order No. 5763 at 32-59. Moreover, the Commission has found that even if paragraph (d)(3) were construed to be ambiguous, the Commission's interpretation of paragraph (d)(3) is reasonable and thus would be entitled to *Chevron* deference. *See* Order No. 4258 at 14-25; Order No. 5337 at 44-57; Order No. 5763 at 60-68. In light of the extensive analysis the Commission has already applied to this issue, especially given that Movants have not raised any arguments that have not already been addressed, the Commission finds it unlikely that Movants would prevail on the merits of their arguments on appeal.

2. The Alleged Arbitrariness of the Final Rules

With respect to the alleged arbitrariness of the final rules adopted by the Commission, Movants argue that "the Commission has failed to establish that the Postal

Service suffers from a revenue problem rather than a cost control problem." Motion at 5. They assert that the Postal Service's revenues have increased every year since FY 2017, but its operating expenses have increased by greater amounts. *Id.* They assert that the final rules provide multiple forms of additional rate authority for the Postal Service but no mechanisms or penalties to force the Postal Service to restrain its costs. *Id.* at 5-6.

In the same vein, they argue that the final rules weaken the existing ratemaking system's incentives for efficiency. *Id.* at 6. In particular, they state that "[e]ven if the Commission were correct that the density and retirement authority address costs outside of the Postal Service's direct control, providing rate authority to cover these costs reduces the incentive to reduce costs within the Postal Service's control." *Id.*

Movants also argue that "the density authority is . . . arbitrary and capricious because it provides additional authority based on supposed unit cost increases in market dominant products without concern for the Postal Service's overall financial condition." *Id.* They assert that "increases in package volume have offset revenue losses resulting from COVID-related volume declines over the past year, allowing the Postal Service to increase revenue . . . .[,]" but "the Commission's rules would provide the Postal Service with additional rate authority to offset losses that . . . do not exist, and . . . would . . . provid[e] the Postal Service with far more rate authority than the Commission contemplated when it developed this proposal . . . ." *Id.* at 6-7. They maintain that "[t]he Commission's failure to resolve this contradiction or modify its proposal in light of changes in the industry over the past year . . . render its final rule on density authority unlawful." *Id.* at 7.

The Postal Service responds that cost reductions and efficiency gains are not the sole objective for the ratemaking system, but must be balanced against other statutory objectives such as the Postal Service's financial stability and whether rates are just and reasonable. Postal Service Opposition at 6, 7. The Postal Service states that in identifying the cause of its net losses it is false to assume that there is a binary choice between "revenue" and "costs," as opposed to both. *Id.* at 6. The Postal Service argues that Movants are essentially trying to have it both ways by arguing that only a strict application of a CPI-based price cap is sufficient to incentivize efficiency and cost control, while arguing at the same time that the Postal Service's losses over the past 14 years, which all occurred under a strict CPI-based price cap, were due primarily to insufficient cost controls. *Id.* at 6-7. The Postal Service asserts that the record in this docket establishes that the cost-savings opportunities available to the Postal Service are limited, which undermines Movants' argument that the Postal Service's losses are attributable solely to insufficient cost controls. *Id.* at 7. The Postal Service states that Movants have not identified any cost-savings opportunities large enough to negate the need for additional revenue. *Id.* at 7-8. Finally, the Postal Service maintains that, contrary to Movants' argument, the density-based rate authority mechanism does account for differences between Market Dominant and Competitive products with respect to mail density. *Id.* at 8. It accomplishes this in two ways: first by calculating Market Dominant density and total density separately and using whichever produces less rate authority, which protects Market Dominant mailers from being harmed by negative volume changes in Competitive products; and second, by implicitly accounting for the relative cost elasticities of each cost segment. *See id.* at 8.

Commission analysis. As the Commission has explained, the modifications to the ratemaking system adopted in this docket were necessary to achieve the PAEA's statutory objectives pursuant to 39 U.S.C. § 3622(d)(3). Order No. 5337 at 70-71, 88-94, 153, 163-165; Order No. 5763 at 72-79, 100-107, 194-196, 269, 341-342. In Order No. 4257, the Commission identified deficiencies with the existing ratemaking system that prevented it from achieving the PAEA's statutory objectives. Of particular relevance with respect to Movants' allegations are the Commission findings with respect to Objectives 1, 5, and 8.

Objective 5 provides that the ratemaking system is to "assure adequate revenues, including retained earnings, to maintain financial stability." 39 U.S.C. § 3622(b)(5). The Commission found that while the existing ratemaking system had generally enabled the Postal Service to achieve short-term financial stability, medium-and long-term financial stability had not been achieved because total revenue had been inadequate to cover total costs, resulting in the Postal Service suffering a net loss every year during the first decade of the PAEA era. Order No. 4257 at 165-169, 247-249. Over time, the accumulation of net losses resulted in accumulated deficits, which prevented the Postal Service from being able to achieve retained earnings. *Id.* at 169-171. The Commission determined that the Postal Service had not had any working capital (assets in excess of liabilities), its capital expenditure ratio had declined, and its debt ratio had steadily increased. *Id.* at 172-175.

Objective 1 provides that the ratemaking system is to "maximize incentives to reduce costs and increase efficiency." 39 U.S.C. § 3622(b)(1). The Commission found that the Postal Service had been able to reduce costs and increase operational efficiency, but not by enough to achieve financial stability. Order No. 4257 at 184-198, 203-208, 216-219, 221-226. The Commission noted that the Postal Service's unique cost structure constrained its ability to further reduce costs—specifically its pool of common costs; the labor-intensive nature of its business; its universal service obligation; and its limited ability due to binding arbitration requirements to set wage rates, adjust its employee complement, and/or reduce workhours. *Id.* at 198-200.

Objective 8 provides that the ratemaking system is to "establish and maintain a just and reasonable schedule for rates . . . ." 39 U.S.C. § 3622(b)(8). The Commission found that while rates had been just for mailers, in terms of not being excessive, rates had nevertheless not been reasonable because rates for certain products and mail classes had been insufficient to cover their attributable costs. Order No. 4257 at 142-145, 226-236. The Commission attributed this, at least in part, to the price cap limitation. *Id.* at 236.

The Commission made specific findings as to why the existing ratemaking system had been unable to achieve these objectives. Specifically, the Commission found that:

> [t]he operating environment on which the PAEA was designed changed quickly and dramatically after the PAEA was passed, and this made it challenging for the ratemaking system under the PAEA to achieve the goals

> it was designed to achieve. At the time it created the new PAEA system, Congress anticipated that the CPI-U price cap would enable the Postal Service to achieve sufficient revenues to cover all of its operating costs and statutorily mandated obligations while at the same time motivate the Postal Service to cut costs and become more efficient. This judgment was based on the appearance of the Postal Service's financial position being relatively stable in FY 2006 and the observable [pre-PAEA] correlation between increases in Postal Service expenses, Postal Service revenues, and the CPI. Generally, Market Dominant revenue had been increasing from FY 1997, reaching its peak in FY 2006.
>
> However, after the enactment of the PAEA, a number of converging macro-level circumstances such as the Great Recession, a rare period of deflation post-Great Recession, and emergent technological trends contributed to the Postal Service's inability to adequately respond to Postal Service-specific challenges such as declining mail density, newly imposed statutory retirement obligations, and long-standing issues with non-compensatory rates. While the nature of Postal Service-specific challenges such as the longer-term diversion of mail to electronic forms of communication may have been somewhat foreseeable, their coincident impact was accelerated by circumstances occurring after the PAEA's enactment, rendering the speed and extent of their impact unforeseeable at the time of the PAEA's enactment. Therefore, [from FY 2007 to FY 2016] the correlation between the growth in Postal Service expenses and revenue and the growth in CPI began to diverge. This sudden divergence made it extremely challenging for the Postal Service to manage retained earnings through sustained net income.
>
> The existing ratemaking system was unable to adequately respond to this confluence of circumstances. The Postal Service was unable to generate sufficient revenue to cover its total costs, thereby resulting in a net loss for each and every year of the PAEA era. The consecutive net losses resulted in an accumulated deficit. The Postal Service was unable to cover the revenue shortfall despite maximum use of its borrowing authority and a sharp decline in capital investments. While some cost reductions and efficiency gains were achieved post-PAEA, they were insufficient to achieve overall financial stability and/or retained earnings.

Order No. 5763 at 282-284 (citing Order No. 4257 (internal citations and marks omitted)). The breakdown in correlation between CPI-U and the Postal Service's costs and revenue is consistent with Movants' observations concerning the Postal Service's operational expenses increasing by greater amounts than revenue.

Movants focus only on cost control and operational efficiency under Objective 1, but 39 U.S.C. § 3622(d)(3) requires a modified or alternative ratemaking system to be designed to balance *all* of the PAEA's objectives, including Objectives 5 and 8. Order No. 5763 at 269, 301, 303. Throughout this docket, the Commission has sought to tailor modifications to identified deficiencies with the existing ratemaking system in a way that strikes an appropriate balance between all the statutory objectives. *Id.* at 302. The evidence reviewed in this docket indicates that existing and future opportunities for cost reductions and efficiency gains by the Postal Service may be more limited than in the past, which supports the conclusion that cost reductions and/or efficiency gains alone are not enough to address the Postal Service's challenges. *Id.* at 340-341. As the Postal Service notes, Movants do not identify any cost-savings opportunities large enough to negate the need for additional revenue.

The Commission has therefore focused on providing the Postal Service with additional revenue to address discrete sources of costs over which the Postal Service does not have direct control, and thus cannot address through cost reductions or efficiency improvements. Forcing the Postal Service to internalize costs which it has no ability to control undermines its ability to achieve medium- and long-term financial stability. Order No. 5337 at 77. Financial pressure due to such costs inhibits the Postal Service's ability to make needed capital investments in order to reduce costs and improve efficiency. Order No. 5763 at 301, 303.

The density-based rate authority and retirement-based rate authority mechanisms that the Commission has adopted are both directed at cost drivers outside the Postal Service's direct control. With respect to the density-based rate authority mechanism, the Commission determined that the Postal Service does not have direct control over exogenous increases in per-unit costs caused by declines in mail density. Order No. 5763 at 77, 87-88. Furthermore, because the portion of overall cost increases caused by such declines are not linked to the inflation rate, the existing CPI-based ratemaking system does not provide adequate rate authority to offset them. *Id.* The Commission also determined that density-driven per-unit cost increases cannot be offset through operational changes, as these increases are the result of the costs of servicing the growing network (and other costs that only indirectly depend on volume) being spread over fewer pieces of mail. *Id.* at 90. With respect to the retirement-based rate authority mechanism, the Commission likewise determined that the Postal Service does not have direct control over such costs, and there are no meaningful cost control measures that the Postal Service could take to reduce them. *Id.* at 111, 118. With respect to the additional rate authority the Commission approved for non-compensatory mail classes, the Commission balanced the need for cost reductions and efficiency improvements against the failure of the existing ratemaking system to achieve compensatory rates and determined that, to date, cost reductions and efficiency improvements have not been sufficient in and of themselves to mitigate the Postal Service's growing revenue problem with respect to non-compensatory mail classes. *Id.* at 194-195.

Despite these targeted sources of additional revenue, however, under the modifications the Commission has adopted the Postal Service will not be able to rely on rate increases alone, because the additional revenue sources are not enough in and of themselves to enable the Postal Service to achieve financial health. Order No. 5763 at 270, 302, 341-342. The Postal Service will still have to pursue cost reductions and efficiency improvements. *Id.* The Commission determined that inclusion of the density-based rate authority mechanism in the ratemaking system should not reduce the Postal Service's incentives for efficiency because it is designed to calculate the *expected* amount of cost increase due to density declines, not the actual increase. *Id.* at 73, 85-87, 93-94, 303-304. If the Postal Service is able to offset some of that expected increase through cost reductions and/or efficiency improvements, then it will be able to retain the associated savings. *Id.* The Commission likewise determined that inclusion of the retirement-based rate authority mechanism in the ratemaking system should not reduce the Postal Service's incentives for efficiency because all such authority must be remitted towards the corresponding statutory liabilities. *Id.* at 111, 118, 305.

Additionally, in recognition of the fact that the final rules authorize new sources of rate authority for the Postal Service, the Commission adopted new reporting requirements with respect to the Postal Service's costs and cost control efforts. Order No. 5763 at 226-241. These are designed to increase transparency for both the Commission and postal stakeholders with respect to the Postal Service's costs and cost control efforts; incentivize the Postal Service to improve the robustness of its cost-benefit analyses; and drive the Postal Service to identify the underlying causes of cost increases, which should enable it to undertake targeted responses. *Id.* at 238. The Commission also committed to exploring in a separate docket potential further incentive-based modifications to the ratemaking system in order to, *inter alia*, maximize incentives for cost reductions and efficiency gains.[18]

Movants' argument that the density-based rate authority mechanism would provide additional rate authority to offset losses that did not exist during FY 2020 (due to the high level of Competitive package volume during that period) misunderstands the purpose of the density-based rate authority mechanism. As the Commission has explained, the density-based rate authority mechanism is designed to offset the unavoidable increase in per-unit costs as fewer mailpieces are delivered to more delivery points; it is not designed to offset specific losses or generate a specific amount of revenue. Order No. 5763 at 28-29. Basing the density mechanism on foregone revenue or contribution, as opposed to the *expected* unavoidable increase in per-unit costs due to loss of density, would weaken the Postal Service's incentives to pursue cost reductions and increased operational efficiency by guaranteeing it compensation for foregone revenue resulting from decreases in density. *Id.* at 95.

---

[18] *Id.* at 132-180. The Commission initiated this docket on January 15, 2021. *See* Docket No. RM2021-2, Advance Notice of Proposed Rulemaking Regarding Performance Incentive Mechanism, January 15, 2021 (Order No. 5816).

Because the density mechanism is designed to offset the particular, unavoidable increase in per-unit costs caused by declining density, as opposed to compensating for the losses in density themselves, it fundamentally does not matter if due to large density declines the resulting authority is higher in a particular year than the historical data would have suggested, nor does it matter if Competitive product revenue in a particular year is sufficient to offset some portion of the expected cost increases caused by the decline in density. Increases in Competitive product volume increase the number of mailpieces across which such costs are spread, and to account for this, the density formula limits the amount of rate authority generated when Competitive product volume trends are more favorable than Market Dominant volume trends. As a result, the amount of available density-based rate authority generated from loss of volume is necessarily lower when Competitive product volume is increasing. In addition, the density formula also implicitly accounts for the relative cost elasticities of each cost segment, which captures changes in the mail mix. Order No. 5763 at 94-95, App'x A at 10.

Throughout this docket, the Commission has been open and transparent. At each stage of the process, the Commission solicited and considered public comments—over 500 sets of them, spanning thousands of pages. The Commission's initial findings with respect to reviewing the initial 10 years of the existing ratemaking system spanned nearly 300 pages, *see generally* Order No. 4257, and its 3 rule proposals averaged over 250 pages each, not counting appendices and attachments, and reports by experts retained by the Commission. *See generally* Order Nos. 4258, 5337, 5763. At multiple points, the Commission has been persuaded to change its proposals based on comments received. *See, e.g.*, Order No. 5337 at 62, 64-70, 105, 132-180, 172, 193, 201, 212-231. In other instances, the Commission has thoroughly explained its reasons for declining to change its proposals in light of comments received, including comments addressing the very same issues Movants now raise. The voluminous record that has been compiled in this docket reflects that the Commission has approached it carefully and thoughtfully and has based its conclusions on substantial evidence. In the end, the

Commission was required to balance the statutory objectives using its experience and judgment. The Commission has provided justifications for all of the findings and rule revisions in this docket that are both reasonable and reasonably explained.[19] Therefore, the Commission does not find that a reviewing court would find the rules adopted in this docket to be arbitrary or capricious.

B. Irreparable Harm to Movants

Movants argue that if a stay is not granted, their member organizations will be forced to pay higher postage rates with no recourse to obtain a refund if those rates are later found to be unlawful. Motion at 7-8. They argue that this will cause them to suffer "devastating" financial harm due to "severe price spikes." *Id.* at 8. They argue that "[t]his is particularly true given the extent of the increase . . . and the total lack of predictability as to when the increase will be in effect." *Id.*

The Postal Service responds that Movants' concerns with respect to damaging price increases are purely speculative—first because Movants have not provided any quantitative evidence of the effect of price increases; and second because the provision of additional rate authority by the Commission does not automatically translate into price increases. Postal Service Opposition at 9-10. The Postal Service argues that Movants are once again trying to have it both ways by arguing that the Postal Service will not suffer any financial harm if the final rules are stayed during the period that appellate litigation is pending, but Movants will be financially devastated if the final rules are in effect during that same period. *Id.* at 10.

---

[19] *Northwestern Corp. v. FERC*, 884 F.3d 1176, 1181 (D.C. Cir. 2018) (Under the Administrative Procedure Act's arbitrary and capricious standard an agency's decision must be reasonable and reasonably explained).

Commission analysis. As the moving party, Movants bear the burden of persuasion with respect to their claims.[20] Movants must offer more than bare allegations to substantiate the harm they allege that they will incur.

Movants' allegations of harm are speculative and conclusory. As the Commission has repeatedly explained, it is the Postal Service as the operator, not the Commission as the regulator, that sets prices. Order No. 5763 at 81, 270, 346. The provision of additional rate authority to the Postal Service does not automatically or necessarily translate into price increases. The ratemaking system sets the outer parameters of rates that the Postal Service may charge, but the Postal Service's Board of Governors must exercise its business judgment in proposing rates within those parameters that are attuned to what the market will bear. Furthermore, the price cap is applied at the class level, which means that the Postal Service is able to exercise its pricing flexibility independently within each mail class and raise, decrease, or hold steady prices for individual products and categories of mail within a class as long as the class complies with the class's overall price cap. The additional sources of rate authority that the Commission has approved are designed to afford the Postal Service more flexibility in setting rates that are compensatory and that address cost drivers outside of the Postal Service's direct control, but it is speculative to presume what the actual rates proposed by the Postal Service will be. And for that same reason, it is speculative to assert that any such rates would be "devastating" to Movants. Furthermore, as the Postal Service notes, even if it were known what the future rates will be, Movants do not offer any quantitative evidence that would enable an evaluation of the impact that rates under the final rules would have on their member organizations' finances.

In addition, the injury Movants allege is not imminent. The Postal Service must give 90 days' notice of its intention to increase rates before implementation, and the

---

[20] *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014).

Commission must favorably review proposed rates before they can go into effect. *See* final 39 CFR §§ 3030.121, 124, 125, 126, Order No. 5763 Att. A at 7-8, 12-15. Once the Postal Service proposes actual rates, the rates will be subject to Commission review in a further proceeding that utilizes notice and comment procedures, and that proceeding will be subject to judicial review. *Id.*; *see also* 39 U.S.C. § 3663. Movants concede that this process could not be completed before the summer of 2021, at the earliest. Motion at 11.

For these reasons, Movants have not established that they will suffer irreparable harm in the absence of a stay.

C. Irreparable Harm to Other Parties

Movants argue that granting a stay would simply preserve the status quo and would not pose a significant financial risk to the Postal Service. Motion at 9. They cite the Commission's finding from Order No. 4257 that the Postal Service has maintained short-term financial stability under the existing ratemaking system, and they assert that since Order No. 4257 was issued the Postal Service has improved both its revenues and its cash reserves. *Id.* at 9-10. They also assert that the Postal Service's liquidity has improved dramatically since Order No. 4257 was issued, largely as a result of recent legislation directed at COVID-19 relief. *Id.* at 10. They maintain that as a result of this liquidity "the Postal Service is well positioned from a cash perspective to weather any temporary setbacks that might occur while the appeal is pending[,]" as well as to "fund major improvements." *Id.* at 10. Finally, they argue that even if the Commission were to prevail on appeal, the additional rate authority approved in Order No. 5763 "would only be delayed by several months[,]" because "[t]he earliest prices [under the modified ratemaking system] could take effect would be some time in the summer of 2021, at which point the appellate proceedings will already be well underway." *Id.* at 11. They argue that such a "limited delay . . . would not have a material impact on the Postal Service's finances or the ability of the rules to fulfill their stated purpose once fully implemented." *Id.*

The Postal Service responds that Movants exaggerate the state of its liquidity. Postal Service Opposition at 10. It states that while the recent legislation Movants refer to permits the Postal Service to borrow up to $10 billion from the U.S. Department of the Treasury, that funding is limited to covering operating expenses, and it is only available upon terms and conditions agreed to by the U.S. Department of the Treasury, with respect to which the Postal Service and the U.S. Department of the Treasury have not yet come to an agreement. *Id.* at 10-11. As a result, the Postal Service maintains that even if it were able to access that funding, it could not be used for anything other than operating expenses. *Id.* at 11.

The Postal Service asserts that the cash reserves Movants refer to "amount[ ] to little more than two months of operating expenses, an amount far below the level that . . . should provide a reasonable cushion for an organization like the Postal Service." *Id.* (footnote omitted) (citation omitted). The Postal Service argues that:

> The inadequacy of current liquidity is all the more palpable in light of the Postal Service's comparably distressed financial state and outlook, its cost-control and revenue constraints, and the fact that it has preserved even this scant liquidity only by accumulating a far greater backlog of unpaid bills[,] [a]nd the cushion would only become smaller if the Postal Service were to accelerate capital spending, as [Movants] suggest.

Id. (citation omitted).

The Postal Service also states that there is no way of knowing how long appellate litigation will take, and a stay could cause real, lasting harm to it. *Id.* at 12. The Postal Service asserts that if the revised rules do not take effect for another year it could miss out on a whole year of additional rate authority, which would be particularly damaging because without density-based rate authority based on FY 2020, the acceleration in density-based cost increases stemming from volume declines associated with the COVID-19 pandemic will go uncompensated. *Id.* at 12-13. The Postal Service asserts that it has been approximately 4 years since the Commission initially determined in Order No. 4257 that the Postal Service lacked medium- and long-term financial stability, and there is no reason to further delay remediating those deficiencies in the ratemaking system. *Id.* at 13.

Commission analysis. With respect to the Postal Service's finances, the Commission found in Order No. 5763 that they remain unstable.[21] The Commission found that the Postal Service's liabilities far exceed its assets, and its liquidity has been maintained only by defaulting on statutorily-mandated payments.[22] The Postal Service's working capital has declined since Order No. 4257 was issued in 2017, its debt ratio has increased, and it still has very limited capacity for capital expenditure.[23]

The CARES Act, Pub. L. 116-636 (March 27, 2020), provided the Postal Service with $10 billion in additional borrowing authority above and beyond the $15 billion ordinarily available to it pursuant to 39 U.S.C. § 2005(a).[24] However, as the Postal Service notes, funds may only be borrowed pursuant to the CARES Act if "the Postal Service will not be able to fund operating expenses without borrowing money," and any funds so borrowed can only be used for operating expenses; they cannot be used for capital investments or to service the Postal Service's debt. *Id.* Appropriations legislation enacted on December 27, 2020 removed the requirement that the Postal Service repay funds borrowed pursuant to the CARES Act, but it did not remove the requirement that such funds can only be borrowed if necessary to fund operating expenses, and can then only be used for operating expenses. Pub. L. 116-260 § 801

---

[21] Order No. 5763 at 26 (citing Docket No. ACR2019, Postal Regulatory Commission, Financial Analysis of the United States Postal Service Financial Results and 10-K Statement, Fiscal Year 2019, May 7, 2020, at 2-6 (FY 2019 Financial Analysis) (discussing the Postal Service's continuing financial instability)).

[22] *Id.* (citing FY 2019 Financial Analysis at 4, 27-38 (explaining that the Postal Service has defaulted on most of the statutorily-mandated payments for Retiree Health Benefits since FY 2008, and, beginning in FY 2017, has defaulted on statutorily-mandated payments for the amortization of unfunded retirement benefits to the Federal Employee Retirement System (FERS) and the Civil Service Retirement System (CSRS)).

[23] *Id.* (citing FY 2019 Financial Analysis at 31-34).

[24] Pub. L. No. 116-636 § 6001(b). Only $1 billion of the Postal Service's $15 billion in standing borrowing authority is currently available to it. *See* United States Postal Service, 2020 Report on Form 10-K, November 13, 2020 (FY 2020 10-K Report).

(December 27, 2020). As a result, access to this additional borrowing authority and any associated temporary increase in liquidity would at most improve the Postal Service's short-term financial stability, meaning its ability to meet its immediate day-to-day operational needs. Order No. 4257 at 159-165. Borrowing more money to cover operating expenses, however, would do nothing to address the net losses and accumulated deficits that undermine the Postal Service's medium- and long-term financial stability, which the Commission identified in Order No. 4257 as a primary deficiency in the existing ratemaking system. *Id.* at 247-249. It is these net losses that the density-based rate authority, retirement-based rate authority, and non-compensatory class modifications to the ratemaking system adopted in Order No. 5763 were designed to address.

As the Postal Service notes, there is no way of knowing how long appellate litigation might take. Order No. 4257 identified clear deficiencies in the existing ratemaking system that have only become more acute since Order No. 4257 was issued. The final rules the Commission adopted are targeted at giving the Postal Service the tools necessary to begin remediating those deficiencies. Those tools include increased rate authority to address non-compensatory mail classes and sources of costs that are outside the Postal Service's direct control. The Postal Service's liquidity remains low and the Postal Service continues to struggle meeting its statutorily-required obligations.[25] Delaying the implementation and use of those tools would only make the Postal Service's immediate problems worse and its medium- and long-term financial stability more difficult to achieve. As the Postal Service asserts, if the final rules do not take effect for another year (or more), then it will be deprived of rate authority that the Commission has determined it needs to begin remediating its financial problems. Therefore, the Commission finds that staying the effective date of its final rules would have negative financial consequences for the Postal Service.

---

[25] *See* United States Postal Service, FY 2021 Integrated Financial Plan, November 24, 2020, at 9-10.

D. The Public Interest

Movants once again assert that the financial consequences to their members of denying a stay would be "dire," and they assert that "[their] interests are part and parcel with the public interest" because "volume loss caused by above-CPI price increases will negatively impact readers of print magazines, newspapers[ ] and newsletters, catalog shoppers, nonprofit organizations, donors, and printers[,]" resulting in "[a] wide swath of American consumers, businesses, and tax-exempt organizations . . . be[ing] harmed . . . ." Motion at 13. They also argue that the public interest supports a stay because the Commission exceeded its statutory authority in promulgating the rules adopted in Order No. 5763. *Id.*

The Postal Service responds that Movants' claims about price increases are speculative because the provision of additional rate authority by the Commission does not automatically translate into price increases, and it is unclear whether, when, and by what amounts postal prices would actually increase under the final rules. Postal Service Opposition at 14. The Postal Service argues that Congress intended for the ratemaking system to be reasonably compensatory to provide for the postal system's current and future needs, and as a result "the public is not harmed by correcting unlawfully and unfairly low rates." *Id.* The Postal Service argues that "failing to do so would harm the mailing and taxpaying public by prolonging the Postal Service's financial instability, and it would continue to unfairly privilege current ratepayers at the expense of future postal users who would benefit from the sort of investments that a more stable Postal Service could make." *Id.* Therefore, the Postal Service maintains that "a stay would perpetuate and deepen the harm that the American public has already suffered from a financially troubled postal system and would continue to put the future financial stability of the Postal Service at risk." *Id.*

Commission analysis. The Commission finds that the public interest favors a ratemaking system that appropriately balances all of the statutory objectives Congress established for it. The PAEA's statutory objectives are in many respects cross-cutting and they require tradeoffs between different aspects of the public interest. Movants and other mailers certainly have an interest in keeping postage rates as low as possible, but the Postal Service and the general public also have an interest in the Postal Service being able to generate enough revenue to remain viable as a public service. Congress charged the Commission with balancing the statutory objectives using its experience and judgment, and the revised rules the Commission has adopted in this docket are designed to achieve that end.

The Commission has found that the range of prices produced by the modified ratemaking system will be just and reasonable to both the Postal Service and to mailers. Order No. 5763 at 352-359. Moreover, given the serious financial constraints that the Commission has identified the Postal Service as operating under, implementation of the modified ratemaking system is consistent with the public's strong interest in having a viable and strong Postal Service that is capable of fulfilling its statutory and Constitutional duties as a fundamental service to the American public. *See* U.S. Const. art. I, § 8, cl. 7; 39 U.S.C. § 403. Therefore, the Commission does not find that staying the final rules would be in the public interest. Movants' argument with respect to the Commission's statutory authority is addressed *supra* at 4-9.

IV. CONCLUSION

The Commission finds that Movants have failed to carry their burden of persuasion with respect to the most significant *Jobbers* factor—their likelihood of prevailing on the merits on appeal. Movants have also failed to present convincing evidence to show that they would be irreparably harmed in the absence of a stay. Movants have not provided sufficient evidence to demonstrate that either the process or the ultimate substantive approaches implemented by the Commission are arbitrary or capricious. At the same time, the Commission finds that delaying implementation of the final rules adopted in this docket would prolong the Postal Service's financial difficulties and would not be in the public interest. Based on these findings, the Commission does not find good cause to stay the effective date of the final rules.

It is ordered:

The Motion for Stay Pending Judicial Review by the Alliance of Nonprofit Mailers, The Association for Postal Commerce, MPA – The Association of Magazine Media, National Postal Policy Council, Major Mailers Association, and the American Catalog Mailers Association, filed December 28, 2020, is denied.

By the Commission.

Erica A. Barker
Secretary

EXHIBIT 2

Postal Regulatory Commission
Submitted 12/31/2020 9:59:51 AM
Filing ID: 115734
Accepted 12/31/2020

CORPORATE AND POSTAL BUSINESS LAW SECTION
LAW DEPARTMENT

UNITED STATES POSTAL SERVICE

December 31, 2020

Hon. Erica A. Barker, Secretary
Postal Regulatory Commission
901 New York Avenue NW, Suite 200
Washington, D.C. 20268-0001

Dear Ms. Barker,

On behalf of the United States Postal Service, I am submitting calculations of future density rate authority and retirement rate authority to become available upon the Commission's determination pursuant to the final rule issued on November 30, 2020 (Order No. 5763, Docket No. RM2017-3). These calculations are presented in the attached Microsoft Excel file and are based on data submitted with the Postal Service's Annual Compliance Report (ACR), filed on December 29, 2020.

In addition, as the ACR makes evident, revenues did not cover attributable costs for two mail classes in FY2020: Periodicals and Package Services.

Finally, at page 196 of Order No. 5763, in discussing the rate authority to be made available for non-compensatory classes, the Commission "require[s] the Postal Service to file a notice by December 31, 2020, of its intent to use this available authority." As a general matter, the Postal Service intends to utilize the additional pricing flexibility granted by the Commission in Order No. 5763, although precise decisions regarding the use of the new authorities, and in what amounts, will be made by the Governors. Such decisions will be made once the rate authorities are made "available" following the formal determination and announcement by the Commission. *See* Order No. 5763, att. at 24, 29, 39.

With kind regards,

/s/ Richard T. Cooper

Richard T. Cooper
Managing Counsel
Corporate & Postal Business Law

Enclosure

cc: Ms. Taylor

Richard T. Cooper, Managing Counsel.
Corporate & Postal Business Law
HQ U.S. Postal Service
475 L'Enfant Plaza, S.W.
Washington, DC 20260-1100
202-257-7988

EXHIBIT 3

Postal Regulatory Commission
Submitted 3/20/2017 11:44:19 AM
Filing ID: 99502
Accepted 3/20/2017

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

STATUTORY REVIEW OF THE SYSTEM	)	
FOR REGULATING RATES AND CLASSES	)	Docket No. RM2017-3
FOR MARKET DOMINANT PRODUCTS	)	

COMMENTS OF
ALLIANCE OF NONPROFIT MAILERS,
ASSOCIATION FOR POSTAL COMMERCE, AND
MPA—THE ASSOCIATION OF MAGAZINE MEDIA

(March 20, 2017)

The Alliance of Nonprofit Mailers ("ANM"), Association for Postal Commerce ("PostCom"), and MPA—The Association of Magazine Media ("MPA") respectfully submit these comments in response to Order No. 3673. These comments are supported by the following declarations:

1. Meta A. Brophy, Director, Procurement Operations, Consumer Reports, Inc.

2. Tracey Burgoon, Director of Direct Marketing, Disabled American Veterans.

3. Rita D. Cohen, Senior Vice President, Legislative and Regulatory Policy, MPA.

4. Jerry Faust, VP–Print & Distribution, Time Inc.

5. Craig Finstad, Assistant Vice President, Direct Response, American Lung Association.

6. Sandra Miao, Director of Membership, National Wildlife Federation.

7. Michael Nadol, President, PFM Group Consulting, LLC.

8. David O'Sullivan, Postal Affairs Manager, Guideposts.

9. Michael Plunkett, President and CEO, PostCom.

10. Quad/Graphics.

11. Bob Rosser, Director Postal Affairs, Products and Services, IWCO Direct.

12. Wendy Smith, Assistant Vice President Fulfillment & Postal Affairs, Publishers Clearing House.

13. Halstein Stralberg, consultant to Time Inc.

I. INTRODUCTION AND SUMMARY

These comments cover three issues: (1) whether the current regulatory system strikes a reasonable balance between (a) the Postal Service's revenue requirements, (b) the mailers' need for protection from abuse of the Postal Service's monopoly power, and (c) the statutory objective to maximize incentives to reduce costs and increase efficiency (Objectives 1, 5 and 8, and Factors 2 and 3); (2) whether the current regulatory system has appropriate standards for recovering the institutional costs of the Postal Service from the multiple products and classes that use it (Objectives 4, 8 and 9); and (3) whether the Commission's current standards for worksharing discounts are appropriate (Objectives 1, 4, and 8).[1] We summarize each issue in turn.

[1] The "objectives" of market dominant ratemaking are codified at 39 U.S.C. § 3622(b); the "factors" are codified at 39 U.S.C. § 3622(c). For brevity, these comments often cite to the objectives and factors instead of the specific parts of §§ 3622(b) and (c).

A. The current regulatory system properly balances the financial needs of the Postal Service with the need to protect captive mailers from abuse of the Postal Service's market power.

The Postal Service is a regulated monopoly. Because it is a monopoly, the Postal Accountability and Enhancement Act of 2006 ("PAEA"), like the Postal Reorganization Act of 1970 and the "just and reasonable" rate standard incorporated in both acts from a century of common carrier and public utility precedent, requires the Commission to limit the prices charged by the Postal Service for its market dominant mail products to levels that balance the financial needs of the Postal Service with the need to protect users of market dominant mail products from abuse of the Postal Service's monopoly power. Since the enactment of the PAEA, this balance has been reflected in the objectives and factors of 39 U.S.C. §§ 3622(b) and (c) and the Consumer Price Index-based cap on market-dominant price increases imposed by 39 U.S.C. § 3622(d).

In this docket, the Postal Service asks the Commission to shatter the CPI cap, and upend the statutory balance of carrier and mailer interests, by allowing the Postal Service to impose above-inflation price increases on captive mailers. Without this, the Postal Service asserts, it faces financial ruin. This assertion, although unfounded, has been repeated often enough that many have come to accept it, and the possibility of a panicky and destructive "solution" to a nonexistent crisis has become an increasing threat.

In fact, reports of the Postal Service's impending demise are greatly exaggerated. The revenue and earnings of the Postal Service are improving, not declining. Market dominant mail volume has stabilized, and the contribution from competitive products (especially e-commerce package delivery service) has been growing rapidly. Operating income (*i.e.*, income before expenditures for retiree health prefunding, amortization payments, and non-cash workers compensation adjustments) has been positive for the past several years. The Postal Service projects that it will earn a small profit in Fiscal Year 2017 despite the rollback of the exigent rate surcharges during Fiscal Year 2016, and earnings should be increasing over the next few years even without major productivity initiatives. These facts refute the Postal Service's claim that continuing growth in the number of delivery points makes a CPI cap unworkable. Furthermore, the Postal Service's own calculations show that the effect of the growth in the number of delivery points is much smaller than claimed by the Postal Service.

The Postal Service also has healthy liquidity. It has about $8 billion of cash, and it generated approximately $3 billion of cash from operations each year from Fiscal Years 2014 to 2016 to fund investments. This cash reserve is several times the average cash reserve held by the Postal Service since 1995.

While the *net* earnings reported by the Postal Service are still negative, this is an artifact of the arbitrary payment schedule enacted by Congress in 2006 to prefund quickly the Postal Service's *future* liabilities for pension and health benefits for its retirees. The prepayment schedule—$5 billion or more a year—proved to be too rapid for the Postal Service to meet, and Congress has not enforced it. The Postal Service's failure to meet an impossible prepayment schedule proves nothing about the Postal Service's actual financial health. These are the facts:

(1) Meeting the 2006 prepayment schedule was unnecessary. The Postal Service's pension and retiree health benefit funds now have $340 billion in assets. Even according to the conservative assumptions of the Office of Personnel

Management ("OPM"), this is enough money to cover 92.5 percent of the projected liabilities of the Postal Service's pension funds, plus about 50 percent of the projected liabilities of the Retiree Health Benefit Fund. The Postal Service's retiree benefit funds are more fully funded than the corresponding retiree benefit plans offered by the vast majority of government and private sector employers in the United States. Indeed, the Postal Service's retiree benefit accounts are well enough funded that they could pay the full amount of the pensions and retiree health benefits promised to postal retirees for decades *even in the implausible event that the Postal Service shut down tomorrow and made no further contributions to the funds*.

(2) The Postal Service funding percentages noted in the previous paragraph reflect OPM's projections of future spending on pension and retiree health care benefits. These projections, however, are highly conservative, meaning that the Postal Service's pension and retiree health benefit plans are even more richly funded than the OPM-derived figures cited in the previous paragraph indicate.

(3) The Postal Service's financial statements understate its true financial strength in a second respect: they value the Postal Service's real estate—most of it acquired years or decades ago—at depreciated historical cost (also known as "book" cost). Book cost understates the current value of commercial real estate because commercial real estate prices, like residential real estate prices, have been rising for decades. Although the use of book costs is generally accepted for financial reports, it is not appropriate here. The purpose of valuing the Postal Service's real estate in the present context is not to determine the profitability of the enterprise as a going

concern, or the size of the Postal Service's rate base for cost-of-service rate regulation, but to assess the ability of the Postal Service's assets to serve as a backstop source of funds to pay the Postal Service's debts to its employees, retirees and other creditors in the hypothetical (and unlikely) event that the Postal Service failed and was liquidated. For that purpose, the current market value of the Postal Service's real estate and other assets is the best measure of how much money could be raised by selling the assets.

(4) If the Postal Service genuinely believes that its finances need improvement, there are ample ways to achieve this under current law. Here are a few major options:

Narrow the employee compensation premium. Although 39 U.S.C. § 1003(a) establishes a policy that postal workers should receive compensation that is comparable to the compensation and benefits paid for "comparable levels of work in the private sector," postal employees continue to enjoy a massive compensation premium over the private sector. By some estimates, postal workers receive nearly twice the compensation that private firms offer for comparable work. The extraordinarily low quit rate of the career postal work force—a fraction of one percent per year—underscores the richness of the compensation that the Postal Service offers. Even a small annual narrowing of the compensation premium in future years would dramatically improve the Postal Service's finances.

Improve operating efficiency. The Postal Service's productivity has been stagnant for the last three years and, in fact, declined last year. Yet, as the Government Accountability Office has noted, the Postal Service has no new major cost saving initiatives planned. Before demanding the right to squeeze more money from captive mailers, the Postal Service needs to revive its cost saving efforts and make serious progress in network rationalization and delivery mode conversion.

Make better management and pricing decisions. The Postal Service needs to stop needlessly driving up its costs through bad management and pricing decisions such as those involving the Flat Sequencing System ("FSS"). When the FSS was still in the planning stage, experts both inside and outside the Postal Service warned that the FSS was unlikely to achieve its goals and was likely to increase, not decrease, the costs of processing and delivering flat-shaped mail. The Postal Service nonetheless chose to go forward with the FSS. Its performance has been even worse than the skeptics warned. The Postal Service should face reality, mothball the FSS, and promote efficiency by increasing the rate discounts offered for carrier route presorting from less than 60 percent to a full 100 percent of the cost savings from this preparation. Doing this would stimulate a massive surge in co-mailing, enabling Periodicals Mail and Marketing Mail Flats to cover most if not all of their reported attributable costs.

Show more creativity and resourcefulness in attracting more revenue. Instead of demanding the right to squeeze more revenue from captive mailers through above-CPI rate increases, the Postal Service needs to develop *voluntary* sources of additional revenue. In setting prices and identifying new sources of revenue, the Postal Service has operated under the 2006 legislation much like under prior law. This stasis is not what Congress intended. The Postal Service should be taking advantage of the tools created by the 2006 law (such as a streamlined Negotiated Service Agreement process) and evaluating fundamentally new sources of revenue, such as displaying advertising on mail trucks and buildings.

(5) Congress also has several ways to improve the Postal Service's finances through legislation. For instance, there is no rational justification for requiring the Postal Service to invest its massive cash reserves in low-yielding Treasury bonds. Most state and municipal government employers and most private employers are allowed to invest the cash in their retiree benefit funds in a diversified mix of stocks, bonds and other assets. Allowing the Postal Service to do the same would improve its balance sheet by more than $100 billion.

Additionally, Congress could integrate the Postal Service's retiree health programs with Medicare. Although the Postal Service contributes to Medicare for its employees, about a quarter of postal retirees and their dependents do not enroll in it, forcing the Postal Service to pay extra to provide duplicate insurance coverage to these individuals. The Postal Service has estimated that this would essentially eliminate the Postal Service's unfunded retiree health benefit liability and reduce expenses by $16.8 billion over the next five years.

* * *

By contrast, precipitously "solving" the Postal Service's finances by allowing it to impose above-CPI rate increases on mail products would be a devastating mistake. The CPI cap imposed by 39 U.S.C. § 3622(d) is the only effective protection offered to mailers and consumers by the current system of market dominant price regulation against abuse of the Postal Service's market power. The chink in this regulatory armor, however, is the credibility of the price cap. A regulator that gains a reputation for relaxing the price cap when the regulated monopoly pleads poverty destroys the credibility of the cap.

In the present context, such a loss of credibility would undermine both the will and the ability of Postal Service management to bargain effectively with postal labor and other interest groups that want to raise the Postal Service's costs. Experience teaches that the Postal Service avoids spending the management resources and political capital needed to cut costs unless forced to do so. The loss of momentum in the Postal Service's cost cutting efforts (in both collective bargaining and productivity initiatives) as the 2007-2009 recession has receded into the past illustrates this. So does the experience of light-handed rate regulation of foreign postal operators. Allowing the Postal Service to extract more money from captive mailers would not improve the Postal Service's financial stability: the past performance of the Postal Service and its foreign counterparts shows that the extra funds would be squandered through laxer control of costs.

These outcomes would violate multiple factors and objectives of 39 U.S.C. § 3622. As noted above, the PAEA did not elevate revenue adequacy to an absolute good superior to all other objectives of 39 U.S.C. §3622(b). The PAEA balances the interests of the regulated monopoly against the interests of its ratepayers and the public. Shattering the CPI cap—the only significant protection offered by PAEA to market-dominant mailers against abuse of the Postal Service's market power—to solve a nonexistent financial crisis would abdicate the Commission's obligation to balance the interests of the Postal Service with the interests of its captive customers and ultimate consumers.[2]

---

[2] On October 28, 2014, ANM, PostCom, MPA, and several other parties submitted a white paper to the Commission arguing that the Commission lacks authority under 39 U.S.C. § 3622(d)(3) to rescind or even substantially modify the CPI cap established under 39 U.S.C. §§ 3622(a) and (d), and that construing § 3622(d)(3) to give the Commission this authority would raise serious Constitutional issues. In

The Commission should take the following steps. *First*, it should find that the current system of regulation properly balances the objectives of 39 U.S.C. § 3622(b) in light of the factors of 39 U.S.C. § 3622(c), issue a report to that effect, and close this docket. *Second*, the Commission should begin an investigation of the current market value of the Postal Service's real estate. *Third*, the Commission should direct the Postal Service to prepare plans for dealing with the labor compensation premium and initiating other major cost reduction initiatives. *Fourth*, the Commission should recommend to Congress that it (a) relax the current restrictions on assets in which the Postal Service may invest its cash, and (b) integrate the Postal Service's retiree health benefit systems with Medicare. The Commission is always free to revisit its findings about the performance of the regulatory system in the future if Postal Service's circumstances change. But now is not the time for the Commission to go wobbly.

B. The current regulatory system includes appropriate standards for recovering the institutional costs of the Postal Service from individual products and classes.

The standards of the current regulatory system for recovering the institutional costs of the Postal Service from the multiple products and classes that use mail (Objectives 4, 8 and 9) are appropriate and should be upheld without change. Price cap regulation for market dominant rates should be retained, and the CPI cap should continue to be applied separately to each class of market dominant

---

April 2016, the Commission deferred consideration of these questions until Phase 2 of the ten-year review. Order No. 3237 in Docket No. RM2016-9¸ *Scope of Review of System for Regulating Market-Dominant Rates and Classes* (issued April 12, 2016). Accordingly, ANM, PostCom and MPA reserve comment on these issues until Phase 2.

mail. The CPI cap divorces prices from attributable costs, providing the Postal Service with needed pricing flexibility. At the same time, applying the cap at the class level, rather than to market dominant products as a whole, protects captive mailers from excessive cost increases and unjust and unreasonable rates. This balance should be preserved, as it has enabled the Postal Service to fully recover its institutional costs while protecting the interests of individual mailers.

C. To minimize the cost of flat-shaped mail, the Commission should require the Postal Service to develop a plan for expeditiously ending the disastrous FSS project and set worksharing discounts that fully reflect cost avoidances, including 100 percent of the costs avoided by presorting to the Carrier Route level.

The Postal Service must not be allowed to charge captive mailers for the added costs resulting from the Postal Service's disastrous decision to invest in the Flats Sequencing System ("FSS") instead of committing fully to co-mailing. The Postal Service made this decision against the strong advice of flats mailers and many experts within the Postal Service itself. The problems noted by these skeptics have fully materialized: far from producing large savings in sorting and delivery costs, the FSS has caused those costs to skyrocket. The FSS adds, for example, almost 17 cents to the cost of an average carrier route flat that converts to FSS processing. The Postal Service's decision to continue running the FSS is an operational matter that is the Postal Service's prerogative. But the Commission has both the power and the duty to ensure that extra costs created by this imprudent and uneconomic investment not be charged to captive mailers. The Postal Service should (1) retire the FSS machines, (2) allow mailers of flat-shaped mail to prepare their mail for (and qualify for) Carrier Route and other discounts in all zones; and (3) make Carrier Route and other worksharing discounts for flats deep enough to cover 100 percent of the costs avoided by the worksharing. These reforms alone should encourage enough co-mailing to enable Periodicals Mail and flat-shaped Marketing Mail to cover all, or nearly all, of their attributable costs.

II. THE CURRENT REGULATORY SYSTEM STRIKES A REASONABLE BALANCE BETWEEN THE POSTAL SERVICE'S FINANCIAL NEEDS AND THE MAILERS' NEED FOR PROTECTION FROM ABUSE OF THE POSTAL SERVICE'S MONOPOLY POWER, AS SHOWN BY THE PERFORMANCE OF THE SYSTEM SINCE 2007. (OBJECTIVES 1, 5, 8; FACTORS 3 AND 12)

Perhaps the most important issue in this docket—and certainly the one that the Postal Service has emphasized most during the run-up to this case—is the appropriate regulatory ceiling on the Postal Service's system-wide revenues from market-dominant products. During the past few years, the Postal Service and its allies have insisted repeatedly that the CPI cap, unless eliminated or relaxed, dooms the Postal Service to insolvency.[3] This claim misconceives both the law and the facts.

[3] *See*, *e.g*., Hearings before House Oversight and Govt. Reform Comm. (Feb. 7, 2017), prefiled testimony of PMG Megan J. Brennan ("2017 Brennan testimony") at 11-12; *id.*, prefiled testimony of Fredric V. Rolando ("2017 Rolando testimony") at 6; Docket No. PI2016-3, PRC *Section 701 Report*, USPS Comments (Nov. 9, 2016) at 1; USPS OIG Report No. RARC-WP-13-007, *Revisiting the CPI-Only Price Cap Formula* (April 12, 2013); USPS OIG Report No. RARC-WP-15-014, *CPI Study Update* (Aug. 10, 2015); International Posts (Feb. 8, 2017); USPS Fiscal Year 2017 Integrated Financial Plan at 1; Decker, Christopher, "Regulating networks in decline," 49 J. Regul. Econ. 344 (May 4, 2016).

A. Title 39 requires that the regulatory system for market dominant mail balance the Postal Service's interests with those of mailers and consumers.

We begin with the law. Section 3622(d)(3) requires the Commission to decide in this case whether the "system" for regulating market-dominant rates "is achieving" the objectives of Section 3622(b) in light of the factors of Section 3622(c). The participants in this case appear to disagree about what this means. The Postal Service has suggested that Objective 5—the revenue adequacy and financial stability objective of PAEA—overrides the other objectives and factors, so that a revenue shortfall under the existing system warrants eliminating or loosening the CPI cap of Section 3622(d) without more. *See, e.g.*, USPS comments in PI2016-13 (Nov. 9, 2016) at 1 (discussing Postal Service interests alone).

The Commission has not embraced this interpretation. But its initial notice in this docket suggests that each of the objectives will be assessed individually. Order No. 3673, the Commission's advanced notice of proposed rulemaking ("ANPR"), is organized according to the nine regulatory objectives enumerated in 39 U.S.C. § 3622(b). For each of the nine objectives, Order No. 3673 solicits separate comment on (1) the definition of the objective, (2) the best benchmarks for determining whether the objective has been satisfied, and (3) an assessment of whether the objective has been satisfied in terms of the benchmarks.

This organizational approach, while raising important and useful questions, risks obscuring the relationship between the objectives. Many of them are interrelated or in tension with other objectives, as the Commission has recognized elsewhere.[4] A sound assessment of whether the current system of regulation is achieving "the objectives" of Section 3622(b) must consider many of them in conjunction with other objectives. The question to be answered by the Commission is not how well the current system is meeting each objective individually, but how well it is balancing all of them. *How* this balance should be achieved is spelled out to a large extent by (1) the text and structure of Section 3622(b) and (c); (2) the century of judicial precedent incorporated by reference in the "just and reasonable" (or "reasonable and equitable") standard of 39 U.S.C. §§ 404(b) and 3622; and (3) Section 3622(d) itself, which reflects a legislative judgment that price cap regulation would enable the Postal Service to earn adequate revenue. We discuss each in turn.

1. The text and structure of Section 3622(b) require that the Commission consider each objective in conjunction with others.

The texts of Sections 3622(b) and (c) make explicit their holistic and interrelated character. Objective 5, read in isolation, would appear to "assure [the USPS] adequate revenues, including retained earnings, and to maintain financial stability." But many of the other objectives and factors direct the Commission to protect captive ratepayers from abuse of the Postal Service's market power, and their inclusion means that Objective 5 cannot be a blank check. Objective 1 calls for the ratemaking system to "maximize incentives to reduce costs and increase efficiency." Factor 12 likewise requires the Commission to take into account "the

---

[4] *See*, *e.g.*, PRC Annual Report to the President and Congress for Fiscal Year 2016 (Jan. 13, 2017) at 24 ("Section 3622(b) establishes a tension between the restrictions of an inflation-based price cap on Market Dominant price increases and the objective that the Postal Service must assure adequate revenues and retained earnings to maintain financial stability.").

need for the Postal Service to increase its efficiency and reduce its costs, including infrastructure costs, to help maintain high quality, affordable postal services."

Objective 8 calls for rates to be "just and reasonable." Factor 3 requires the Commission to take into account "the effect of rate increases upon the general public" and "business mail users." And both provisions are buttressed by 39 U.S.C. § 404(b), which requires that rates for market dominant products be "reasonable and equitable," and which limits the Postal Service to revenue "sufficient" to provide appropriate services "under best practices of honest, efficient, and economical management."[5]

The introductory phrase of § 3622(b) explicitly requires that "each" objective "shall be applied in conjunction with the others." The legislative history of Section 3622 confirms that this requirement was inserted deliberately, so that one objective would not be treated as an absolute value, overriding the others.

H.R. 22, introduced in January 2005, directed the Commission to develop a system of ratemaking "designed to meet the following [seven] objectives," much like PAEA, but lacked the language of PAEA requiring each objective to be applied "in conjunction with the others." *See* Cong. Rec. H6523 (July 26, 2005). Even without this language, however, the bill could not be construed to bestow primacy on the

---

[5] Several other objectives and a factor also speak to the Commission's ratemaking standards. Objective 2 requires "predictability and stability in rates," without regard to changes in Postal Service costs. Objective 4 seeks "[t]o allow the Postal Service pricing flexibility," a goal that can be at odds with traditional cost-of-service regulation in which the regulated entity's costs strictly dictate its rates. Objective 6 requires the system of ratemaking "[t]o reduce the administrative burden and increase the transparency of the ratemaking process," again without regard to the revenue sufficiency of the rates established, and in part to reduce the cost to all parties involved with evaluating and justifying rates.

objective "[t]o assure adequate revenues, including retained earnings, to maintain financial stability." The Committee on Government Reform Report to H.R. 22 stated that under the system of ratemaking proposed, "losses could not be recovered by increasing rates beyond specified parameters without regulatory approval." H.R. Rep. No. 109-66, at 44 (2005). The Committee further explained that the pre-PAEA "rate-setting process provide[d] little or no incentive for the Postal Service to control its costs because all costs [were] ultimately passed through to the consumer regardless of how efficiently or inefficiently the Postal Service operate[d]. Under the new system, the Postal Regulatory Commission will have the flexibility to design a system that will improve efficiency and improve costs." *Id.* at 48. H.R. 22 would therefore have directed the Commission to design a rate-setting system that balanced the seven objectives enumerated in H.R. 22.

This directive to balance objectives became more explicit as H.R. 22 moved through the legislative process. After the House passed H.R. 22, the Senate amended the bill by substituting it with its own bill, S. 662. When first introduced in 2005, S. 662 also lacked the "in conjunction with the others" language of PAEA. But the bill was later amended to require expressly that the Commission apply each of the objectives "in conjunction with the others." Cong. Rec. S926 (Feb. 9, 2006) (S. Am. 2750). Thus, when the Senate passed H.R. 22 as amended, it incorporated the "in conjunction with the others" language. Cong. Rec. S928. This language persisted in H.R. 6407, the bill that ultimately was enacted as PAEA. What had been implicit in H.R. 22, as suggested in the Committee Report, became explicit in law.

Accordingly, there is no basis in the text or legislative history of Section 3622(b) to elevate one objective above another. The system of ratemaking must be designed to achieve multiple goals and balance competing objectives.

2. The "just and reasonable" rate standard of Sections 404(b) and 3622(b)(8) incorporates a century of precedent requiring that regulatory commissions balance the interests of regulated monopolies with their ratepayers.

The balance of Postal Service and mailer interests required by Section 3622 is underscored by the regulatory context in which it was drafted. Congress did not write on a blank slate. By 2006, Congress had been enacting statutes authorizing administrative agencies to regulate the rates charged by regulated monopolies under a "just and reasonable" (or its variant, "reasonable and equitable") standard for nearly 120 years. When incorporating this standard into Sections 404(b) and 3622(b)(8), Congress may be presumed to have been aware of the meaning of this term of art. *See C.I.R. v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (Congress is presumed to be aware of settled judicial and administrative interpretations of words when it writes them into a statute).[6]

One of the main purposes of the "just and reasonable" rate standard of Sections 404(b) and 3622(b)(8), like its antecedents in the Interstate Commerce Act and other cognate statutes, is to prevent natural monopolies and franchised

---

[6] The Commission has repeatedly relied on precedent under the Interstate Commerce Act and its other progeny in construing the cognate provisions of Title 39. *See*, *e.g.*, PRC Docket No. R74-1, *Postal Rate & Fee Increases, 1973*, Op. & Rec. Decis. at 72 n.1, 109, 116, 126 n.2, 129, 135 n.1, 151 n.2, 165 n.3 (Aug. 28, 1975) (citing ICC precedent); PRC Docket No. MC2002-2, *Experimental Rate & Serv. Changes to Implement Negotiated Serv. Agreement with Capital One*, Op. & Rec. Decis. 138-39 ¶¶ 7013-14 (May 15, 2003) (citing ICC, FCC, FERC, FMC and state commission precedents).

monopolies from abusing their market power. *Munn v. Illinois*, 94 U.S. 113 (1877); James C. Bonbright, *Principles of Public Utility Rates* 33 (1961) ('It is a general doctrine of American law, almost universal in its application to public utility companies operating under special franchises or 'certificates of convenience and necessity,' that these companies are under a duty to offer adequate service at 'reasonable' (or 'just and reasonable') rates."); Stephen Breyer, *Regulation and its Reform* 36 (1982); Richard A. Posner, *Economic Analysis of Law* 346-47 (4th ed. 1992).

The just and reasonable standard requires the regulator to balance (1) the need for regulated monopolies to attract and retain sufficient capital to provide service with (2) the need to protect captive ratepayers from abuse of the regulated firms' market power. *See*, *e.g.*, *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (stating that zone of reasonableness is "bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates") (quoting *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950)); *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (referring to "decades" of precedent holding that rates must fall within a "zone of reasonableness" where rates are neither "less than compensatory" nor "excessive," thus "striking a fair balance between the financial interests of the regulated company and the relevant public interests") (internal quotations omitted); *City of Chicago v. FPC*, 458 F.2d 731, 750-51 (D.C. Cir. 1971) (describing the necessary balance between a rate high enough to attract capital and low enough to prevent exploitation of consumers), *cert. denied*, 405 U.S. 1074 (1972).

3. The prescription of index ratemaking by Section 3622(d) specifies the balancing of interests required by the PAEA.

In truth, Congress resolved much of the tension between the objectives of Section 3622(b) by enacting Section 3622(d), which mandates that rates be limited at the class level to the rate of inflation. The CPI cap mandated by 39 U.S.C. § 3622(d) gives tangible and specific effect to the balance of the Postal Service and mailer interests stated more generally in the objectives of PAEA:

> 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.

USPS v. PRC, 785 F.3d 740, 745 (D.C. Cir. 2015) (quoting S. Rep. No. 108-318, at 19 (2004)). Regardless of whether Section 3622(d) allows the Commission to rescind or relax the CPI cap in this proceeding,[7] at a minimum the provision sheds considerable light on the meaning of the reference in Section 3622(d)(3) to the "objectives in subsection (b)," since the two provisions were enacted simultaneously as part of Section 3622.

The maximum rate standard mandated by Section 3622(d) is a form of price cap regulation, a safeguard against abuse of market power by a regulated monopoly that began to replace traditional cost-of-service regulation in the 1980s. Price cap regulation constrains regulated prices by reference to an external cost index such as the CPI, rather than the costs of the regulated firm itself.[8]

---

[7] For the reasons stated at pp. 9-10, n.2, *supra*, the undersigned parties reserve this issue for discussion in Phase 2.

[8] *See, e.g.*, Laffont, Jean-Jacques, and Tirole, Jean, *A Theory of Incentives in Procurement and Regulation* 13-14 (1993); Viscusi, W. Kip, Harrington, J.E., and Vernon, J.M., *Economics of Regulation and Antitrust* 439-42 (4th ed. 2005); *National*

Under Section 3622(d), the Postal Service's overall revenue requirement no longer sets a floor under or a ceiling over the Postal Service's overall revenues. Instead, with narrow exceptions, 39 U.S.C. § 3622(d) limits the average annual increase in rates for market-dominant classes of mail to the rate of increase in the Consumer Price Index. 39 U.S.C. § 3622(d)(1), (2); Order No. 547 in Docket No. R2010-4 (Sept. 30, 2010) at 6-7, 10, *aff'd in relevant part*, *USPS v. PRC*, 640 F.3d 1263, 1264 (D.C. Cir. 2011). By "severing the linkage under traditional cost-of-service ratemaking" between the Postal Service's costs and rates, Congress sought to (1) create an incentive for the Postal Service to hold its cost increases below the rate of inflation, and (2) protect ratepayers if the Postal Service's costs nevertheless outstrip inflation. Order No. 547 at 11-13.

The CPI cap directly advances most of the objectives of Section 3622(b). The cap provides incentives to reduce costs and increase efficiency (Objective 1)—and the stricter the cap, the greater the incentive—by preventing the Postal Service from automatically recouping cost increases through rate increases. It creates predictability and stability in rates (Objective 2) by limiting annual increases and tying the amount of those increases to a publicly available index applied through an adjustment methodology that Congress has prescribed in detail. *See, e.g.*, Docket No. RM2007-1, *Regulations Establishing a System of Ratemaking*, Order No. 26 (Aug. 15, 2007); *id.*, Order No. 43 (Oct. 29, 2007). The CPI cap mechanism allows the Postal Service pricing flexibility (Objective 4) by divorcing prices from costs and

---

Rural Telecom Ass'n v. FCC, 988 F.2d 174, 178-79 (D.C. Cir. 1993) (summarizing history of adoption of price cap regulation by FCC in the late 1980s); Order No. 561, *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, FERC Stats. & Regs. ¶ 30,985, 30,948-49 & n. 37 (1993), *aff'd*, *Ass'n of Oil Pipelines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

allowing unequal price changes within a class. It affords the Postal Service adequate revenues (Objective 5) by allowing the Postal Service to increase rates as fast as the CPI, a less restrictive constraint than the market forces facing many private sector businesses or the price ceilings imposed on most other regulated monopolies. See pp. 67-72, *infra*. Indeed, it even allows the Postal Service to obtain additional revenues when faced with "extraordinary or exceptional" circumstances that would prevent the Postal Service, even under best practices of efficient management, from providing necessary services without an above-CPI rate increase. 39 U.S.C. § 3622(d)(1)(E). The CPI cap also reduces the administrative burden of the rate process (Objective 6) by eliminating the 10-month rate cases that existed under the Postal Reorganization Act and replacing them with a streamlined process in which the only question to be decided by the Commission is whether the Postal Service's rates comply with the cap. It further increases the transparency of the process (Objective 6) by establishing a firm limit to price increases, tying that limit to a publicly available index, and reducing the need to investigate and evaluate Postal Service cost allocation methodologies when evaluating rates. Finally, the CPI cap furthers the goal of "establish[ing] and maintain[ing] a just and reasonable schedule for rates and classifications," 39 U.S.C. § 3622(b)(8).

The legislative history makes clear that the adoption of the CPI cap as the primary tool for balancing the interests of the Postal Service and its ratepayers was intentional. H.R. 22, as originally introduced, posited a price cap as one of many options the Commission could consider in designing a rate-making system that would meet the specified objectives. H.R. Rep. No. 109-66, at 47 (2005). The bill, while limiting the average price increase for a subclass to CPI, provided an exception to this rule if an above-CPI increase was "reasonable and equitable and necessary to enable the Postal Service, under the best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States." *Id.* at 47-48. As then-Congressman Pence argued on the House Floor, "Such a cap hardly equips the U.S. Postal Service with the tools to control its costs and renegotiate labor costs." Cong. Rec. H6539 (July 26, 2005).

By contrast, the version of the bill ultimately enacted as the PAEA established a CPI-based price cap as a requirement of the system of ratemaking, depriving the Commission of the authority to design a system that met the objectives by other means. The Congressional Record shows that the sponsors of the legislation were concerned that without a cap the Postal Service would send itself into a "a potential 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." Cong. Rec. S11674 (Dec. 8, 2006) (Sen. Collins); *accord* Cong. Rec. H6513 (July 26, 2005) (Chairman Davis comments on H.R. 22). In other words, the cap, rather than being in tension with Objective 5, was seen by Congress as an essential tool to ensure adequate revenue.

* * *

As we now demonstrate, Congress got things right. The current system has allowed the Postal Service to succeed while protecting its ratepayers, and it has created an environment in which even greater success is possible.

B. The current regulatory system allows the Postal Service to earn sufficient income to provide necessary services.

The case for allowing the Postal Service to charge above-CPI rate increases on market-dominant mail is unsupported. Despite the 2007-2009 recession, the long-term decline in First-Class volume, and the massive inefficiencies in the Postal Service's operations, the current regulatory system has provided—and should continue to provide—the Postal Service with sufficient revenue to provide necessary services.

Less than two months ago, Fredric Rolando, the president of the NALC, took to task the "narrow subset of commentators" who "have been writing 'sky-is-falling' pieces that mislead about Postal Service finances while ignoring the broader context of its value to our society." Fredric Rolando, "What You May Not Know About the U.S. Postal Service," Townhall (Jan. 26, 2017), *available at* https://townhall.com/columnists/fredricrolando/2017/01/26/postal-service-n2276774 (site visited Mar. 15, 2017). "Despite what you may have heard," Mr. Rolando continued, "the Postal Service is operating in the black. USPS revenue exceeded operating expenses by $610 million in Fiscal Year 2016, bringing its total operating profit the past three years to $3.2 billion." *Id.* Mr. Rolando has since touted the Postal Service's fiscal soundness elsewhere. Last month, he noted that "annual USPS revenue has been rising steadily, leading to impressive operating profits." Fredric Rolando letter to the editor of The Guardian, "The United States Postal Service isn't 'in decline' – far from it," (Feb. 26, 2017), *available at* https://www.theguardian.com/business/2017/feb/26/the-united-states-postal-service-isnt-in-decline-far-from-it (site visited Mar. 15, 2017). Mr. Rolando has further expanded on this observation:

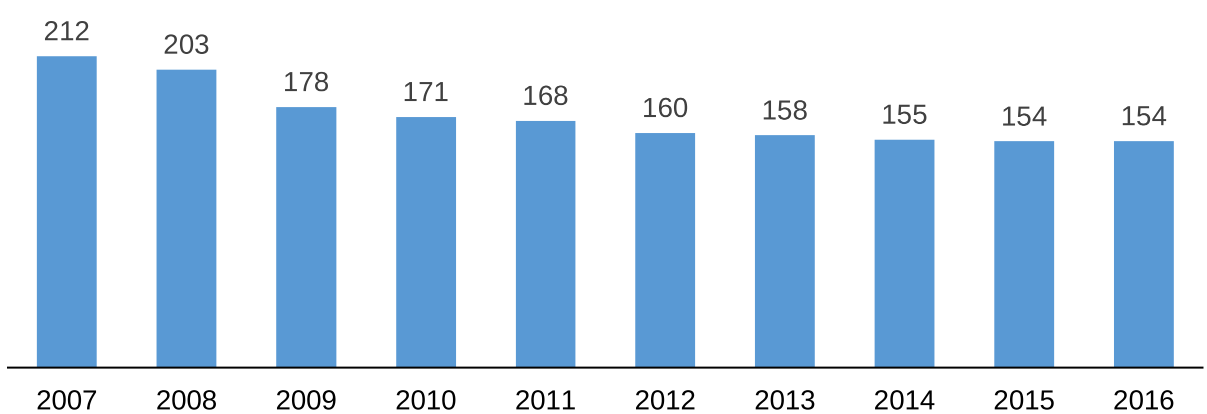
> In fact, for more than three years the Postal Service has been operating at a profit, to the tune of $3.7 billion overall. Revenues have steadily risen as the economy improves and as online shipping boosts package revenues. On Feb. 9, USPS announced a $522 million operating profit for fiscal year 2017's first quarter. This is earned revenue; the Postal Service receives no taxpayer money.

Fredric V. Rolando letter to the editor of USA Today (March 7, 2017) (available at (http://www.usatoday.com/story/opinion/2017/03/07/things-bad-postal-service-say/98871900/ (site visited Mar. 12, 2017). Mr. Rolando's assessment is correct.

1. Mail volume and revenue

Market dominant mail volume and revenue indeed have largely stabilized. Fiscal Year 2016 was the fifth year in a row in which mail volume has stabilized above 150 billion pieces:

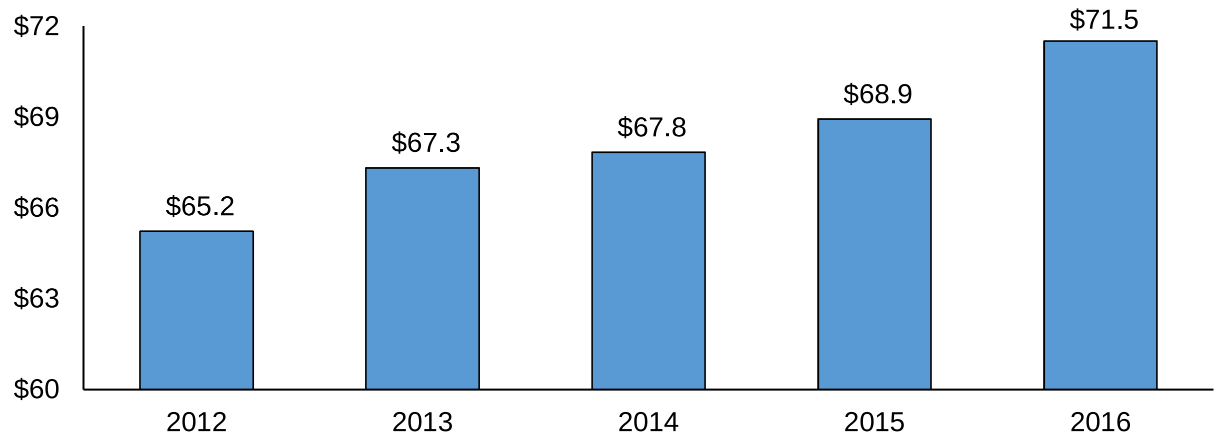
Figure 1
FY 2007 – FY 2016 Total Mail Volume
(Billions)



Brennan 2017 testimony at 3.

The Postal Service's revenue performance has been even stronger. Total revenue increased by nearly ten percent from Fiscal Year 2012 to Fiscal Year 2016:[9]

Figure 2
FY 2012 – FY 2016 Total Revenue
(Billions of Dollars)

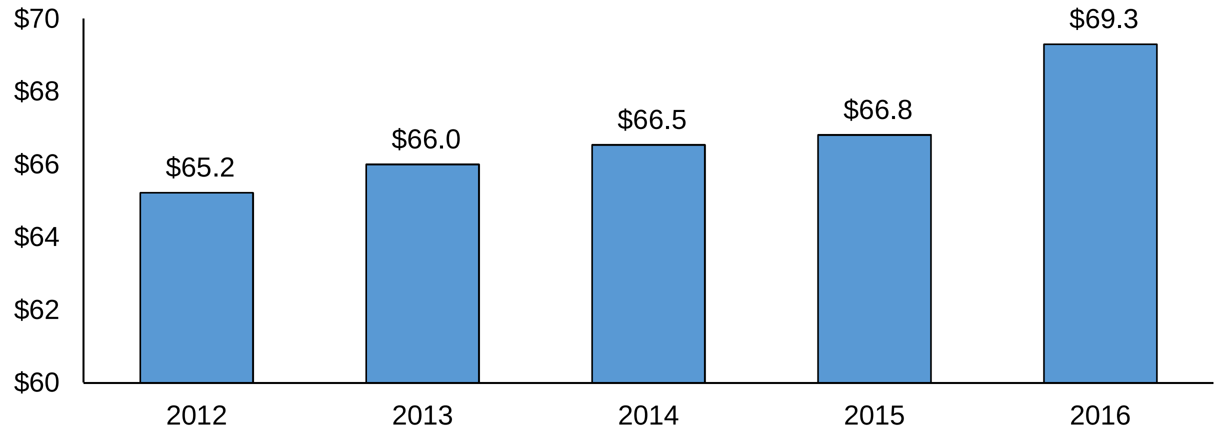


Although some of this revenue growth was due to non-recurring events, revenue grew by more than $4 billion from FY 2012 to FY 2016 even without revenue from the exigent surcharge and one-time revenue adjustments:[10]

[9] Library Reference ANM *et al.*—LR—RM2017-3/1 (worksheet "Figures 2 & 3").

[10] Library Reference ANM *et al.*-LR-RM2017-3/1 (worksheet "Figures 2 & 3").

Figure 3
FY 2012 – FY 2016 Total Revenue
(Excluding Exigent Revenue & One-Time Revenue Adjustments)
(Billions of Dollars)

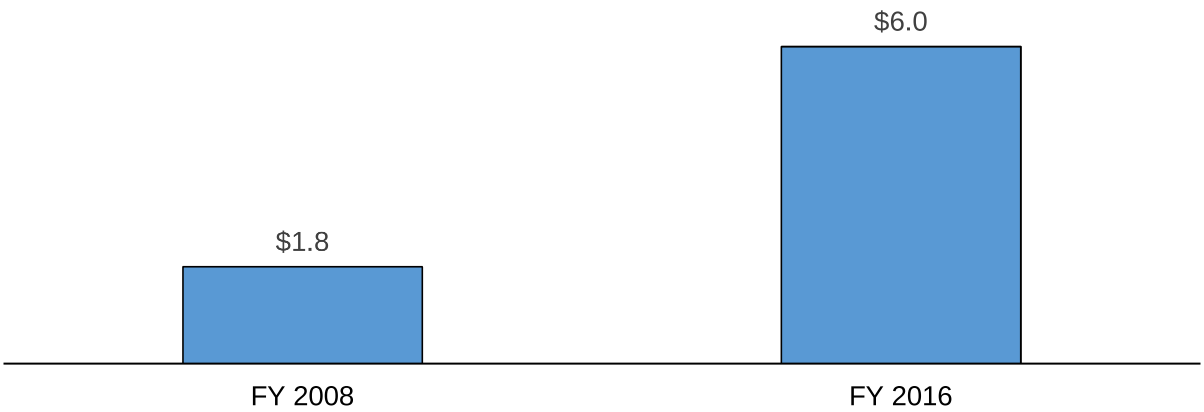


The Postal Service's business, taken as a whole, is not in a state of decline.

Competitive products have played a significant role in the financial recovery of the Postal Service. As noted by Mr. Rolando, the e-commerce boom, which shows no signs of slowing, has given a major boost to the Postal Service's financial performance. The growth in e-commerce has increased both revenue from and the profitability of competitive products for the Postal Service. Between Fiscal Year 2008 and Fiscal Year 2016, the contribution of competitive products to institutional costs has more than tripled, from $1.8 billion to $6.0 billion, and is projected to jump again to $6.8 billion in FY 2017.[11]

[11] Library Reference ANM *et al.*-LR-RM2017-3/1 (worksheet "Figure 4").

Figure 4
Growth in Competitive Product Contribution
(Billions of Dollars)



The Postal Service has tried to dismiss these favorable trends in volume, revenue and contribution on three grounds: (1) the volume of and contribution from First-Class Mail have continued to decline; (2) the growth in delivery points substantially increases Postal Service costs; and (3) the growth in competitive product volume is fragile and may reverse at any time. While each of these points has a modicum of truth, the Postal Service has greatly overstated their significance.

Contribution Effect of Volume Shifts. The Postal Service is correct that the volume of First-Class Mail, which has a high cost coverage, continues to decline. The effect of this ongoing trend, however, has been offset by increases in total contribution from other products. The overall effect of recent volume changes in *all* products (holding unit contribution constant) has been an *increase* in contribution. As Table 1 shows, recent decreases in contribution-weighted volume for market-dominant products have been more than offset by increases in contribution-weighted volume for competitive products:[12]

[12] Library Reference ANM *et al.*-LR-RM2017/3-1 (worksheets "Table 1 (FY 2014 – FY 2016)" and "Table 1 (FY 2015 – FY 2016").

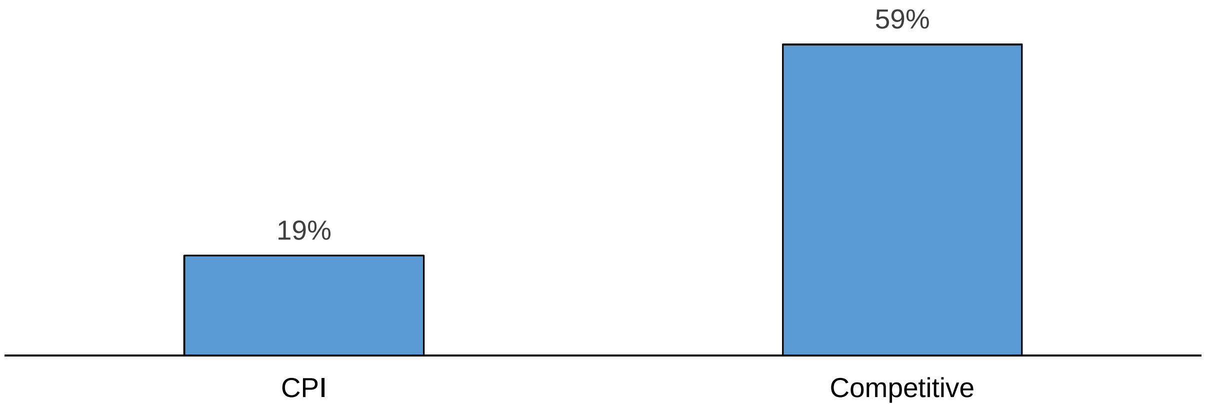
Table 1
Effect of Volume Changes on Contribution
($ Millions)

Category	FY 2014 – FY 2016	FY 2015 – FY 2016
Market-Dominant	(401.2)	(171.2)
Competitive	865.3	374.3
Total	**464.1**	**203.0**

The shift in mail mix between market-dominant and competitive products has a second benefit for the Postal Service's finances. Because competitive products have been found by Congress or the Commission to face effective competition, the Postal Service is legally permitted to raise rates for competitive products by more than inflation, further increasing contribution. Like its competitors, the Postal Service has done so. Over the last five years, the Postal Service has raised competitive product rates by an annualized 5.6 percent—4.3 percent per year more than inflation.[13] With competitive products now generating more than a quarter of Postal Service revenue, the pricing freedom enjoyed by the Postal Service in markets that Congress or the Commission have found to be effectively competitive now provides a major boost to the Postal Service's finances.

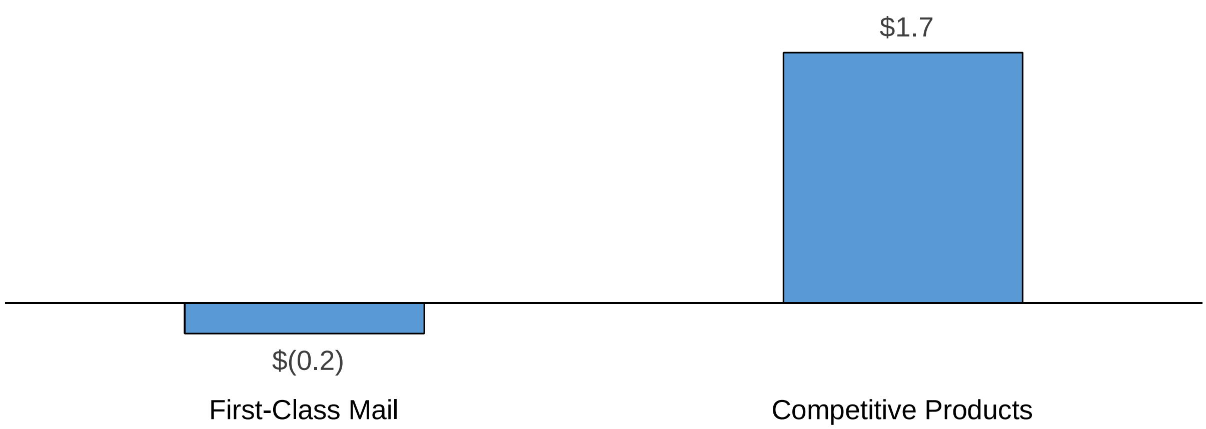
[13] Library Reference ANM *et al.*—LR—RM2017-3/1 (worksheet "Figure 5").

Figure 5
Comparison of Cumulative Competitive Product Price Increases with CPI
(FY 2007 – FY 2017)



Taking into account both changes in volumes and rates, recent increases in competitive product contribution have overwhelmed the decline in contribution from First-Class Mail:[14]

Figure 6
Change in First-Class Mail and Competitive Product Contributions
from FY 2014 to FY 2016
(Billions of Dollars)



[14] Library Reference ANM *et al.*-LR-RM2017-3/1 (worksheet "Figure 6").

Growth in Delivery Points. The Postal Service is correct that (1) the number of delivery points grows each year and (2) this growth tends to increase the Postal Service's costs. The Postal Service exaggerates the size of this effect, however, as the Postal Service's own roll-forward calculations show. When the Postal Service rolls forward (extrapolates) its historical expenses to future periods in rate cases, the Postal Service is required to quantify the effect of the increasing number of delivery points, and may not just assert that the effect is large. The increase in the number of delivery points over time is the primary input to the non-volume workload effect used by the Postal Service in its roll forward model. Docket No. RM2013-11, USPS-R2010-4R/8, Input_12.xls, "Non-vol Wkld." In Docket No. R2013-11, the most recent case in which the Postal Service filed a roll forward analysis, this effect added just $75 million each year (or 0.1 percent) to Postal Service costs. Docket No. RM2013-11, USPS-R2010-4R/8, FY2013BR.CompSumRpt.BR-Final.xls and FY2014BR.CompSumRpt.BR-Final.xls. Thus, while the growth in delivery points indeed creates a small headwind against the Postal Service going forward, the effect is much less than the Postal Service now claims. Furthermore, because the non-volume workload effect does not account for the fact that new delivery points are generally lower-cost ones (*i.e.*, centralized delivery points), the real non-volume workload effect is likely much smaller than even the roll forward analysis suggests.

Uncertainties in Competitive Product Volume. On page 29 of its Form 10-Q for Fiscal Year 2017, Quarter 1, the Postal Service asserts that it is at risk at any time of losing its competitive product volume to bypass by its largest customers:

> The growth in our Competitive service revenues over the past five years is largely attributable to three major customers. Each of those

> three major customers is building the capability which would enable them to divert volume away from the Postal Service over time. If those customers divert significant volume away from the Postal Service, the growth in our Competitive service revenues may not continue.

The Postal Service recently made a similar claim in Docket No. RM2017-1, *Institutional Cost Contribution Requirement for Competitive Products*. Docket No. RM2017-1, Initial Comments of USPS (Jan. 23, 2017) at 15-17. The Commission should view these claims with skepticism.

First, this is not a new risk. It is well known that UPS and FedEx are two of the Postal Service's largest competitive product customers. The Postal Service has grown its competitive product volumes and increased its rates even though UPS and FedEx own and operate their own networks. UPS and FedEx make heavy use of Postal Service delivery, despite owning and operating their own networks, because the address density of the Postal Service's volume enables the Postal Service to provide economical, high quality delivery service, particularly for lightweight packages sent to residential addresses. The Postal Service's network is well suited to delivery in the booming e-commerce market.

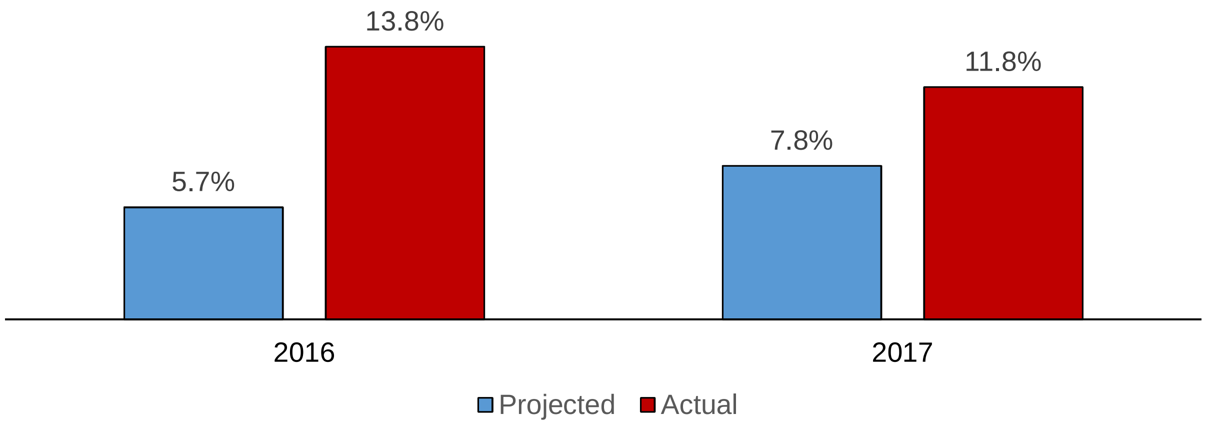
Second, the Postal Service has a track record of underestimating the projected performance of its competitive products. In its Integrated Financial Plan for Fiscal Year 2016, the Postal Service projected that "Shipping and Packages" volumes, most of which are generated by competitive products,[15] would grow by

---

[15] "This category includes: First-Class Package Service, a shipping option for high-volume shippers of packages that weigh less than one pound and First-Class Mail parcels for shipment of boxes, thick envelopes or tubes of 13 ounces or less; Package Services for merchandise or printed matter, such as library and media mail weighing up to 70 pounds; Parcels - Parcel Select, Parcel Return Service and Standard Mail Parcel Services which provide commercial customers with a means of package shipment, typically "last-mile" products; Priority Mail, which is offered as a

5.7 percent. In fact, actual volumes grew by 13.8 percent, almost 2.5 times as much. The Postal Service predicted in its Integrated Financial Plan for Fiscal Year 2017 that Postal Service Shipping and Packages volume would grow by 7.8 percent this year; so far the volume has grown by 11.8 percent:[16]

Figure 7
Projected v. Actual Growth Rates for Shipping & Packages
FY 2016 – FY 2017



2. Operating income

Thanks to these strong fundamental trends, the Postal Service's operating income has been positive for several years, and the Postal Service projects it to remain positive in Fiscal Year 2017 despite the rollback of the exigent rate

---

service both within the U.S. and abroad with the domestic service offering a 1-3 day specified (non-guaranteed) delivery; and Priority Mail Express, which provides an overnight, money-back guaranteed service which includes tracking, proof of delivery and basic insurance up to $100. Priority Mail Express delivery is offered to most U.S. destinations for delivery 365 days a year." USPS Form 10-K for Fiscal Year 2016 at 3.

[16] Library Reference ANM *et al.*-LR-RM2017-3/1 (worksheet "Figure 7"). Note: Fiscal Year 2017 Actual Growth Rate is from the USPS Preliminary Financial Information (Unaudited), January, 2017, filed on Feb. 24, 2017.

surcharge. USPS Fiscal Year 2017 Integrated Financial Plan (Nov. 2016) at 3. The Postal Service reported $522 million in controllable income for the first quarter of Fiscal Year 2017,[17] and a total operating profit of $3.7 billion since the start of Fiscal Year 2014.[18]

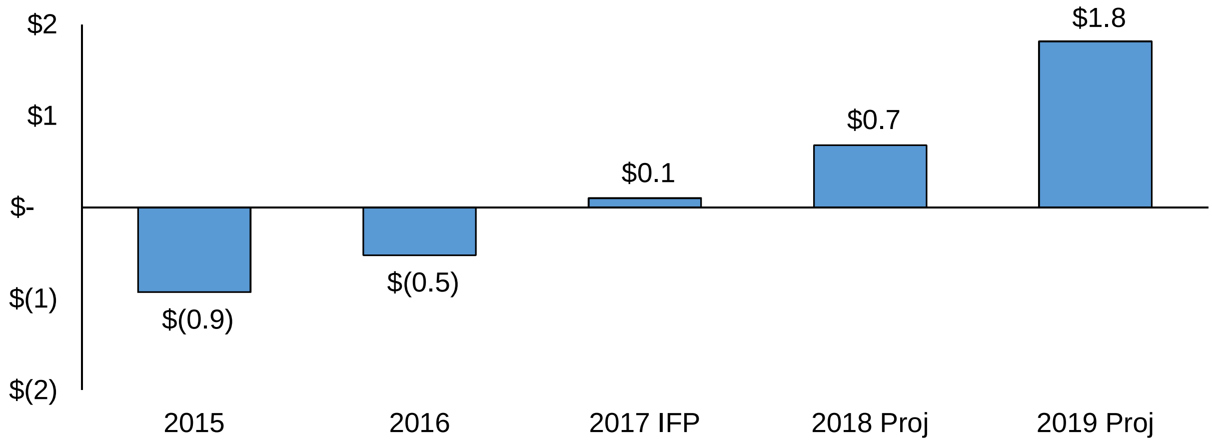
3. Projected future financial performance

The recent gains in revenue and contribution should continue in the future, even without major cost savings initiatives, if the Postal Service simply limits its cost level increases to the rate of growth of the Consumer Price Index. The roll-forward analysis documented in Library Reference ANM *et al.*-LR-RM2017-3/1, Rollfwd.xlsx shows this. Between Fiscal Year 2015 and Fiscal Year 2019, the Postal Service is projected to improve its annual controllable operating income by approximately $2.7 billion:

[17] USPS Press Release, "U.S. Postal Service Reports Fiscal Year 2017 First Quarter Results" (Feb. 9, 2017). Furthermore, the Postal Service achieved this first quarter income despite allowing its workhours to grow to 2 percent above plan. December 2016 Preliminary Financial Information (Unaudited). If the Postal Service fails to meet its planned income, the fault will lie in poor cost control, not any shrinkage in revenue.

[18] Fredric V. Rolando letter to the editor of USA Today (March 7, 2017) (available at (http://www.usatoday.com/story/opinion/2017/03/07/things-bad-postal-service-say/98871900/ (site visited Mar. 12, 2017).

Figure 8
USPS Controllable Operating Income (excluding Exigent Revenue)
In FY 2015 – FY 2019
(Billions of Dollars)



The projected increases in controllable operating income occur despite inclusion of cost increases due to delivery point growth; the use of conservative rate increases (less than the average increase USPS has implemented in recent years) on competitive products; and the use of annual volume changes lower than occurred in FY 2016. ANM *et al*.-LR-RM2017-3/1, Rollfwd.xlsx.

4. Liquidity

The Postal Service has sufficient liquidity to continue providing essential postal services for the foreseeable future. The Postal Service projects that it will have $8 billion in cash at the end of FY 2017 if it does not make amortization payments. USPS Fiscal Year 2017 Integrated Financial Plan (November 2016) at 9. Moreover, the Postal Service has recently been generating annually about $3 billion in cash, which can also be invested in new delivery vehicles and other assets. USPS Form 10-K for Fiscal Year 2016 at 42.[19]

The Postal Service suggests that this amount of cash is inadequate because it covers less than 30 "Banking Business Days" of operations. USPS Fiscal Year 2017 Integrated Financial Plan at 9. The analysis underlying this claim, however, is "not consistent with best practice." OIG Report FT-AR-17-001, *Measurement of Days of Operational Cash on Hand* 1 (Oct. 20, 2016).

First, the Postal Service has understated the number of days it could operate with only the cash that it now has on hand. A proper measure of the number of days would be approximately 50 percent higher than the Postal Service's estimate. The Postal Service erroneously "uses banking days of 251 (excluding holidays and weekends) rather than operating days of 365 in its calculation. Additionally, capital outlays are incorrectly included in its calculation, which further dilutes days of cash on hand." *Id*. at 1, 6-7.

Second, the Postal Service has failed to explain what minimum number of days of operations that should be permitted by the amount of cash on hand, however calculated. *Id*. at 8. The Postal Service's days of cash on hand today is significantly higher than the average since 1995 (6 days by the Postal Service's calculation, 9 days by the OIG's). *Id*. at 7. Moreover, if additional cash ever were to become necessary, the Postal Service could generate massive additional liquidity by tapping into the value of its real estate, *e.g.*, by selling unneeded buildings and

[19] And thanks to the nearly $2 billion "Depreciation and amortization" annual non-cash accrual, USPS would generate a great deal of cash from operations even at operational breakeven. USPS Form 10-K for Fiscal Year 2016 at 42.

entering into sale/leaseback transactions for buildings that the USPS needs to continue using. USPS OIG Report No. FT-MA-12-002, *Pension and Retiree Health Care Funding Levels* (June 18, 2012) at 6 (citing OIG Report No. FF-MA-11-118, *Leveraging Assets to Address Financial Obligations* (July 12, 2011)).

Third, and most important, the number of days of cash on hand has limited relevance for an enterprise like the Postal Service. The optimal number of days of cash on hand depends on many circumstances. www.ncbi.nlm.nih.gov/pubmed/18972996. Generally, days' cash on hand is a measure of how long an organization could operate before running out of cash if revenue were turned off completely. But Postal Service revenue will never be turned off completely unless a policy decision is made to shut down the enterprise. As discussed above, the Postal Service's cash flow is very strong. The private economy and the government rely on its continuing operations. It is a full-on federal government agency, as Chairman Taub has often noted. If the self-funding model under which it now operates stops working, the federal government will have to make a decision about a new model. "[I]n the event of a cash shortfall, the U.S. government would likely prevent the Postal Service from significantly curtailing or ceasing operations." OIG Report FT-AR-17-001 at 8-9; *accord*, USPS Form 10-Q report for Quarter 1, 2017 (Feb. 9, 2017) at 9 (same).[20] Among other things,

[20] The financial analysis that is appropriate for a government entity differs from the financial analysis appropriate for a private firm. *See* PRC FY 2015 Financial Analysis Report 75 (Mar. 29, 2016). There are two reasons for this. First, federal government enterprises are subject to statutory constraints that reflect a more complex mix of goals than profit maximization. Second, federal government enterprises enjoy an implicit guarantee of payment by the federal government, which is not subject to bankruptcy. For this reason, government-owned enterprises must be evaluated by different standards of financial stability than privately owned

Congress could raise the Postal Service's current borrowing limit of $15 billion, which has been arbitrarily frozen for some time, and now equals in inflation-adjusted dollars only about 25 percent of the Postal Service's initial borrowing limit in 1971.[21]

Finally, the Postal Service argues that its real liquidity would be much less than $8 billion if the Postal Service made the scheduled contributions to the Retiree Health Benefits Fund ($2.9 billion), the Civil Services Retirement System ("CSRS") ($1.2 billion), and the Federal Employee Retirement System ("FERS"). USPS Fiscal Year 2017 Integrated Financial Plan at (November 2016) at 9. But the premise of this argument is counterfactual. The Postal Service did not make the prefunding payment to the RHBF required by Congress in Fiscal Years 2012 through 2016, and Congress did nothing to force payment.

---

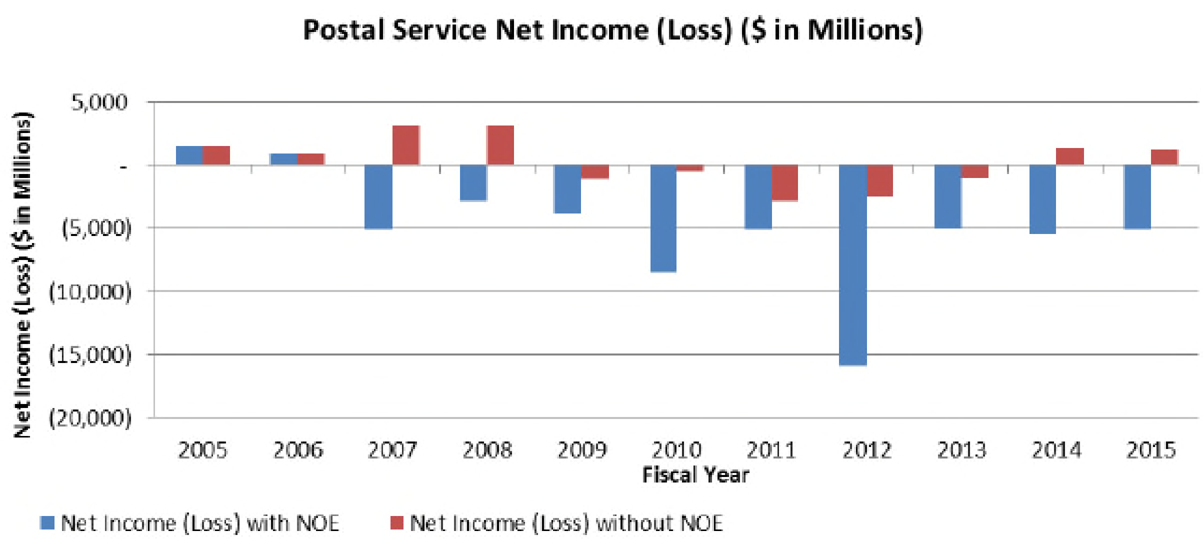
firms. As Chairman Taub has acknowledged, "[f]inancial analysis used in the private sector may not be directly relevant to government agencies because revenue streams, equity structures, and management incentives differ." Prefiled Testimony of Robert G. Taub to U.S. House Oversight and Government Reform Committee (May 11, 2016) at 9. "Stakeholders of private sector entities use financial analysis to make investment and credit decisions, and success is often measured by the company's stock valuation. In contrast, Federal agencies are mission-oriented and measure success through the provision of service." *Id.* at 12; *see also id.* at 14 (noting limitations on the predictive value of the Altman Z-Score).

[21] The borrowing limit set by the Postal Reorganization Act in 1970 was $10 billion. Pub. L. No. 91-375 (Aug. 12, 1970), § 2, 84 Stat. 740 (codified at former 39 U.S.C. § 2005(a)). This amount was equivalent to about $60 billion in 2017 dollars. *See* www.usinflationcalculator.com/inflation/consumer-price-index-and-annual-percent-changes-from-1913-to-2008/.

5. The negative net earnings reported by the Postal Service are largely an artifact of the statutory prefunding requirement.

The Postal Service, obviously aware of its favorable operating performance, emphasizes instead its reported *net* income, which has been negative since 2006. These reported losses, however, are an artifact of the Postal Service's failure to meet the arbitrary and needlessly short prefunding schedule prescribed by Congress in 2006 for the Postal Service's retiree health benefits fund. Nadol Decl. at 17-18. The following figure, published by the Commission in March 2016, dramatically illustrates the extent to which the losses reported by the Postal Service in recent years have been artifacts of the prefunding requirement and other non-operating expenses:[22]

Figure 9



Source: Postal Service Form 10-K and USPS Annual Report, FY 2005-2015.

Note: NOEs include all non-cash workers' compensation costs, the accrued payment to the Postal Service's RHBF, the FERS supplemental payment, and any one-time expense or revenue adjustments.

[22] Source: PRC FY 2015 Financial Analysis Report at 1 (March 29, 2016).

Fiscal Year 2016, which ended too late to be included in the Commission's Financial Analysis Report for Fiscal Year 2015, continued the trend. The Postal Service reported a loss of $5.6 billion in that year, but a controllable operating income of $610 million. USPS Form 10-K for Fiscal Year 2016 at 15.

There is no serious dispute that the vast majority of the Postal Service's reported "losses" in recent years would not have occurred but for the prefunding schedule prescribed by the PAEA. As NALC president Rolando has noted, the "expense of this mandate has accounted for nearly 90 percent of the Postal Service's reported financial losses since 2007." Rolando 2017 testimony at 2; *accord*, PRC Fiscal Year 2015 Financial Analysis Report 75-78 (Mar. 29, 2016); OIG Report No. RARC-WP-16-009, *Peeling the Onion: The Real Cost of Mail* (April 18, 2016) at 1 (the Postal Service would have broken even between 2006 and 2015, despite the recession, with additional cost savings or revenue of 3.1 cents per piece; of this 3.1 cent gap, 2.8 cents were due to the RHB prefunding requirement).

These unpaid installments, however, do not raise current cash flow issues. No cash will change hands between the Postal Service and its retirees until the retirees actually retire and start receiving their pensions and health care coverage: the funds transferred by the Postal Service to its pension and retiree health care accounts are still assets available to the Postal Service to pay its future liabilities to its retirees. To be sure, the underfunding of retiree benefit plans can raise serious concerns if it casts doubt on the ability of an employer to meet its financial commitments to its retirees and other creditors in the future. But the Postal Service warrants no such concern, even for the future. As shown in the next section, the Postal Service's pension and retiree health benefit funds—contrary to conventional wisdom—are extraordinarily well funded by the standards of most public and private sector employers.

C. The negative balance sheet reported by the USPS does not reflect its true financial condition.

1. The Postal Service's failure to meet the needlessly fast prefunding schedule prescribed by PAEA proves nothing about the ability of the Postal Service to meet its actual financial obligations to retirees, or its financial stability generally.

One of the main arguments offered by the Postal Service for jettisoning the CPI cap is the large excess of reported liabilities over reported assets on the Postal Service's balance sheet. *See*, *e.g*., Brennan 2017 testimony at 7 (table); USPS Form 10-K for Fiscal Year 2016 at 12. But this negative reported net worth is essentially an artifact of the same arbitrary prefunding requirements that have caused the Postal Service to report net losses on its income statement in recent years. Of the $96 billion negative net worth reported by the Postal Service at the end of Fiscal Year 2016, all but about $22 billion represented the unfunded portion of the Postal Service's pension and retiree health benefit plans. *Compare* Rectanus 2017 testimony (GAO-17-404T) at 15 with Brennan 2017 testimony at 7.

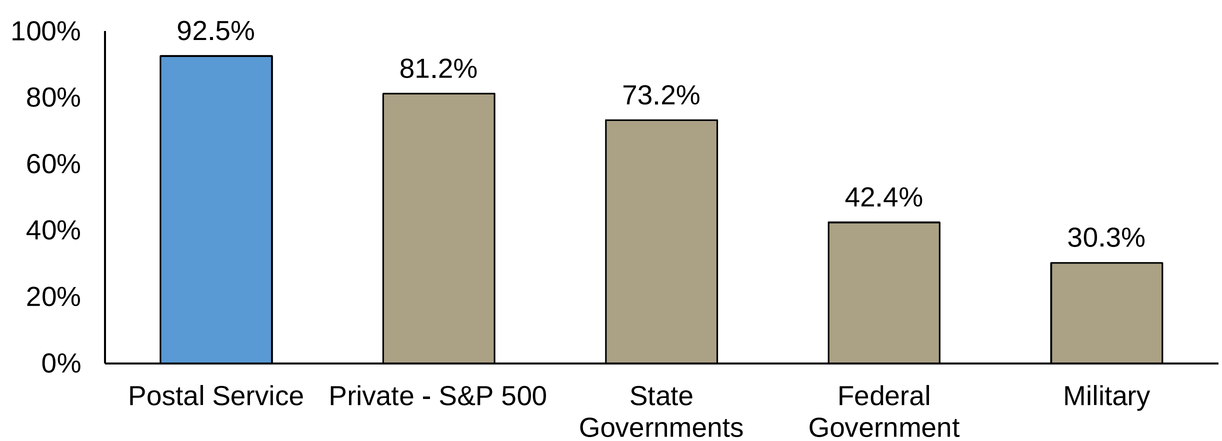
These figures, and the negative net worth reported by the Postal Service as a result, are meaningless in terms of the Postal Service's ability to meet its obligations. In fact, the Postal Service has funded its pension and retiree health benefit funds more fully than have the vast majority of government and private sector employers in the United States. Nadol Decl. at 12-18. Even according to the conservative assumptions of the Office of Personnel Management ("OPM"), the

Postal Service's pension funds already have enough funds to cover 92.5 percent of their projected liabilities, and the Retiree Health Benefit Fund already has enough funds to cover about 50 percent of its projected liabilities. *Id.* Overall, the Postal Service's retirement benefit accounts (*i.e.*, both the pension and retiree health benefit accounts) already contain over $338 billion in assets, or 82 percent of actuarial liabilities. Rectanus 2017 testimony (GAO-17-404T) at 18 (Table 4).

The Postal Service's pension funding level of 92.5 percent is far higher than the overall federal funding level, the funding level of most state and local government retirement plans, and the standards established under the Pension Protection Act of 2006 for determining whether a private employer's plan is "at risk" or "endangered." Nadol Decl. at 12-14.

Figure 10

Pension Funding Levels

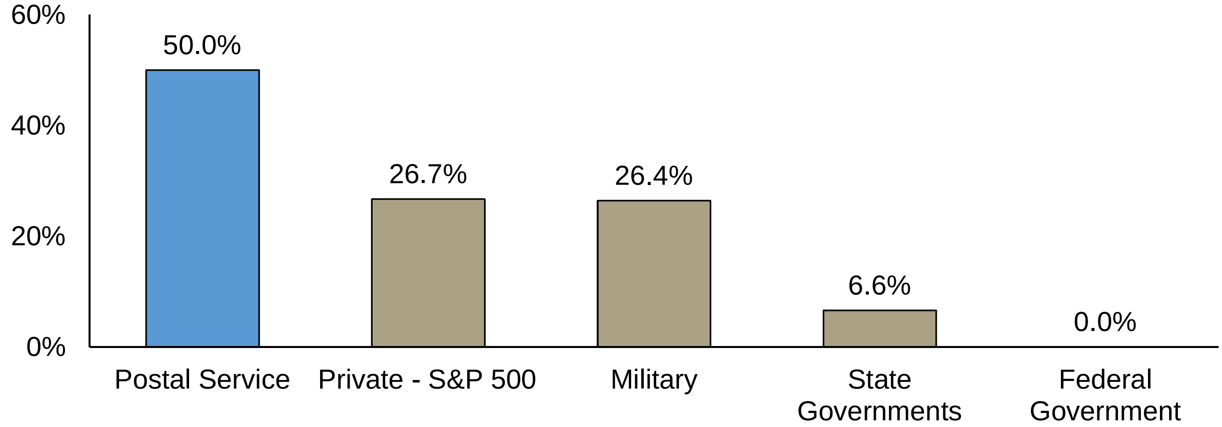


Nadol Decl. at 4, 12-14.

Likewise, the 50 percent funding of the retiree health benefit plan surpasses the funding of health care benefits by most private employers, the federal government and many state and local governments, many of which have yet to prefund this benefit at all:

Figure 11

Retiree Healthcare Prefunding Levels FY2014



Nadol Decl. at 4, 14-17; Brennan 2017 testimony at 12-13. Even without further contributions, the $338 billion of funds in the Postal Service's pension and retiree health benefit plans are sufficient to meet the Postal Service's financial obligations to its retirees for decades. Nadol Decl. at 5-6, 28-29. There is no immediate problem, let alone a crisis, here.[23]

Moreover, the Postal Service funding percentages noted in the previous paragraph are highly conservative. They reflect OPM's projections of future

[23] A moment's thought should make clear why pension and retiree benefit plans do not need to be fully funded. The financial solvency of a retiree benefit fund requires that an employee's benefits be fully funded only when the employee retires, contributions to his or her retirement fund end, and withdrawals begin. But most employees in any workforce have not reached retirement age, and their employer has years to continue funding their benefits before retirement occurs. Except in the hypothetical case in which every employee in an employer's workforce is about to retire, there is no reason why the employer's retiree benefit fund should ever be fully funded.

spending on pension and retiree health care benefits. The OPM projections assume, for example, that the actuarial and financial factors affecting the projected future level of retirement benefits for federal government retirees as a whole are a good proxy for Postal Service-specific factors. But experience shows that actual pension benefit spending for an average Postal Service retiree has been, and will continue to be, less than the average per-retiree spending for other federal employers. *See*, *e.g.*, OPM, *Federal Employees' Retirement System: Government Costs*, 81 Fed. Reg. 93851 (Dec. 22, 2016); USPS OIG Report Number FT-WP-15-003, *Considerations in Structuring Estimated Liabilities* at 7 ("Using demographics specific to Postal Service employees would reduce the combined retiree health care and pension liabilities by $8.5 billion."); USPS OIG Report FT-MA-13-024, *Using USPS-Specific Assumptions for Calculating the Federal Employees Retirement System Liability* (Sept. 27, 2013) (finding that substituting USPS-specific employee characteristics for general federal employee characteristics reduced the projected liability of the FERS pension program to Postal Service employees by $9.5 billion). Hence, the Postal Service's pension and retiree health benefit plans are even more fully funded than the OPM-derived figures cited in the previous paragraph indicate. Nadol Decl. at 19-23, 25.

The Commission has recommended that Congress amend the current required prefunding level to comport with standard industry practice in both the private and public sectors. Docket No. PI2016-3, PRC Section 701 Report (Nov. 14, 2016) at 6-7. Whether Congress takes this action or not, however, the Postal Service's failure to reach the needlessly high prefunding target prescribed by the PAEA cannot logically justify any loosening of the CPI cap. If the Postal Service can meet its obligations to its present and future retirees without reaching the statutory prefunding target, allowing the Postal Service to extract the shortfall from captive mailers through above-CPI price increases would give the Postal Service (or future mailers) a windfall at the expense of the current generation of captive mailers.

2. The Postal Service massively understates its financial resources by valuing real estate on its balance sheet at depreciated book cost instead of current market value.

The Postal Service's balance sheet also understates the Postal Service's net worth in a second major respect. In calculating its net worth, the Postal Service values its enormous portfolio of real estate at depreciated historical cost (roughly speaking, the cost at which the assets were acquired years or decades ago, minus accounting depreciation). In 2012, however, the Postal Service's Office of Inspector General estimated that the current market value of the Postal Service's real estate portfolio exceeded book cost by approximately $70 billion. OIG Report FT-WP-15-003, *Consideration in Structuring Estimated Liabilities* (Jan. 23, 2015) at 3-4 (citing OIG Report FT-MA-12-002, *Pension and Retiree Health Care Funding Levels* (June 18, 2012)). The disparity may be even greater today, since the average price of commercial property in the United States has increased by roughly 40 percent since 2012. Nadol Decl. at 30-31.[24]

[24] *See also* Green Street Advisors U.S. Commercial Property Price Index, https://www.greenstreetadvisors.com/insights/CPPI (site visited Mar. 13, 2017); Society of Industrial and Office Realtors Commercial Real Estate Index (Jan. 2017), http://www.sior.com/docs/default-source/marketing/sior-index-updated-jan-2017.pdf?sfvrsn=0 (site visited Mar. 13, 2017).

An economically valid assessment of the Postal Service's financial stability requires that the Postal Service's real estate be valued at its current market value. Depreciated original cost, although consistent with the requirements of GAAP for financial statements to shareholders and other investors, and used by many (although not all) regulators to determine the rate bases of common carriers and public utilities whose maximum rates are still regulated on cost-of-service principles, is not an appropriate measure of the financial stability of an enterprise like the Postal Service in the context of this case. The question before the Commission here is whether the Postal Service will have enough funds to pay the amounts promised to its creditors—including its current and former employees—in the "very unlikely event" that the Postal Service "were suddenly shut down" and its assets were liquidated. *Cf.* OIG Report FF-MA-11-118 at 4.[25] To answer *this* question, one needs to estimate how much the Postal Service could realize by selling some of its (by assumption) superfluous real estate and other assets on the open market. The answer depends on the current market value of the assets, not their historical book costs. Nadol Decl. at 6, 31-32. *Accord*, *Bank of Am. Nat'l Trust and Savings Ass'n v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 457 (1999) ("[T]he best way to determine value is exposure to a market.") (citing *Baird: Elements of Bankruptcy* at 262); *In re The Bible Speaks*, 65 B.R. 415, 418 (Bankr. D. Mass. 1986) (noting in Chapter 11 reorganization proceeding that "it is clear that the value of this real estate is substantially in excess of its book value, which merely represents historic cost less depreciation" and taking "judicial notice of the general

[25] As discussed above, if the Postal Service's business continues on its likely course, there will be no collapse and the Postal Service's retiree benefit funds will be amply funded to pay the claims against them.

increase in real estate values … since then"); *Estate of Tully v. U.S.*, No. 488-71, 1978 WL 3453, * 12 (Ct. Cl. 1978) ("This commonly found difference between original cost less depreciation and fair market value accounts in large part for the unreliability of book values.") (additional citation omitted)).[26]

The current record does not allow for a more precise measure of the understatement of the current market value of the real estate on the Postal Service's books. Until the Commission develops a reasonable estimate of the current value of the Postal Service's real estate, any determination that the Postal Service needs to extract more funds from captive ratepayers to satisfy its future liabilities to retirees in the unlikely event of a shutdown is premature.[27]

---

[26] The Postal Service has recognized that GAAP does not necessarily provide the most realistic results in all contexts. In the first quarter of Fiscal Year 2017, the Postal Service earned in $1.4 billion in net income according to GAAP. In announcing its financial results for that quarter, however, the Postal Service downplayed the $1.4 billion GAAP-compliant earnings figure because it included non-operating gains. USPS press release (Feb. 9, 2017).

[27] When the OIG investigated this issue in 2011 and 2012, the Postal Service professed not to "maintain fair market or assessed tax value records for its properties." OIG Report FF-MA-11-118 at 2 n. 6. When the undersigned parties sought discovery on the same issue in the current docket, the Postal Service objected on the ground that the mailers had "ample materials with which to attempt to advance their argument" on the issue. Response of the USPS in Opposition MPA *et al*. Motion for Issuance of Information Requests (Jan. 24, 2017) at 4. The Commission upheld the Postal Service's objection on the theory that "this stage of the docket" is not a "litigated proceeding," while reserving the option of requesting such information if the Commission "later determines that additional information is necessary." Order No. 3763 at 3, *aff'd*, Order No. 3807 at 8-9.

D. The Postal Service has ample means to improve its financial position even further without imposing above-inflation price increases on captive mailers.

As explained above, the Postal Service has sufficient income and assets to provide appropriate services and cover its liabilities without triggering a death spiral. If the Postal Service is still unsatisfied with its current finances, however, it has ample means to improve them under the existing regulatory system. The following are several of the most significant.

1. Moving toward compliance with the pay comparability requirement.

The Postal Service could save billions of dollars of costs annually by reducing the compensation premium paid to postal employees. 39 U.S.C. § 1003(a) establishes a policy that the Postal Service shall "maintain compensation and benefits for all officers and employees on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector of the economy." The pay comparability policy, however, has been honored in the breach for years.

When the President's Commission on the United States Postal Service considered the issue in 2003, there was considerable evidence that the Postal Service was paying compensation far in excess of the comparability standard. Nadol Decl. at 33-34.[28] In 2003, Professor Michael Wachter, Co-Director of the

[28] *See also* Douglas K. Adie, *An Evaluation of Postal Service Wage Rates* 89-101 (1977); D. Adie, "How Have Postal Workers Fared Since the 1970 Act?" in Sherman, Roger, ed., *Perspectives on Postal Service Issues* 74-79 (1980); Sharon P. Smith, "Commentary," in *id.* at 94-98; Michael L. Wachter and Jeffrey M. Perloff, "A Comparative Analysis of Wage Premiums and Industrial Relations in the British Post Office and the United States Postal Service," in Michael A. Crew and Paul R.

Institute for Law and Economics at the University of Pennsylvania and a frequent witness for the Postal Service in wage and compensation arbitration cases, testified to the President's Commission that the "wage premium is large – econometrically estimated to be 21.2 percent or 33.9 percent by Dr. Wachter using different methods for his October 2001 testimony before the interest arbitration panel." Moreover, the total compensation premium, including benefits, was much higher than the wage premium alone. Testimony of Prof. Michael Wachter before the President's Commission (April 29, 2003) (available at www.ustreas.gov/offices/domestic-finance/usps/meetings/4-29-03/witnesses.shtml); Nadol Decl. at 33. The President's Commission, without trying to quantify the compensation premium, found that Postal Service employees enjoyed the "'best of both worlds"—an average salary of more than $42,000 and "the job security and ample benefits packages that make Federal employment attractive."[29] *Accord*, FTC, *Accounting for Laws that Apply Differently to the USPS and its Private Competitors* 39-40 (Dec. 2007).

Unfortunately—and despite the much-ballyhooed deployment of non-career employees—the Postal Service has made no progress since the enactment of PAEA in reducing the hourly compensation premium its employees receive. Nadol Decl. at 7-11. Postal Service compensation levels have risen faster than inflation over the past 10 years. Today, the compensation paid to career postal employees is

---

Kleindorfer, eds., *Competition and Innovation in Postal Services* 115-137 (1991); Michael L. Wachter, Barry T. Hirsh and James W. Gillula, "Difficulties of Deregulation When Wage Costs are the Major Cost," in Crew and Kleindorfer, eds., *Future Directions in Postal Reform* 1-24 (2001).

[29] President's Commission on the United States Postal Service, *Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service* 109 (July 31, 2003).

approximately *double* the compensation offered by private employers for comparable work. Nadol Decl. at 34-48, 51-58.

The most telling evidence that the Postal Service pays a large compensation premium remains the Postal Service's "historically very low" quit rates for its career employees. Nadol Decl. at 48-49. Between 2008 and 2013, the quit rates for postal workers represented by NALC, APWU, NRLCA, and NPMHU actually fell—to approximately one-half of one percent per year. In 2013, for example, the annual quit rates were 0.5% (NALC), 0.4% (APWU), 0.7% (NRLCA) and 0.4% (NPMHU)—compared with 4.8% for the average federal sector employee and 22.3% for the average private sector employee. OIG Report No. RARC-WP-15-004, *Flexibility at Work: Human Resource Strategies to Help the Postal Service* (Jan. 5, 2015) at 12. During the same period, the average quit rates for the federal government as a whole were approximately *ten times* as high (about 4.8 percent), and the average quit rates for the private sector were approximately *40 times* as high (approximately 22.3 percent). *Id.*[30]

Relying on a variety of data sources and analyses, Mr. Nadol demonstrates in his declaration that the compensation received by the average Postal Service employee is now virtually *double* the compensation offered by the private sector for comparable levels of work. Nadol Decl. at 7-18, 34-47. The compensation premium would be massive even if the compensation levels offered by the private sector were much higher than Mr. Nadol has determined.

---

[30] The quit rates among USPS non-career workers are higher. *See* OIG Report No. RARC-WP-15-004 at 13 *et seq*. The main causes, however, appear to be working conditions, not rates of pay. Nadol Decl. at 49-50.

The APWU-Postal Service collective bargaining arbitration in mid-2016 illustrates the Postal Service's failure to deal effectively with the compensation premium. The neutral arbitrator on the APWU-Postal Service arbitration panel found that Postal Service compensation levels violate the comparability standard by almost every objective measure:

> [T]he package of economic benefits received by bargaining unit employees—retirement benefits, retiree health care, paid leave, low employee health care contributions, and a no-layoff provision—are superior to those typically available to private sector employees. Another factor which stands out are the quit rate data, which show that career Postal Service employees voluntarily leave their jobs at a rate far lower than do private sector employees. Despite APWU arguments to the contrary, I consider this as powerful evidence that APWU-represented employees consider their jobs with the Postal Service to be superior to the alternatives available to them elsewhere. To be sure, wages and benefits are not the only considerations that enter into an employee's decision whether to stay with the Postal Service or go elsewhere, but it would be naïve to believe that these are not major considerations. Hence, I conclude that the almost total unwillingness of APWU-represented employees to leave their jobs voluntarily is powerful evidence that they view their compensation and benefits as superior to what they would receive elsewhere, based on their skill and experience.

In the Matter of USPS and APWU, AFL-CIO, Interest Arbitration Decision and Award (July 8, 2016) at 11.

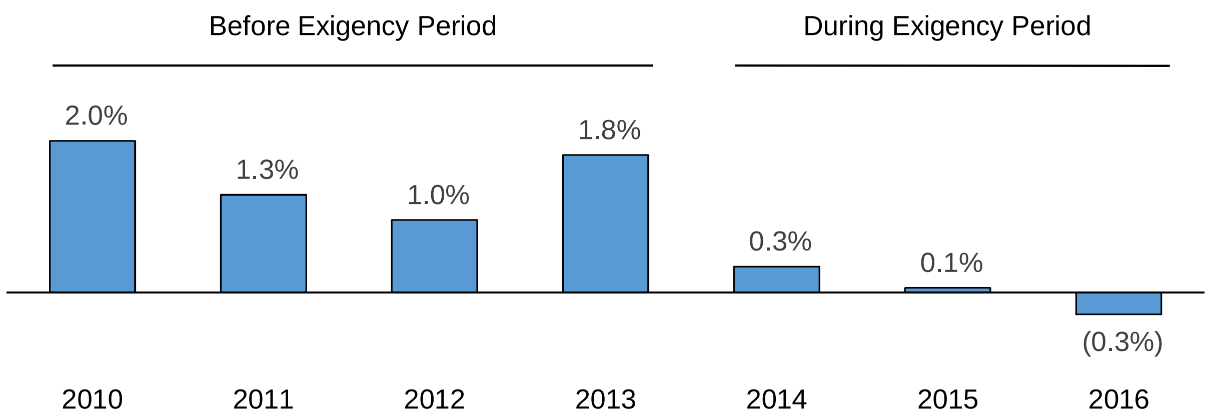
The arbitrators ultimately did not enforce compensation comparability, however. The reason illustrates the unforced errors by the Postal Service that have maintained the longstanding compensation premium. A year before the APWU arbitration, the Postal Service had *voluntarily* agreed to a collective bargaining agreement with the National Rural Letter Carriers' Association ("NRLCA") that included general pay increases of 1.2%, 1.3%, and 1.3%, lagged six months; a COLA with a 2014 base; and health benefits contribution reductions of 1% per year for three years. *Id.* at 12. Assigning "considerable weight to the USPS-NRLCA Agreement," the APWU arbitration panel awarded similar terms. "Interest arbitrators often look favorably at recent voluntary agreements," the neutral on the APWU panel explained. "I follow that line of reasoning in assigning substantial weight to the NRLCA agreement." *Id.*

The Postal Service fortunately does not need legislative reform to deal with the compensation premium. As Mr. Nadol explains in his declaration, there are two standard techniques for moving toward pay comparability, both of which have worked effectively. First, the compensation levels of current career employees are grandfathered in, but not increased. Second, the use of Tier 2 employees is greatly expanded. These approaches have worked when tried in many jurisdictions. Nadol Decl. at 9-11, 61-67. But they will not work for the Postal Service unless it tries them. And the Postal Service is unlikely to push hard for them in future collective bargaining agreement negotiations if the Commission takes the pressure off by weakening or eliminating the discipline provided by the CPI cap. *Id.* at 67; *see also* pp. 64-66, *infra*.

2. Reviving the Postal Service's cost reduction initiatives.

Another way that the Postal Service could improve its finances under current law would be to resume serious efforts to reduce costs. Between 2010 and 2013, the Postal Service achieved productivity gains in the range of one to two percent per year. Since Fiscal Year 2014—not coincidentally, the year in which the exigent surcharge approved in Docket No. R2013-11 took effect—Postal Service productivity growth has collapsed:[31]

Figure 12
USPS Total Factor Productivity (TFP) Growth Rates
(FY 2010 – FY 2016)



Despite its poor productivity performance since the beginning of 2014, the Postal Service has admitted that it "has no current plans to initiate major initiatives to achieve cost savings in its operations." Rectanus 2017 testimony at 10; *accord*, Hearings before the Senate Comm. on Homeland Security and Govt. Affairs (Jan. 21, 2016), prefiled testimony of Lori Rectanus (GAO-16-268T) at 8 (same). This approach is unacceptable. As noted above, efficiently run businesses (and nonprofit organizations) continually search for opportunities to improve productivity, particularly during economic downturns, whether company- or industry-specific or nationwide. *See* pp. 67-69, *infra*.

The Postal Service's network rationalization efforts illustrates the lack of a sustained commitment to cost control. In 2010, the Postal Service began the

[31] Library Reference ANM *et al*.-LR-R2017-3/1 (worksheet "Figure 12").

process of implementing a two-phase Network Rationalization plan. According to the Postal Service, the first phase of the plan, which was fully implemented, realized annual savings of $865 million.[32] The Postal Service, however, has halted the second phase of this plan, which was scheduled to begin in 2014, despite having estimated that Phase 2 of its plan would save $1.2 billion per year.[33] While implementation of the network rationalization plan has not been without its challenges,[34] the Postal Service is plainly leaving money on the table by halting these efforts indefinitely, since Congress has not required this. Rectanus 2017 testimony at 10.

The failure to move forward with Phase 2 of the network rationalization initiative has hurt the Postal Service's labor productivity as well. As the Postal

[32] *See, e.g.*, ACR 2015, USPS Response to Chairman Information Request No. 7, Question 16.

[33] *See, e.g.*, OIG Report NO-AR-16-009 at 25 (reporting initial estimates of $750 million for Phase 2, subsequently revised to $1.2 billion); USPS.com, "Our Future Network: Key facts on network rationalization," https://about.usps.com/news/electronic-press-kits/our-future-network/ofn-usps-key-fact-on-network-rationalization.htm (reporting cost savings of approximately $0.9 billion from Phase 1 and anticipating total annualized savings of $2.1 billion from Phase 1 and Phase 2 combined).

[34] Indeed, implementation of Phase 2 was halted in large part because of detrimental impacts on service. *See, e.g.*, OIG Report NO-AR-16-009 at 7. But the notion that network rationalization necessarily leads to unacceptable decline in service performance warrants further consideration by the Commission. For many mailers—including nonprofit organizations, many advertisers, and magazine publishers, —reliability of service is more important than absolute speed. Most ANM, PostCom and MPA members can anticipate and adjust to changes in projected delivery times as long as the delivery times are predictable. While absolute delivery time is important for some mailers, cost control is more important for most. In any event, ANM, PostCom and MPA do not believe that service degradation—specifically in terms of reliability and predictability—is a necessary consequence of optimizing mail processing facilities.

Service noted in its FY2016/17 Report & Plan, it failed to meet its Deliveries per Total Work Hours goal (a measure of productivity) partly as a result of "a delay in plant consolidations [and] not capturing all of Network Rationalization phase 2 savings."[35] As there are no legal constraints on the Postal Service's ability to move forward with these plans, it should do so forthwith.

Another missed opportunity to save costs involves the use of less costly modes of delivery, particularly curbside and centralized mailboxes. The Postal Service has estimated that the resulting savings could be on the order of $2 billion annually. GAO Report GAO-14-144, *U.S. Postal Service: Delivery Mode Conversions Could Yield Large Savings but More Current Data Are Needed* (May 2014). While these delivery options may not be suitable for all areas, and additional investigation of the impact on response rates and the value of mail is warranted, potential savings of this magnitude should not be ignored.

3. Making better management and pricing decisions.

The Postal Service can further improve its finances under the present system by avoiding misguided pricing and investment decisions. The Flat Sequencing System ("FSS") debacle is a good example. Before the FSS was deployed, experts both inside and outside the Postal Service warned that the FSS was unlikely to achieve its goals and was likely to increase, not decrease, the costs of processing and delivering flat-shaped mail. Plunkett Decl. at ¶ 6-8. The mailing industry urged the Postal Service to commit to a rate structure that gave efficient incentives for co-mailing by mail owners, printers and mail service providers, rather than having the

[35] United States Postal Service FY 2016 Annual Report to Congress, Docket No. ACR2016, Library Reference USPS-FY 16-17 2016 Annual Report and Comprehensive Statement of Postal Operations at 22.

Postal Service invest billions in the FSS. Stralberg Decl. at 1-2; Library Reference ANM *et al.* –LR-RM2017-3/2

The Postal Service instead chose to proceed with the FSS. Its performance has been even worse than the skeptics warned. First, the Postal Service's planners greatly underestimated the extent to which mailers would sort flats to the carrier route level. Stralberg Decl. at 4. Second, the Postal Service overstated the costs of manual sequencing of carrier route flats by carriers, and thereby overestimated the costs saved by diverting the sequencing work to the FSS. *Id.*. Third, the Postal Service, erroneously assuming that practically all flats within an FSS zone would be placed in delivery sequence by the FSS, removed the vertical flats cases carriers had used for manual sequencing. *Id.* Fourth, the Postal Service's planners incorrectly assumed that nearly all flats would be machinable on the FSS. *Id.*; Plunkett Decl. at ¶ 7. Fifth, the Postal Service's predictions that practical concerns about the FSS machines themselves, including their footprint, cost, and complexity, would be solved during the design and implementation of the system proved incorrect. Plunkett Decl. at ¶ 6. Finally, because flats mail volume was lower than the Postal Service had expected, it added many outlying zones to the territory covered by each FSS machine, causing substantial service degradation. Stralberg Decl. at 1-2. Because reality unsurprisingly did not follow these incorrect assumptions, many of which industry questioned at the time, the large reductions in sorting and delivery costs that were invoked to justify the FSS program have not materialized, and almost certainly never will. *Id.* at 5-11. The FSS, for example, adds almost 17 cents to the cost of an average carrier route flat that converts to FSS processing. *Id.* at 2, 6.

It is long past time for the Postal Service to face reality, retire the FSS, allow mailers to presort flats to the carrier route in all zones (including the current FSS zones), and deepen worksharing rate differentials to recognize 100 percent (up from the current 60 percent[36]) of the costs avoided by carrier route presorting and related worksharing. The resulting increase in co-mailing and co-binding will result in huge shifts to carrier route presortation, a preparation that enables flat-shaped mail to cover its attributable costs. Quad/Graphics Decl. at 3. This threshold will never be met as long as the Postal Service keeps the FSS on life support while forbidding carrier route presorting in zones with FSS machines and maintaining a price structure that discourages efficient co-mailing and the related worksharing. *Id*. at 2-3; Stralberg Decl. at 3.

The Postal Service has offered no cogent reason for failing to take these obvious steps. In Docket No. ACR2016, the Postal Service advanced essentially two arguments against encouraging co-mailing by deepening the discounts for Carrier Route Basic presorting to 100 percent of the costs avoided by this level of mail preparation: (1) the percentage of flats presorted to the Carrier Route has increased over time even without any substantial increase in the Carrier Route discount; and (2) other rate design elements provide sufficient incentive to comail.[37] These arguments are without merit. The first is a non sequitur. That the percent of flats entered at Carrier Route mail has increased without a significant increase in the Carrier Route discount says nothing about whether a substantial deepening of the

[36] Docket No. ACR2016, FY16.3 WorksharingTables.Rev.3.6.17.xls, "Periodicals Outside County."

[37] Docket No. ACR2016, USPS-FY16-44, Report Responding to Periodicals Pricing Directives at 5.

Carrier Route discount would cause a substantially *further* increase in the percentage of flats entered at the Carrier route level. The relevant comparison is incremental. The second argument is also misplaced. The Carrier Route discount, not the bundle and container rates, remains the key incentive for comailing. Quad/Graphics Decl. at 2-3.

Whether to continue using the FSS is a managerial decision that falls within the Postal Service's responsibility. But deciding what costs may be recovered from captive mailers is the Commission's responsibility. For all of the reasons explained above, the Postal Service's failure to end its FSS project and revamp its rate structures for flat-shaped mail to give mailers stronger incentives to engage in cost-savings practices such as Carrier Route preparation and sorting is an independent ground for rejecting the Postal Service's request for the right to impose above-CPI rate increases on captive mailers.[38]

4. Looking creatively for new revenue sources as effectively operated private businesses do.

The Postal Service should emulate competitive private businesses and look for innovative ways to develop *voluntary* sources of new revenue.

Objective (4) of PAEA explicitly exhorts the Commission to grant the Postal Service pricing flexibility and to consider "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

[38] MPA initial comments in ACR2015 at 3-6; PostCom initial comments in ACR2015 at 1-3; Valpak initial comments in ACR2015 at 13-14; MPA reply comments in ACR2015.

available on public and reasonable terms to similarly situated mailers." Yet in the ten years since the passage of PAEA, the Postal Service has filed only five negotiated service agreements relating to market dominant products. By contrast, thus far in FY 2017, the Postal Service has already filed 129 competitive product pricing contracts. This activity on the competitive side suggests that the capability and infrastructure to negotiate pricing contracts exists, yet its use with market dominant products remains severely limited. It is disingenuous at best for the Postal Service to be arguing that the regulatory system established after PAEA is not working when it has largely ignored the pricing freedoms that the law enabled. Similarly, despite greater flexibility to experiment, the Postal Service has averaged only one market test per year since PAEA's passage.

Another potential source of revenue that the Postal Service does not appear to have pursued seriously is the rental of advertising space on mail trucks. As the USPS OIG has noted, "From public transportation to sports stadiums, venues use their prime real estate to sell space to advertisers and generate extra revenue. Take for example the Washington Metro transit system. Ad space is for sale everywhere – on buses and trains (inside and out) and even on train tunnel walls and floors." "We 'Advertise' for You?" OIG Blog (Nov. 30, 2009) (downloaded from https://www.uspsoig.gov/blog/we-%E2%80%9Cadvertise%E2%80%9D-you). The most sensible approach to selling advertising space on postal trucks is to put the necessary tasks—controlling the inventory, handling the ad sales, and execution—out for bid to media companies. One such company, Clear Channel, signed an eight-year, $151 million contract with the Metropolitan Washington Airports Authority for the right to manage advertising at the Reagan National and Dulles

International airports.[39] Another company that ran a pilot on-vehicle advertising project for the Postal Service during 2009-2011 estimated that advertising on Postal Service vehicles could raise $360 million per year. Post & Parcel (Nov. 29, 2011) (downloaded from http://postandparcel.info/44007/news/companies/advertising-on-usps-vehicles-could-raise-360m-a-year/).

There are likely to be many other opportunities for the Postal Service to develop profitable new ways to generate additional revenue. Private businesses have faced many of the same financial pressures as the Postal Service since 2007, and they have reacted in innovative ways to maintain and grow their business. The declarations included with these comments describe the actions companies such as Publishers Clearing House and IWCO Direct have taken to expand their business, seek new customers, and leverage their existing expertise into new markets when faced with declining demand for their traditional products and services. *See, e.g.*, Smith Decl. at ¶¶ 5, 8; Rosser Decl. at ¶ 9.

The Postal Service should follow the lead of these businesses. It will not do so, however, without an incentive. The CPI cap was designed to provide that incentive. Yet for its market dominant products, the Postal Service largely manages its operations as though nothing has changed. If the cap is weakened and the incentive to innovate reduced even further, the likelihood that the Postal Service will continue pursuing marketing innovations of the kind described above will be nil.

[39] "With a captive audience of 44 million, Clear Channel and MWAA launch $151M advertising deal," Washington Business Journal (Mar. 11, 2016) (available at www.bizjournals.com/washington/morning_call/2016/03/with-a-capitve-audience-of-44-million-clear.html).

E. Congress has other practical means to improve the Postal Service's financial position even further without imposing above-inflation price increases on captive mailers.

1. Allowing the Postal Service to invest its cash in assets other than low-yield Treasury bonds.

Congress has several other ways to improve the Postal Service's balance sheet if necessary. First, Congress could allow the USPS to invest its cash in a diversified portfolio of debt and equity securities instead of low-yield Treasuries. That adjustment alone would reduce the present value of the Postal Service's postretirement obligations by more than $100 billion, transforming the Postal Service's pension and retiree health benefit fund from an overall deficit of $79 billion to a large overall surplus. Nadol Decl. at 5, 19-23, 25-26.

Current law requires that funds invested in the Civil Service Retirement and Disability Fund (which holds the postal funds for both the CSRS and FERS) and the Postal Service Retiree Health Benefits Fund, as well as other cash held by the Postal Service, be invested in low-yielding Treasury bonds. 5 U.S.C. § 8909a(c). This requirement is of no benefit to the Postal Service, its employees, or its ratepayers, and it merely forces them to subsidize the rest of the federal government. As the president of the NALC has noted, "No private company in America would invest 100 percent of their pension and post-retirement health funds in such a conservative way." Rolando 2017 testimony at 9. Allowing the Postal Service to invest its cash in a well-diversified portfolio of private sector equities, bonds and real estate could massively improve the Postal Service's finances without incurring undue risk. Nadol Decl. at 21-23; *accord*, Rolando 2017 testimony at 8-11;

Hearings before the House Comm. On Oversight and Govt. Reform (May 11, 2016) at 8-13; *id*. at Attachment 2 (Lazard analysis).

Attachment A, *infra*, illustrates the dramatic effect that a higher return on invested funds would have on the Postal Service's balance sheets. The average return currently anticipated by a sample of 126 public retiree plans recently surveyed by the National Association of State Retirement Administrators is approximately 7.0 percent. *See* http://www.nasra.org/investment. Substituting this value for the discount rates of 3.9 percent and 5.25 percent discount rates currently used to determine the present value of the expected stream of future payments to retirees reduces that present value by approximately $146 billion. This one change alone transforms the Postal Service's pension and retiree health benefit from an overall deficit of $79 billion to an overall *surplus* of $66.7 billion. *See* Attachment A, *infra* (summarizing Nadol Decl. at 20-23)

These figures rely on the simplifying assumption that the Postal Service's projected future outflows will remain constant (in real dollars) in perpetuity. A more precise calculation of the effect of using a different discount rate would require time-series data on the Postal Service's projected future payments to its employees' pension and Retiree health Benefit funds. These data are not publicly available, but should be in the Postal Service's possession. Accordingly, the Commission should obtain and make this information public and analyze the effect of different discount rates on the present value of USPS retirement liabilities and the Postal Service's balance sheet.

2. Integrating the Postal Service's retiree health care system with Medicare.

Another major cost-saving reform available to Congress is the integration of the Postal Service's retiree health programs with Medicare. Although the Postal Service contributes to Medicare for all of its employees, many postal retirees and eligible dependents do not use it.[40] The unused contributions to Medicare are another unjustified subsidy of the Treasury by the Postal Service and its customers. Requiring all Postal Service retirees and survivors over age 65 to participate in Medicare Parts A and B—and establishing an Employer Group Waiver Plan ("EGWP") to take advantage of subsidies available under Medicare Part D for prescription drug benefits within each Federal Employee Health Benefit plan—would "essentially eliminate the Postal Service's retiree health benefit liability and reduce expenses by $16.8 billion over 5 years (2018-2022)." Brennan 2017 testimony at 14-15; *see also* Rolando 2017 testimony at 6. As the Postal Service noted in 2013, the resulting savings would be a "lifeline to the Postal Service" that would not "come at the expense of a single job or require the closing of any post office or postal facility."[41] Nadol Decl. at 24-27.

---

[40] About 8 percent of Postal Service annuitants and dependents do not participate in Medicare Part A, and 26 percent do not participate in Part B. Brennan 2017 testimony at 14.

[41] Letter from Jeffrey C. Williamson, Chief Human Resources Officer and EVP, USPS, to Lorelei St. James, Director, Physical Infrastructure, GAO (reproduced in GAO Report No. GAO-13-658, *U.S. Postal Service: Proposed Health Plan Could Improve Financial Condition, But Impact on Medicare and Other Issues Should Be Weighed Before Approval* (July 2013) at App. III).

3. Allowing the Postal Service to make rational changes in delivery frequency

Through appropriations riders enacted every year since 1984, Congress has required the Postal Service to deliver mail six days per week. *See* PRC Annual Report to the President and Congress for Fiscal Year 2016 (Jan. 13, 2017) at 46. This requirement may not be necessary for all types of mail and all areas. Providing the Postal Service with the flexibility to reduce frequency of delivery where appropriate could result in significant savings. The Commission estimated the cost of providing service six days per week, rather than five, at $2.07 billion in Fiscal Year 2015. *Id.* The Postal Service could greatly improve its finances by capturing even a portion of the savings available from eliminating six-day delivery where appropriate.

F. The current regulatory system provides important protections to captive mailers that would be undermined if the Postal Service were allowed to impose above-CPI rate increases on market-dominant products.

The current regulatory system has also provided critical protections to captive mailers by limiting the Postal Service's ability to exploit its market power by collecting monopoly rents or letting its costs run out of control. By contrast, allowing the Postal Service to impose above-inflation price increases on captive mailers is likely to lead to both sizeable price increases on market-dominant products and weaker cost discipline by the Postal Service, without any net improvement in the Postal Service's financial health. This outcome would violate the (1) the text and purpose of Section 3622(d), which established the CPI cap; (2) the efficiency goal of Section 3622(b)(1) and 3622(c)(12); and, (3) the "just and reasonable" rate standard embodied in Sections 404(b), 3622(b)(8), 3622(c)(3).

Relaxing the CPI cap on market-dominant prices almost certainly would undermine Postal Service cost discipline and lead to higher prices for captive mailers and consumers. In turn, any extra revenue generated by those price increases almost certainly would be dissipated through higher costs, and would not improve the Postal Service's financial stability. The CPI cap is the only real leverage that either the Postal Service or the Commission have under current law to hold down the Postal Service's costs and induce it to become more productive and efficient. The credibility of the CPI cap, however, is its potential Achilles heel. Once the cap is lifted permanently—or a regulated monopoly learns that the regulator will relax the cap on a case-by-case basis when the monopoly loses money—the deterrent effect of the price cap on the firm's costs is lost. *See* Nadol Decl. at ¶ 11.

The performance of the Postal Service and European postal operators provides ample support for these conclusions. Two pieces of evidence stand out:

(1) The financial pressures during and shortly after the 2007-2009 recession forced significant cost discipline by the Postal Service. *See* USPS OIG Report No. RARC-WP-16-009, *Peeling the Onion: The Real Cost of Mail*, at 4 (noting that the USPS decreased controllable expenses by reducing number of career employees, reducing work hours, downsizing and restructuring its network, reducing the use of air transportation, and redesigning delivery routes). But the recovery in mail volume and revenue in the current decade, and the $4 billion in contribution from the above-CPI price increases authorized by the Commission in Docket No. R2013-11, have lessened those pressures, and the Postal Service's productivity gains have slowed to a near standstill. See p. 52, *supra*. Indeed, in

several key respects the Postal Service's productivity gains have reversed. Rectanus 2017 testimony at 4-5 (noting rise in USPS compensation and benefits expenses since 2015).

(2) The European countries that have relaxed their regulation of maximum prices charged for market-dominant postal products have seen those prices far outstrip inflation. In late 2016, WIK-Consult studied the performance of six major foreign postal operators for the OIG. USPS OIG Report No. RARC-17-003, *Lessons in Price Regulation from International Posts* (Feb. 8, 2017). In Australia, where market-dominant postal services are subject to cost-of-service rate regulation (not index regulation), service quality has declined, and regulated prices experienced increases in the range of 40 percent to 114 percent in January 2016. *Id*. at 22, 26. In Canada, which replaced price cap regulation in 2009 with price regulation "based on political decisions rather than a fixed economic methodology," letter mail prices rose by approximately 35 to 59 percent in 2014. *Id*. at 28. In France, where the postal regulator allows a negative productivity adjustment for falling mail volume, price increases have exceed inflation several times. *Id*. at 36-40. In the United Kingdom, which has eliminated or loosened maximum rate regulation for most mail products, the price of a 100 gram first-class letter increased by 88.2 percent between 2007 and 2016; the price of a second class 100 gram letter more than doubled. *Id*. at 55-57.

Another study by WIK Consult detailed the breakdown of Royal Mail's cost discipline that has followed the loosening of maximum rate regulation. The conclusions of the WIK report are chilling. "Targeted cost savings in delivery are relatively low." WIK-Consult report to OFCOM, *Review of the Projected Costs* *within Royal Mail's Business Plan* (March 31, 2016) at 109. "The company relies on traditional ways of organising delivery and does not (yet) appear to be pursuing more innovative delivery models." *Id.* "We consider Royal Mail's parcel automation programme is less ambitious than its peers." *Id.* "[I]international peers in Denmark, Sweden, the Netherlands and Germany appear to have been more successful at managing the relationships with their employees and unions and, at the same time, agreeing [sic] higher levels of efficiency and cost flexibility, allowing them to meet market challenges more effectively." *Id.* at 110. "Overall, we conclude that Royal Mail's planned initiatives are technically feasible but, overall, less ambitious than its peers." *Id.* at 111.

There is no reason to believe that the consequences of allowing the Postal Service to "fix" its balance sheet by imposing above-inflation price increases on its captive customers would be any less destructive. Magazine Publishers would respond to the increases by closing titles, going digital only, cutting circulation or frequency, and reducing staffing. Cohen Decl. at 5-7; Faust Decl. at ¶ 12 (Time Inc.). For nonprofit mailers, above-CPI rate increases would have a "crippling effect" on organizational effectiveness, forcing cutbacks in "fundraising appeals and renewals, magazine, and other important publications" and conversions to "alternative channels of communication," a move that would "greatly impair" the ability of nonprofits to carry out their qualifying nonprofit missions. Brophy Decl. at ¶ 11 (Consumer Reports); Burgoon Decl. at ¶¶ 7-10 (Disabled American Veterans); Finstad Decl. at ¶¶ 9-10 (American Lung Association); Maio Decl. at ¶ 12 (National Wildlife Federation); O'Sullivan Decl. at ¶ 8 (Guideposts). For-profit mailers and mail service providers would be impacted as well, curtailing marketing campaigns, reducing services, and passing costs on to customers and consumers (leading to further reductions in mail volume). Smith Decl. at ¶ 4 (Publishers Clearing House); Rosser Decl. at ¶ 5 (IWCO Direct).

Allowing the Postal Service to impose above-inflation rate increases on mailers—causing layoffs among *their* rank-and-file workers and price increases for ordinary consumers—rather than requiring the Postal Service to limit its price increases to the rate of inflation—would be contrary to Objectives 1 and 8, and would be particularly unjust in light of the cost control measures and other restructuring under taken by the mailing industry since 2007. Most private sector mailers face severe cost and revenue pressures, and have been forced to implement layoffs and other painful cost control measures during the past decade. During and after the 2007-2009 recession, "many private sector companies (such as automobile companies, airlines, mail preparation and printing companies, and major newspapers) took far-reaching measures to cut costs (such as reducing or stabilizing workforce, salaries, and benefits)." GAO Report GAO-16-651T at 10.

So did the members of ANM, PostCom and MPA. For example, IWCO Direct, a service provider focused on direct mail printing, closed two facilities, resulting in the loss of 585 jobs, and engage in reductions in force across its Minnesota-based operations in 2008. Rosser Decl. at ¶ 8. Publishers Clearing House carried out five reductions in force from 2009 through 2011, eliminating 2%, 3%, and 4% of the workforce in each of the respective years). Smith Decl. at ¶ 9.

The economizing and restructuring have continued since the end of the recession. Consumer Reports has cut back its mail volume, resulting in "a falloff in subscriptions and revenue that required taking a number of austerity measures" including the shuttering of two monthly print publications and layoffs of both managerial and unionized hourly employees. Brophy Decl. ¶ 10. Disabled American Veterans has also cut back on solicitation mailings, leading to a 10 percent decline in its donor base since 2013 and an even steeper decline in net income. Burgoon Decl. ¶ 7. Guideposts has likewise curtailed its donor acquisition mailings by 50 percent since 2007, causing its active fundraising donor file to decrease by over 40 percent during the same period. O'Sullivan Decl. at ¶ 7. Guideposts has been forced to reduce employee staff levels by 30 percent and cut salaries for its remaining employees by an average of six percent. *Id.* Between 2012 and 2016, the overall revenues of the National Wildlife Federation declined each year by an average of nearly five percent. Financial pressures have forced NWF to cut or limit staff, reduce program activities, and limits is publication volume. Miao Decl. at ¶ 11.

The 22 publishing companies who responded to an MPA survey earlier this year have closed 43 titles since 2011, reduced the frequency of 45 titles, and cut circulation of 68. Cohen Decl. at 4-5. Time Inc. has lowered its cost base every year from 2011 - 2015 through staff reductions and lower print and paper costs. Time Inc. has closed eight magazine titles, sold twelve magazine titles, reduced issue frequency for seven magazine titles and cut circulation for five magazine titles since 2007 to manage costs in a market of declining magazine print advertising and circulation revenues. Faust Decl. at ¶ 11. The magazine publishing industry as a whole has reduced its head count from 142,885 employees in 2006 to 112,742 employees in 2011 to 95,674 as of September 2016.[42]

The notion that Objective 5, the revenue adequacy objective, can override the pro-ratepayer objectives of Sections 3622(b) ignores the explicit language of Section 3622(b), which requires the Commission to apply "each" of the objectives "in conjunction with the others" when designing a system for regulating rates. It also ignores the century of precedent under the just and reasonable rate standard that Congress incorporated by reference in Sections 404(b) and 3622(b)(8). And it ignores the plain language of Section 3622(d), which established the CPI cap.

The Postal Service's objection that the CPI cap is somehow unfair or anomalous because it is "not faced by private companies," *see* USPS FY 2017 Integrated Financial Plan at 2, is equally without merit. Privately owned firms with the monopoly power possessed by the Postal Service commonly have their prices regulated, often with an index mechanism that is *more* stringent than the one established by the Commission. And privately owned firms without monopoly power are subject to a *de facto* rate cap in the form of competition.

The Postal Service still has monopoly power. First, it enjoys a legal monopoly over the right to deliver most letter mail. The private carriage of "letters or packets," which have been defined to include most bulk advertising mail, is a crime. 18 U.S.C. §§ 1693-1696; 39 U.S.C. §§ 601-606; *Associated Third Class Mail Users v. USPS*, 600 F.2d 824 (D.C. Cir. 1979). Second, the mailbox monopoly, codified at 18 U.S.C. § 1725, gives the Postal Service exclusive access to even privately-owned

[42] Source: U.S. Bureau of Labor Statistics, Series ID ENUUS000105511120, NAICS code 511120 (Periodical publishers—not including Newspapers) (data extracted on March 17, 2017).

mailboxes. Third, the economies of scale and scope still possessed by the Postal Service in mail delivery also provide it with significant market power over many products that are not legal monopolies. *See* 39 U.S.C. § 3621(a) (list of market-dominant products initially prescribed by PAEA); 39 U.S.C. §§ 3642(b)(1), (2) (recognizing that the Postal Service can have market dominance over mail products not covered by the postal monopoly). Privately-owned companies with comparable monopoly power have had their rates regulated since the 1800s. *See* 1 Alfred E. Kahn, *The Economics of Regulation* 3-4 (1970).

Indeed, the price caps used to limit the maximum rates of most other franchised monopolies in the United States are more stringent, not less, than the index mechanism under which the Postal Service has been operating since 2007. Most price caps imposed on privately-owned common carriers and public utilities include a productivity offset (or X-factor) that effectively limits regulated price increases to *less than* the full amount of inflation. See *Edison Electric Institute v. ICC*, 969 F.2d 1221 (D.C. Cir. 1992); *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 183-84 (D.C. Cir. 1993); *Bell Atl. Telephone Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996); *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1435, 1437 (D.C. Cir. 1996).

There is a good reason for this. Indexing mechanisms are intended to emulate the performance of effectively competitive markets.[43] Competitive markets

---

[43] *USPS v. PRC*, 785 F.3d at 745; *see generally Edison Electric Institute v. ICC*, 969 F.2d 1221, 1226 (D.C. Cir. 1992) (index ratemaking for market-dominant railroad services was designed to create "an incentive for a price-regulated industry to make prudent business decisions without at the same time allowing it to charge unreasonably high rates free of challenge"); *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 177-178 (D.C. Cir. 1993) (describing incentive for efficiency created by price cap regulation of telecom rates); *Bell Atl. Telephone Cos. v. FCC*, 79 F.3d 1195,

compel firms over time to increase productivity—and share productivity gains with consumers by raising prices more slowly than inflation. The discipline provided by competitive markets to control costs is perhaps strongest during economic downturns, whether industry-specific or economy-wide. In competitive markets, well-managed businesses respond to economic hardship not by demanding the right to surcharge their customers with above-inflation price increases, but by controlling costs and learning to operate more efficiently. That is how many American industries responded to the 2007-2009 recession. See pp. 67-68, *supra*.

It is certainly true of the suppliers of most of the inputs used by mailers *other than* mail. Thanks to productivity growth, most inputs used by mailers have become less costly since 2007.[44] The one core cost that has increased annually during the past decade for most mailers is postage. Faust Decl. at ¶¶ 6,8; Smith Decl. at ¶ 6.[45] In 2006, postage represented 24% of Time Inc.'s total physical

1198 (D.C. Cir. 1996) ("Price cap regulation is intended to provide better incentives to the carriers than rate of return regulation, because the carriers have an opportunity to earn greater profits if they succeed in reducing costs and becoming more efficient."); *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1429-30 (D.C. Cir. 1996) (adoption of index ratemaking for oil pipelines was "intended to streamline regulatory provisions and to give pricing flexibility to oil pipelines, while preventing excessive rates and charges against any captive shippers on oil pipelines."); *see also* USPS OIG Report No. RARC-WP-13-007, *Revisiting the CPI-Only Price Cap Formula* (Apr. 12, 2013) at ii ("In the absence of competition, the cap is intended to serve as a surrogate or proxy for competitive market forces by providing a control on bloat and inefficiency in the Postal Service.").

[44] *See, e.g.*, Faust Decl. at ¶¶ 6, 8; Rosser Decl. at ¶ 10 (relating how IWCO Direct, a mail service provider, reduced its prices in response to client demand).

[45] In addition to postage increases, the costs of complying with Postal Service requirements has increased as well, as the Postal Service has shifted certain mail preparation and entry costs to mailers. *See* Rosser Decl. at ¶¶ 11-15; Faust Decl. at ¶ 9.

production cost. In 2011, postage was 29% of total production costs and in 2015 it was 38%. Faust Decl. at ¶ 8. For a group of 22 magazine publishing companies (with 280 individual titles) surveyed by MPA, postage has increased from 26 percent of total manufacturing, production, and distribution costs in 2006 to 38 percent in 2015. Cohen Decl. at 4.

III. HOW INSTITUTIONAL COSTS SHOULD BE RECOVERED FROM THE MULTIPLE PRODUCTS AND CLASSES THAT USE THE POSTAL NETWORK. (OBJECTIVES 4, 8 AND 9)

Objectives 4, 8, and 9 concern how the Postal Service should recover its institutional costs from the multiple products and classes that use mail. Objective 4 seeks to allow the Postal Service pricing flexibility, and the ability to decide how much particular products and classes will contribute to institutional costs is a key component of pricing flexibility. Objective 8 calls for a "just and reasonable" rate schedule, which implies rates that will allow the Postal Service to recover its institutional costs but that do not saddle any particular product or class with an unreasonable share of institutional costs. This objective specifically notes that it does not "prohibit the Postal Service from making changes of unequal magnitude within, between, or among classes of mail." 39 U.S.C. § 3622(b)(8). Finally, Objective 9, which states the goal of allocating institutional costs "appropriately between market-dominant and competitive products," speaks to institutional cost allocation. *Id.* at § 3622(b)(9). The Commission should retain the CPI-based price cap applied separately to each class of mail. Applying the CPI cap separately to each class strikes the appropriate balance between providing pricing flexibility to optimize institutional cost recovery and protecting captive ratepayers from unreasonable price increases.

A. Elimination of Commission prescription of institutional cost coverages in favor of the CPI cap was a major improvement that should be retained.

Before PAEA, postal rates were based in large part on costs of service. After determining the attributable costs of each class and subclass, the Commission would determine the contribution to the Postal Service's institutional costs that each product or class should make. The latter determination often resulted in "class wars" in which, for instance, First and Third Class mailers would fiercely argue why fewer institutional costs should be attributed to their class and more to one or more other classes. These arguments were a principal driver of the lengthy and contentious rate setting process under the Postal Reorganization Act and were costly and wasteful.

One of the signature achievements of PAEA has been the elimination of these class wars.[46] By setting the price cap at the class level and allowing unequal rate changes between classes and among products within a class, PAEA eliminated any need or incentive to engage in such costly litigation. Instead, price changes are filed and approved relatively quickly with a minimum of controversy. The Commission should not underestimate the value of this change as it evaluates the current system of ratemaking.

---

[46] *See, e.g.*, Cong. Rec. S11675 (Dec. 8, 2006) (Sen. Collins explaining that PAEA "replaces the current lengthy and litigious rate-setting process with a rate cap-based structure" that provides the Postal Service with "much more flexibility" while simultaneously capping rate increases).

Furthermore, there is no evidence that the move to the price cap has inhibited the Postal Service from recovering its institutional costs. While it is true that some products and classes fail to cover attributable costs as measured by the Postal Service, it has still been able to recover its institutional costs as a whole, as demonstrated by its positive controllable income. Moreover, as the Postal Service has recognized in arguing against implementing significant above-CPI increases to Standard Mail Flats, simply raising a product's price does not necessarily increase the contribution of that product to the Postal Service's institutional costs. *See, e.g.*, Docket No. R-2010-4, Statement of James M. Kiefer at 30 (July 6, 2010) ("Because postage accounts for approximately half the costs of mailing a catalog, a postal price increase of [the magnitude necessary to reach full cost coverage] would put serious additional pressures on catalog mailers, thereby reducing volumes even further than they have already fallen."). If a price increase causes volume to decline by a greater percentage than unit contribution increases, overall contribution declines. This is true even for a monopoly. Jean Tirole, *The Theory of Industrial Organization* 66 (1988). Thus, a system that mandated each product recover a fixed portion of institutional costs could have the perverse effect of reducing the Postal Service's ability to recover total institutional costs.

Therefore, there is no reason to believe an alternative regime, such as the pre-PAEA system of rate regulation, would better apportion institutional costs than the application of the CPI cap at the class level. It is not apparent that another system, including one that applies the cap at a different level, would better recover institutional costs or that it would better protect captive mailers from unreasonable price increases. What is apparent is that if the price cap were to apply to market dominant products as a whole, users of allegedly underwater products such as Periodicals and Standard Mail Flats would likely experience radical and unreasonable cost increases.

B. The attributable cost "factor" (Section 3622(c)(2)) should remain subordinate to the CPI cap requirement of Section 3622(d).

For this reason, the attributable cost "factor" of Section 3622(c)(2) should remain subordinate to the CPI cap requirement of Section 3622(d) in any ratemaking system the Commission establishes. Creating a blanket exception to the CPI cap for classes of mail or products merely because they reportedly fail to cover attributable costs would be undesirable and unfair, even assuming *arguendo* that Section 3622(d)(3) empowered the Commission to modify the CPI cap.

Periodical Mail and Marketing Mail flats illustrate why this is so. The reported cost coverage of these products has been generally declining for years despite (1) Postal Service investment in flats automation; and (2) improvements in mail preparation and worksharing by mailers that have greatly decreased the work content of Periodicals Mail and flat-shaped Standard Mail. The fundamental cause of the failure of these products to cover reported attributable costs is not any shortfall of revenue or any dereliction of mailers in worksharing, but the out of control costs of the Postal Service. Moreover, as explained above, perhaps the leading cause of the Postal Service's cost overruns is its misguided insistence on deploying and continuing to operate the FSS, and steering flats mail volume to it by requiring flats in FSS zones to comply with FSS preparation requirements, not carrier route presort preparation requirements, and failing to properly encourage co-mailing despite repeated (and ultimately correct) warnings from mailers and

Postal Service employees that this strategy was likely to drive up the Postal Service's costs of processing and delivering flat-shaped mail. *See* pp. 55-57, *supra*; ANM-MPA reply comments in ACR2014 (Feb. 13, 2015); MPA-ANM reply comments in ACR2013 (Feb. 14, 2014); PostCom comments in ACR2016 (Feb. 2, 2017) at 3-4; PostCom reply comments in ACR2016 (Feb. 13, 2017) at 3-6; PostCom comments in ACR2015 (Feb. 2, 2016); PostCom comments in ACR2014 (Feb. 2, 2015) at 1-4.

Requiring mailers of flats to pay higher prices to cover needlessly high costs resulting from Postal Service management decisions taken over the repeated objections of these mailers would not only be unfair, but would violate the policies that that postal rates be just and reasonable (39 U.S.C. §§ 404(b) and 3622(b)(8)) and that "incentives to reduce costs and increase efficiency" should be maximized (39 U.S.C. § 3622(b)(1).

In any event, the inability of certain products to recover their attributable costs is not evidence that the current system is failing to properly apportion costs. With respect to periodicals, for instance, the "underwater" condition of the class is a function of excessive costs, not overly-constrained prices and, as discussed above, can be substantially traced to management decisions made by the Postal Service over industry protestations. No system of ratemaking can entirely protect against poor business decisions, such as implementation of the FSS, that disable an enterprise from charging a price high enough to recover the cost of its misguided investment.[47]

[47] This principle has long been a feature of textbook economics. *See, e.g.*, WILLIAM J. BAUMOL AND ALAN S. BLINDER, MICROECONOMICS: PRINCIPLES AND POLICY at 441 (7th ed. 1998) (contrasting regulated markets in which a firm is guaranteed "just *one standard rate* of profit to the firm . . . . whether its management is totally

Finally, the Commission should recognize that recognize that the "underwater" products and other products with higher coverage ratios are often complementary goods. For example, subscriptions to periodicals mailed at Periodicals Mail rates generate large volumes of allied mailings (e.g., acknowledgements, renewal notices, invoices, and solicitations) that have much higher reported coverage ratios. The contribution from this complementary mail offsets most of the reported shortfall from Periodicals Mail. Cohen Decl. at 3 & Exhibit 1. Flat-shaped Marketing Mail also generates complementary mail volume with higher reported coverage ratios.

C. The CPI cap should continue to be applied separately to each class, not applied to market dominant mail as a whole.

In light of the above, the application of the CPI cap at the class level has proven to be a reasonable means of balancing the interests in granting the Postal Service pricing flexibility, protecting individual ratepayers from unjust and unreasonable rate increases, and apportioning cost recovery among classes. Even if one assumes that, contrary to the language and structure of the statute, the Commission has the authority to apply a price cap to prices at something other than the class level, there is no reason to do so.

In developing the price cap provisions of the PAEA, Congress considered applying a cap at other levels. The legislative history reflects years of debate and deliberation over the breadth of the baskets of products to which the index

---

incompetent or extremely talented and hardworking" with a competitive market in which "a firm with an especially ingenious and efficient management will do better [than the average firm], and a firm with an incompetent management is likely to go broke"); *id.* at 442 (noting that "when a regulated industry is in financial trouble . . . there is nothing the regulator can do to guarantee a 'fair rate of return'").

adjustment should apply. In S. 2468, the postal reform bill passed by the Senate Homeland Security and Governmental Affairs Committee in the 108th Congress, the choice of groupings for application of the index was to be left to the regulator. The committee noted:

> The Committee expects that the Postal Regulatory Commission, in public proceedings and with the input of all interest parties, will fully and carefully evaluate the merits of a wide range of rate cap structures. This consideration should include, but should not be limited to ... the definition of the product groupings to which the caps will be applied.

S. Report No. 318, 108th Cong., 2d. Sess. 10 (Aug. 25, 2004).

The predecessor of PAEA passed by the same Committee in the 109th Congress, however, abandoned this open-ended approach by specifying directly that the rate index must be applied at the class level:

> The annual limitation 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.

S. 662, 109th Cong., 1st. Sess (reported June 22, 2005), § 201(a) (proposed 39 U.S.C. § 3622(d)(2)(A)). The Senate Committee adopted this provision despite a letter from the Board of Governors of the Postal Service expressing a preference that the index be applied at the level of the Postal Service's aggregate revenues. Letter of the Board of Governors of the U.S. Postal Service to Chairman Susan Collins (February 24, 2005).

The predecessor of PAEA passed by the House of Representatives would have disaggregated the relevant product baskets even further, applying the index as a separate constraint on each *subclass*:

> In the administration of this section, the Commission shall not permit the average rate in any *subclass* of mail to increase at an annual rate greater than the comparable increase in the Consumer Price index, unless it has, after notice and opportunity for a public hearing and comment, determined that such increase is reasonable and equitable and necessary to obtain 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.

H.R. 22 (reported by the House Committee on Government Reform on April 28, 2005) at § 201(a) (proposing language to be codified at 39 U.S.C. § 3622(e)) (emphasis added); *see also* Cong. Rec. H6523 (July 26, 2005). "To ensure fairness," the Committee explained, "the new system provides that rates from any one subclass should not increase faster than CPI." H. R. Rep. No. 66, 109th Cong., 1st Sess. 48 (April 28, 2005).[48]

The version of the legislation ultimately enacted into law resolved the conflict between the Senate and House bills by defining the relevant baskets as classes rather than subclasses. 39 U.S.C. §§ 3622(d)(2)(A); *see also* USPS at 12-13 (discussing legislative history). The final version of the legislation did not restore the earlier Senate version that would have allowed a single index basket consisting of market-dominant mail.

Allowing unused rate increase authority to spill over into other baskets would effectively merge the multiple class-specific baskets into a single basket, accomplishing precisely what Congress rejected, and would gut the effectiveness of the cap as a safeguard for individual mail classes or individual groups of market

---

[48] *See* H.R. 22 at Sec. 201 (proposing a new § 3622(e) directing the Commission to "not permit the average rate in any subclass of mail to increase at an annual rate greater than the comparable increase in the Consumer Price Index"),

dominant mailers. Allowing the Postal Service to apply the cap only to market-dominant products as a whole would allow the Postal Service to target groups of mailers that comprise only a small percentage of mail with rate increases multiple times the rate of inflation simply by holding rate increases for larger groups of other mail slightly below inflation.

Congress ultimately determined that applying the price cap at the class level struck the optimal balance between providing the Postal Service enough flexibility to design rates within a class of mail and providing an adequate level of rate stability and predictability for mailers. This determination was made in light of all of the goals of PAEA and as a holistic solution to achieving them. As Representative Shays noted, PAEA promotes "both price stability and pricing flexibility."[49] Congress's insight has proven reasonable, and the Commission should continue to enforce the CPI cap at the class level.

IV. WORKSHARING DISCOUNTS AND OTHER ISSUES OF RATE DESIGN WITHIN INDIVIDUAL RATE CLASSES (OBJECTIVES 1 AND 8)

Objectives 1 and 8 are also pertinent to worksharing discounts. Properly designed worksharing discounts "maximize incentives to reduce costs and increase efficiency" (Objective 1) and help "establish and maintain a just and reasonable schedule for rates and classifications" (Objective 8). The current system for regulating worksharing discounts does not fully satisfy these objectives.

Between 1971 and the mid-1990s, the Commission gradually moved toward a recognition that worksharing discounts promote the fairest and most efficient

[49] Cong. Rec. H9182 (Dec. 8, 2006) (Rep. Shays).

allocation of resources when rate differentials for worksharing equal 100 percent of the costs avoided by worksharing. The Commission noted this in 2006:

> In Docket No. MC95-1, the Commission provided a clear rationale for worksharing, explaining why workshare discounts were in the nation's best interest, and how the amounts of workshare discounts should properly be developed. This rationale was premised on the concept of Efficient Component Pricing (ECP).
>
> Since that case, broad support has grown for applying that principle in the development of mail processing workshare rates. Indeed, in every subclass that has worksharing discount rates, both the Postal Service and the Commission strive to obtain an ECP outcome, i.e., a one-hundred percent passthrough of the avoidable cost savings. The ECP principle has now been applied to more workshare activities, such as the costs saved as a result of mailer dropshipping. Although consideration of the pricing factors and other policies of the Act sometimes prevent attainment of a full set of ECP rates, it does provide a unifying principle across subclasses for worksharing rates.

R2006-1 Op. and Rec. Dec. ¶¶ 4004-05.

In 2006, however, a provision of the PAEA amended Title 39 to provide that worksharing discounts, with some exceptions, should not "exceed the cost that the Postal Service avoids as a result of" the worksharing. 39 U.S.C. § 3622(e)(2), (3). Although nothing in the amendment required the Commission to make worksharing differentials *less than* "the cost that the Postal Service avoids" from worksharing, the legislation has led to a proliferation of key worksharing passthroughs, *e.g.*, for Periodicals Carrier Route Basic flats and First-Class Mail 5-Digit Automation Letters, that are considerably smaller than the underlying cost avoidances. Docket No. ACR2015, FY 2015 Annual Compliance Determination (Mar. 28, 2016) at 12, 19. Perhaps the most serious example of this trend is the Postal Service's policy of suppressing carrier route discounts for flat-shaped mail along with the Postal

Service's FSS debacle. *See* pp. 55-57, *supra*. The FSS debacle is a textbook example of what can go wrong when the Postal Service performs functions that mailers (or mail services providers) could perform at a lower cost.

The Commission's Annual Compliance Determination has admonished the Postal Service to send more efficient Periodicals price signals by setting more appropriate passthroughs for 5-Digit and Carrier Route presortation, *i.e.*, reducing the greater-than-100 percent 5-Digit passthrough and increasing the less-than-100 Carrier Route passthrough. Docket No. ACR2015, FY 2015 Annual Compliance Determination at 18-19. As discussed above, the Postal Service has repeatedly rebuffed this correct approach. If the Commission is serious about wanting Periodicals Mail and flat-shaped Marketing Mail to cover 100 percent of attributable costs, the Commission should order the Postal Service to correct its dysfunctional price structure for flat-shaped mail by ending the FSS debacle, setting worksharing rate differentials for Periodicals Mail at 100 percent of avoided costs, and setting rate differentials for Carrier Route and non-Carrier Route Marketing Mail that equal at least 100 percent of the cost differences between the two products.

CONCLUSION

The Commission faces a clear choice. One is to maintain the current regulatory system. If the Commission does that, the Postal Service will not only survive but, with a modest amount of resourcefulness and economical management, grow and prosper. The Postal Service's volume, revenue, earnings, cash flow, and net worth will continue to improve. The Postal Service's pension and retiree health benefit plans, which are already extraordinarily well funded, will become fully funded with ample time to spare.

By contrast, "solving" the Postal Service's finances by allowing it to impose above-CPI rate increases on mail products—even "temporarily," in "narrow circumstances," or "just this once"—would be a tragic mistake. The most fragile link in price cap regulation is the credibility of the regulator's will to enforce the cap. The collapse of the Postal Service's productivity growth after obtaining the exigent rate surcharge in Docket R2013-11, and the similar experience of several large postal operators in Western Europe in recent years, confirm that allowing the Postal Service to breach the CPI cap would undermine both the will and the ability of postal management to bargain effectively with the interest groups that want to raise the Postal Service's costs. Hence, allowing the Postal Service to extract more money from captive mailers is unlikely to improve the Postal Service's finances for long. Cost increases would follow on the heels of the revenue increases, and the extra funds would quickly vanish.

For the reasons explained above, the Commission should find that the current system of regulation properly balances the objectives of 39 U.S.C. § 3622(b) in light of the factors of 39 U.S.C. § 3622(c), issue a report to that effect, and close this docket. The Commission should also take several actions beyond this docket. First, it should begin an investigation of the current market value of the Postal Service's real estate. Second, it should direct the Postal Service to prepare plans for dealing with the labor compensation premium and initiating other major cost reduction initiatives. Third, the Commission should recommend to Congress that it (a) relax the current restrictions on the asset classes in which the Postal Service may invest its cash, and (b) integrate the Postal Service's retiree health benefit systems with Medicare.

Respectfully submitted,

/s/

Matthew D. Field
Ian D. Volner
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-8281
mfield@venable.com
idvolner@venable.com

Counsel for Association for Postal Commerce

David M. Levy
Eric S. Berman
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-4732
dlevy@venable.com
esberman@venable.com

Counsel for Alliance of Nonprofit Mailers and MPA–The Association of Magazine Media

March 20, 2017

ATTACHMENT A

EFFECT OF A HIGHER RETURN ON INVESTED FUNDS ON THE POSTAL SERVICE'S BALANCE SHEETS

This attachment illustrates the dramatic effect that a higher return on invested funds would have on the Postal Service's balance sheets. The average return currently anticipated by a sample of 126 public retiree plans recently surveyed by the National Association of State Retirement Administrators is approximately 7.0 percent. *See* http://www.nasra.org/investment. Substituting this value for the discount rates of 3.9 percent and 5.25 percent discount rates currently used to determine the present value of the expected stream of future payments to retirees reduces that present value by approximately $146 billion.

This one change alone transforms the Postal Service's pension and retiree health benefit from an overall deficit of $79 billion to an overall *surplus* of $66.7 billion. In particular, increasing the assumed discount rate to 7.0 percent raises the funded ratio of the USPS share of the CSRS and FERS pension plans from 92.5 percent to 114.6 percent, and the funded ratio of the USPS Retiree Health Benefits Fund from 49.9 percent to 73.1 percent.

In the aggregate, the overfunding in the pension plans exceeds the remaining retiree healthcare liability, and the reported total funding of all three plans combined exceeds 100%.

Tables 2 and 3 on pp. 20-23 of Mr. Nadol's declaration show these results in tabular form:

Nadol Table 2

Federal Pension Plans - USPS Share - September 30, 2014[1]			
5.25% Discount Rate			
	CSFRS	**FERS**	**Total**
Accrued Actuarial Liability	201.5	104.5	306.0
Assets (at Par Value)	182.1	100.9	283.0
Unfunded Actuarial Liability	19.4	3.6	23.0
Funded Ratio (Calculated)	90.4%	96.6%	92.5%
7.00% Discount Rate			
	CSFRS	**FERS**	**Total**
Accrued Actuarial Liability	162.6	84.3	247.0
Assets (at Par Value)	182.1	100.9	283.0
Unfunded Actuarial Liability	-19.5	-16.6	-36.0
Funded Ratio (Calculated)	112.0%	119.6%	114.6%

(1) Units other than percentages in billions of dollars.

Nadol Table 3

USPS Retiree Health Benefits Fund - September 30, 2016[1]	
3.90% Discount Rate	
	USPS RHBF
Accrued Actuarial Liability	104.0
Assets (at Par Value)	51.9
Unfunded Actuarial Liability	19.4
Funded Ratio (Calculated)	49.9%
7.00% Discount Rate	
	USPS RHBF
Accrued Actuarial Liability	71.0
Assets (at Par Value)	51.9
Unfunded Actuarial Liability	19.1
Funded Ratio (Calculated)	73.1%

(1) Units other than percentages in billions of dollars.

EXHIBIT 4

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

STATUTORY REVIEW OF THE SYSTEM)
FOR REGULATING RATES AND CLASSES) Docket No. RM2017-3
FOR MARKET DOMINANT PRODUCTS)

**COMMENTS OF ALLIANCE OF NONPROFIT MAILERS,
AMERICAN CATALOG MAILERS ASSOCIATION, INC.,
ASSOCIATION FOR POSTAL COMMERCE,
IDEALLIANCE AND
MPA—THE ASSOCIATION OF MAGAZINE MEDIA**

Matthew D. Field
Ian D. Volner
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-8281
mfield@venable.com
idvolner@venable.com

Counsel for Association for Postal Commerce

David M. Levy
Eric S. Berman
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-4732
dlevy@venable.com
esberman@venable.com

Counsel for Alliance of Nonprofit Mailers and MPA–The Association of Magazine Media

Hamilton Davison
President & Executive Director
AMERICAN CATALOG MAILERS ASSOCIATION, INC.
PO Box 41211
Providence, RI 02940-1211
(800) 509-9514
hdavison@catalogmailers.org

David J. Steinhardt
President & CEO
IDEALLIANCE
1800 Diagonal Road, Suite 320
Alexandria, VA 22314-2862
(703) 837-1066
dsteinhardt@idealliance.org

March 1, 2018

Contents

SUMMARY OF COMMENTS 1

COMMENTS 9

I. THE ALTERNATIVE REGULATORY SYSTEM PROPOSED IN ORDER NO. 4258 IS UNLAWFUL BECAUSE § 3622(d)(3) DOES NOT AUTHORIZE THE COMMISSION TO BREACH THE CPI CAP. 9

A. Differences between the wording of Sections 3622(a) and 3622(d)(3) do not authorize the Commission to disregard the CPI cap. 16

B. Differences between the language of Sections 3622(c)(4) and 3622(d)(3) do not authorize the Commission to disregard the CPI cap. 20

C. The Commission's obligation to maintain the CPI cap stems from the body of Section 3622(d), not just its title. 21

D. Unexpressed legislative "purposes" and "intent" and the sparse legislative history of PAEA cannot override the text of Sections 3622(d)(1) and (2). 22

E. The Commission's grounds for distinguishing its prior holdings recognizing the central role and binding effect of the CPI cap are arbitrary and capricious. 27

II. THE PROPOSED REGULATORY SYSTEM VIOLATES THE TERMS OF THE REGULATORY BARGAIN THAT CONGRESS ADOPTED IN SECTION 3622(b). 29

A. The Commission has failed to apply all of the objectives or balance the interests of the Postal Service and its customers 30

B. The proposed alternative system of regulation would violate Objective 1, maximizing incentives for efficiency 34

1. Objective 1 requires the Commission to consider the effect of an alternative regulatory system on the Postal Service's *incentives* to reduce costs and increase efficiency, not the Postal Service's *financial ability* to make investments. 39

2. The Commission's "harmonious cycle" hypothesis is unsupported speculation. 41

3. The historical data confirm that the proposed alternative system would lead to ballooning costs and diminished efficiency. 48

4. The 0.75 percent surcharge proposed for maintaining recent rates of productivity growth does not cure the violation of Objective 1....... 52

C. The proposed system of regulation would violate Objective 2, rate stability....... 57

D. The proposed alternative system of regulation would violate Objective 8 (39 U.S.C. § 3622(b)(8)) and 39 U.S.C. § 404(b), which require that postal rates be just and reasonable. 62

E. The Commission's analysis of Objective 5 (revenue adequacy or financial stability) is flawed. 71

F. The Commission's treatment of Objective 3 (high quality service standards) is arbitrary. 82

III. THE EXTRA SURCHARGES PROPOSED FOR PERIODICALS MAIL AND MARKETING MAIL FLATS ARE UNLAWFUL. 84

A. The Postal Service, not its captive customers, is causing the losses on Periodicals Mail and Flat-Shaped Marketing Mail....... 86

B. The Commission has failed to reconcile the proposed surcharges for "noncompensatory" products and classes with Objective 1 and other provisions of PAEA....... 101

C. Despite the Postal Service's needlessly high costs, Periodicals Outside County Carrier Route mail already covers its attributable costs....... 107

CONCLUSION 108

SUMMARY OF COMMENTS

This case illustrates the havoc that can result from construing a complex statute by focusing on one provision in isolation instead of reading the statute as a whole.

39 U.S.C. § 3622(d)(3) requires the Commission, in conducting its 10-year review of the "system" for regulating market dominant rates established by the Commission in 2007, to apply "each" of the ratemaking objectives of the PAEA "in conjunction with the others." *Id.*, § 3622(b). Some of the objectives protect the Postal Service. In particular, Objective 5, 39 U.S.C. § 3622(b)(5), entitles the Postal Service an assurance of "adequate revenues, including retained earnings, to maintain financial stability." "Adequate" means sufficient to "maintain high quality services" as defined under Section 3691. But other objectives protect mailers. In particular, Objective 1 requires the system of regulation to "maximize incentives to reduce costs and increase efficiency." Objective 2 calls for "stability in rates." And Objective 8, like 39 U.S.C. § 404(b), directs the Commission to "establish and maintain a just and reasonable schedule for rates and classifications." Finally, 39 U.S.C. § 3622(d), with a few exceptions not relevant here, imposes a statutory constraint on rate increases that trumps any of the objectives of § 3622(b): rate increases for any market-dominant class may not exceed increases in the Consumer Price Index.

In Order No. 4258, however, the Commission has reduced this structure to a one-dimensional caricature. The order adopts an expansive definition of revenue adequacy, elevates it to the supreme regulatory objective, and effectively writes out of the statute the objectives of PAEA that promote efficiency and protect mailers. The result is a series of above-CPI rate increases whose magnitude is unprecedented in the annals of incentive ratemaking. Assuming annual inflation of two percent, for example, the proposed alternative system would impose rate increases over five years as high as *40 percent* on Periodicals Mail and Marketing Mail Flats and *28 percent* for other Market-Dominant products.

These staggering increases are unlawful in several respects.

(1)

The Commission may not authorize above-CPI rate increases under Section 3622(d)(3). Section 3622(d)(1) and (2) forbid class-average rate increases that exceed the growth in the CPI, except in limited circumstances not relevant here. Section 3622(d)(3), which authorizes the Commission to modify or replace the "system" for regulating market-dominant rates, does not override Sections 3622(d)(1) and (2). The modified or new "system" that Section 3622(d)(3) authorizes the Commission to adopt, like the initial "system" that Section 3622(a) directed the Commission to adopt, consists of the *regulations* adopted by the Commission *under* the statute, not the statute itself. As a subordinate body of rules, neither iteration of the "system" can modify the authorizing statute, which is outside of and superior to the "system." Hence, the rulemaking authority delegated to the Commission by Sections 3622(a) and 3622(d)(3) is limited by the binding statutory constraints that Congress codified in Section 3622, including the CPI-based price cap (Section 3622(d)) and the restrictions on worksharing discounts (Section 3622(e)).

(2)

Even if (contrary to fact) Section 3622(d)(3) empowered the Commission to abrogate the CPI cap, the alternative regulatory system proposed in Order No. 4258 would still be unlawful because it would violate several important objectives of Section 3622(b) meant to protect captive mailers.

(a) The proposed alternative system would violate Objective 1, maximizing incentives to reduce cost and increase efficiency. Index ratemaking encourages a regulated monopoly to operate efficiently by promising greater profits if the firm achieves above-average productivity gains, and lower profits (or losses) if the firm fails to do so. Showering the Postal Service with an extra $16 to $24 billion of revenue over the next five years, most of it unconditioned on any required showing of efficiency or productivity gains, would weaken, not maximize, incentives for efficiency and cost control.

The Commission's counterargument—that more money will mean greater efficiency by alleviating the shortage of investment capital that supposedly prevents the Postal Service from operating more efficiently—founders on several grounds. First, the *ability* to invest in efficiency is distinct from the *incentive* to do so. Objective 1 focuses on the latter, and the Commission cannot evade it by conflating the two issues, or simply assuming that more retained earnings will automatically translate into greater and more effective investment on efficiency.

Second, the "harmonious cycle" of investment hypothesized by the Commission is unsupported speculation. The Postal Service has funds to make to make investments. It made capital investments in efficiency and cost reduction between 1971 and 2007, when the Postal Reorganization Act imposed a breakeven requirement. Today, 11 years after PAEA became law, the Postal Service boasts cash reserves that exceed $10 billion, and generates about $3 billion in additional cash from operations each year. This is unsurprising: a firm that is mature or shrinking can generate sufficient cash to pay for needed investments if the firm's revenue covers the firm's accrued operating costs, including non-cash depreciation expenses.

Third, the Commission has failed to identify, let alone quantify, the likely return on, the additional investments that the Postal Service supposedly would make if it enjoyed higher earnings. Indeed, the Commission could not perform such an analysis, for it refused to allow discovery of any of the relevant data and analyses from the Postal Service.

Fourth, the performance of the Postal Service and its European counterparts in the past few years, when enforcement of index ratemaking has slackened, foreshadows how the proposed above-CPI surcharges would undermine the Postal Service's incentive to lower costs and increase efficiency.

Fifth, the 0.75 percent surcharge proposed for maintaining recent rates of productivity growth would not cure the violation of Objective 1. Any incentive provided by this surcharge would be outweighed by the windfall the Postal Service would still receive from the across-the-board surcharge of two percentage points, the approximately two additional percentage points of surcharges authorized for "noncompensatory" products and classes, and the additional surcharge of 0.25 percentage points offered for maintaining nominal service performance standards at their current level. The Postal Service would receive this entire windfall automatically, without any obligation to improve productivity or reduce costs. We are unaware of any precedent for allowing a regulated monopoly to collect above-normal earnings merely for maintaining existing productivity trends, let alone those as meager as the Postal Service has achieved in recent years. Forcing captive mailers to pay the Postal Service a matching grant here is completely unwarranted.

(b) The proposed alternative system would violate Objective 2 (rate stability). This flaw cannot be evaded by redefining rate stability as rate *predictability*. As the Commission has repeatedly found, "rate stability" in this context means the absence of any real (*i.e.*, inflation adjusted) price increases. Rates that increase on average measurably faster than inflation are not stable in this sense even if the magnitude and timing of the increases are predictable. The increases proposed by the Commission—as much as 30 percent above inflation over five years, and as much as 40 percent in nominal terms—would massively violate Objective 2.

(c) The Commission's proposals would also violate Objective 8 and 39 U.S.C. § 404(b), which require the establishment of "just and reasonable" (or "reasonable and equitable") rates and classifications. This standard requires, among other things, that captive ratepayers be protected from having to pay for needlessly high costs or needlessly low efficiency. The massive rate increases that Order No. 4258 would allow, unconditioned on any requirement that the Postal Service first control its excess costs, would not be just, reasonable or equitable. Although the mailers raised the issue at length in their Phase I comments, Order No. 4258 ignores it.

(d) The Commission's analysis of Objective 5 (revenue adequacy or financial stability) is also flawed. The Commission has improperly elevated financial stability over the other objectives of Section 3622(b). But the proposed system would be unjustified by Objective 5 even if it could properly trump the other objectives. The Postal Service has achieved short-term financial stability, and the Postal Service's longer-term financial prospects are much brighter than the Commission portrays.

In particular, the Commission's proposal ignores that the contribution from competitive products, mainly package delivery, is growing by an average of $1 billion per year. A rational analysis of the putative shortfall in contribution that the Postal Service allegedly needs to recover from market-dominant products must consider the anticipated contribution from competitive products, since both sets of products contribute to institutional costs. Correcting this omission single-handedly refutes the Commission's shortfall analysis: the likely five-year growth in contribution from competitive products by itself equals the extra contribution that the Commission projects the Postal Service needs to break even over the same period.

The Commission's analysis of the Postal Service's obligations to its retirees is also unsound. The red ink on the Postal Service's financial statements is largely an artifact of the Postal Service's failure to meet the unrealistic prefunding schedule enacted in PAEA. But neither Congress nor the Administration have moved to enforce the schedule. In reality, the Postal Service's retiree benefit plans are extraordinarily well funded by comparison with most private sector plans and nearly all other federal, state and local government plans.

The undersigned parties' comments in Phase I identified other steps that the Postal Service could take to improve its finances. Some of the most promising and potentially lucrative steps do not require legislation. The Commission has failed to discuss any of these options in Order Nos. 4257 and 4258.

The Commission's shortfall analysis suffers from another, equally significant failure of proof: the gross shortfall amount assumed by the Commission is unsupported by a reliable projection of the Postal Service's future revenue needs.

Finally, even if the Postal Service needed more money, the proposed extra surcharges would be unlikely to provide it. The gain in unit contribution would likely be offset by a drop in mail volume.

(e) The radical rate increases proposed by the Commission cannot be justified by invoking Objective 3, the objective of "maintain[ing] high quality service standards established under section 3691." 39 U.S.C. § 3622(b)(3) (citing 39 U.S.C. § 3691). The value of high quality service is determined not in a vacuum, but through a cost-benefit analysis that balances the benefits of faster and more reliable service against the costs of providing it. Order No. 4258 provides no such analysis. Without it, there is no basis for finding that current service standards or actual service performance are too low.

The 0.25 percentage surcharge proposed for market-dominant mail if the Postal Service maintains its current service performance standards is unjustified for other reasons as well. The award is contingent on maintaining published (or nominal) service standards. There is no requirement that the published standards improve over time. There is no requirement that the actual service performance live up to the nominal standards. And there is no requirement that the Postal Service reduce its costs at all. The Postal Service gets to collect the surcharge regardless.

(3)

The extra surcharges of two percentage points or more proposed for "non-compensatory" products and classes—mainly Periodicals Mail and Marketing Mail Flats—are unlawful as well. The losses experienced by the Postal Service are its own responsibility. During the past decade, the efficiency with which the Postal Service has handled flat-shaped mail has declined greatly. As a result, the Postal Service's costs of sorting, transporting and delivering flats are much higher than if the Postal Service had just maintained the same productivity levels for flat-shaped mail as when PAEA was enacted.

The main causes of this abysmal performance are Postal Service management errors. The first is the failure to scale down Postal Service operations and costs in tandem with the decline in its volume and workload in recent years. The second is the Postal Service's obstinate refusal to abandon the Flats Sequencing System ("FSS") despite repeated warnings, from within the Postal Service and from mailers of flats, that the FSS was an economic disaster in the making. A third error is the deliberate mispricing of Carrier

Route Basic flats, which needlessly deters mailers from engaging in an efficient amount of worksharing. Correcting these unforced errors would virtually eliminate the shortfall between revenue and Postal Service attributable costs. Hence, trying to eliminate the shortfall through extra above-CPI charges on "noncompensatory" products would violate Objective 1, as well as other provisions of PAEA.

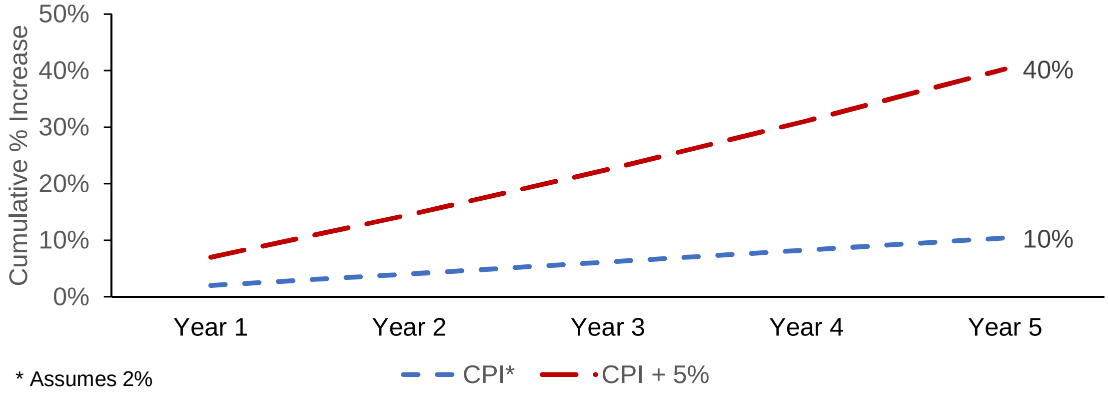
Finally, Outside County Carrier Route mail, despite the management errors discussed in these comments, covers its attributable costs even today. Hence, even if (contrary to fact) a "noncompensatory" product surcharge were somehow warranted for other kinds of Periodicals Mail, no surcharge would be appropriate for Outside County Carrier Route.

COMMENTS

I. THE ALTERNATIVE REGULATORY SYSTEM PROPOSED IN ORDER NO. 4258 IS UNLAWFUL BECAUSE § 3622(d)(3) DOES NOT AUTHORIZE THE COMMISSION TO BREACH THE CPI CAP.

A threshold and fatal objection to the Commission's proposals in Order No. 4258 is their *ultra vires* character. The proposals would subject all market-dominant mail to sizeable above-inflation rate increases. Some products and classes, including Periodicals Mail and Marketing Mail Flats, would face annual rate increases of as much as five percentage points above inflation. The cumulative five-year rate increase for those products would be as much as 40 percent, or 30 percentage points above inflation:

Figure 1. Comparison of PRC-Proposed Periodicals Rate Increase With Inflation



Source: Library Reference ANM *et al.*–LR–RM2017-3/4, "Figure 1."

A system of regulation that would allow the Postal Service to increase its rates for any class by more than the annual change in the CPI-U index exceeds the Commission's authority. As the undersigned parties explained in a letter and white paper submitted to the Commission on October 28, 2014, the text and structure of 39 U.S.C. § 3622 prohibit the Commission from making such changes to the system of ratemaking.[1] The Commission tried to refute this reasoning in Order No. 4258 (at pp. 6-20). The counterarguments are unsound, however.

As the mailers explained in their 2014 white paper, the authority conferred on the Commission by Section 3622(d)(3)—to "make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives" if the Commission determines during its 10-year review proceeding that the current

---

[1] The white paper is appended to these comments as Appendix A and incorporated herein by reference.

system of ratemaking is not achieving the objectives of PAEA—does not empower the Commission to allow price increases that violate 39 U.S.C. § 3622(d)(1). That provision requires that the system of regulation "shall" prevent rate increases greater than "the change in the [CPI-U] 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." 39 U.S.C. § 3622(d)(1). Section 3622(d)(1) also requires that the system of regulation "shall" include provisions that prevent the Postal Service from adjusting rates "in excess of the [CPI-U] limitations."

The mandatory effect of this language is unambiguous. Whatever modified or new ratemaking system the Commission might make, that system is subordinate to the CPI cap. The "Requirements" of the system of ratemaking are, indeed, required elements of the system of ratemaking. Where the statute states the system "shall" contain certain elements, including "an annual limitation on the percentage changes in rates . . . equal to the change in the Consumer Price Index for All Urban Consumers," it means the system "shall" contain these elements.

This conclusion is underscored by the division of labor prescribed by the statute. Nowhere in PAEA did Congress itself establish a "system" of ratemaking. Congress delegated that task to the Commission. Section 3622(a) directs *the Commission* to "establish . . . a modern system for regulating rates and classes for market-dominant products." The rest of Section 3622 lays out the features the system established by the Commission must incorporate. Section 3622(b) lists nine objectives that "[s]uch system shall be designed to achieve"; Section 3622(c) identifies 14 factors the Commission must take into account "[i]n establishing or revising such system"; and Section 3622(d) lists "Requirements" that "[t]he system for regulating rates and classes for market-dominant products shall" include or establish. Within the bounds drawn by Sections 3622(d) and (e),[2] Congress gave the Commission broad discretion to construct via rulemaking a "system" for regulating rates. But nothing in Section 3622 (or in PAEA generally) authorized the Commission to modify, eliminate, or replace any part of the statute itself.[3]

Section 3622(d)(3) calls for the same division of labor. The provision directs the Commission to review, and allows it to modify or replace, "the system for regulating rates and classes for market-dominant products established under this section"—*i.e.*, the same interstitial implementing rules that Section 3622(a) required the Commission to "establish." Section 3622(d)(3) does not authorize the Commission to review, modify or replace the

[2] The statute also includes provisions in Section 3622(e) governing workshare discounts, but it does not contain direction to the Commission regarding how to incorporate these provisions into the "system." Rather, these are statutory provisions that are superior to, and govern regardless of, the "system" of rules that the Commission establishes under the statute.

The proposed rule changes for worksharing discount differ from the proposed above-CPI rate increases in one important respect: the Commission can make the changes to the worksharing regulations proposed in Order No. 4258 without violating Section 3622(e), so long as the Commission continues to honor the statutory exceptions applying to passthroughs that exceed 100%.

[3] The Postal Service's statement that Section 3622(d) "plainly states at the outset that its provisions are part of the 'system for regulating rates and classes for market-dominant products'" (USPS Comments at 19; Order No. 4258 at 9) is untrue. The statute does not state this anywhere.

statutory framework itself. The language describing the "system" in Section 3622(d)(3) is nearly identical to the language of Section 3622(a), which directs the Commission to "establish . . . a modern system for regulating rates and classes for market-dominant products." The "system" referred to in Section 3622(d)(3) can only be the "system" established pursuant to 3622(a). In other words, it is the rules—or "system"—established by the Commission to implement PAEA that are being reviewed, not PAEA itself, including its CPI cap requirement. Construing each appearance of the term "system" in Section 3622 to refer to the system of regulation established by Commission rulemaking *except when* the term appears in subsection 3622(d)(3) is a nonsensical construction. A word or phrase that appears in two or more provisions of the same section of a statute is presumed to have the same meaning each time. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

The Commission has repeatedly recognized the central importance and binding character of the CPI cap. When promulgating the modern system of ratemaking in Docket RM2007-1, the Commission read Congress' words as they were written, acknowledging that Section 3622(d) "addresses some of the ***mandatory*** features that the Commission ***must*** include in the modern regulatory system." Docket No. RM2007-1, *Regulations Establishing System of Ratemaking*, Order No. 26 (Aug. 15, 2007) at 7 (emphasis added).

The Commission likewise stated in 2010:

> Quantitative pricing standards are at the top of the statutory hierarchy. Next in the hierarchy are the qualitative "objectives" listed in section 3622(b), followed by the qualitative "factors" listed in section 3622(c). Under this hierarchy, violations of the three quantitative pricing requirements are "out of bounds." The Postal Service has broad flexibility to develop prices to achieve the qualitative objectives and factors of section 3622(b) and (c) *so long as its prices are "in bounds" because they satisfy these quantitative requirements.*

Docket No. RM2009-3, *Consideration of Workshare Discount Rate Design*, Order No. 536 (Sept. 14, 2010) at 16–17, 35–36 (emphasis added); *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Cir. 2012), *on remand*, Order No. 1427 at 17–19.

Similarly, in the first exigent rate case, the Commission characterized the role of the CPI cap in the statutory hierarchy as absolute, "central," and "indisputable," and the Commission's role vis-à-vis the "system for regulating rates and classes" as secondary and interstitial. Order No. 547 in Docket No. R2010-4, *Rate Adjustment Due to Extraordinary or Exceptional Circumstances* (Sept. 30, 2010) at 10–13, 49–50. PAEA, the Commission explained, had replaced the break-even mandate of the Postal Reorganization Act with the CPI cap as the main safeguard for captive mailers. *Id.* "PAEA removed any reference to cost-of-service regulation, establishing the price cap as the *only regulatory model to be used under the new rate system*." *Id.* at 10 (emphasis added). "The broad flexibility" in pricing otherwise allowed the Postal Service by PAEA "underscores the importance of the price cap as a protection mechanism for ratepayers." *Id.* at 12. "The price cap . . . stands as the single most important safeguard for mailers." *Id.* at 13. The "role of the price cap is central to ratemaking, and the integrity of the price cap is indispensable if the incentive to reduce costs is to remain effective. Therefore, *it would undermine the basic regulatory approach of the PAEA if the Postal Service could pierce the price cap routinely*." *Id.* at 49–50 (emphasis added).

The Commission reaffirmed this position on remand from the D.C. Circuit:

> Key policies underlying the PAEA include efficiency and cost control. The PAEA permits the Postal Service to retain earnings that may be distributed as incentives to management and employees. [H.R. Rep. No. 109-66] at 43-44. The PAEA, however, precludes the Postal Service from recovering losses by increasing rates above the price cap without the Commission's approval. *Id.*
>
> *The price cap plays the central role in implementing the purposes and policies of the PAEA.* The price cap incents the Postal Service to improve efficiency and reduce its costs and serves as the primary source of discipline over the Postal Service's expenses. Order No. 547 at 38, 64. It also maintains "adequate financial safeguards and incentives for cost control" and acts as the single most important safeguard for mailers by providing rate stability and predictability. Senate Report at 10; Order No. 547 at 12.

Order No. 864 in Docket No. R2010-4R, *Rate Adjustment Due to Extraordinary or Exceptional Circumstances* (Sept. 20, 2011) at 32–33 (emphasis added).

In Order No. 4258, however, the Commission offers several reasons for abandoning this position in the 10-year review:

(1) Differences between the wording of Sections 3622(a) and 3622(d)(3) imply that the Commission may adopt in the 10-year review any alternative system that disregards the CPI cap.

(2) Differences between the wording of Section 3622(c)(4) and 3622(d)(3) likewise imply that the Commission may adopt an alternative system of regulation that disregards the CPI cap.

(3) The title of Section 3622(d)—"Requirements"—cannot alter the text of the statute.

(4) The legislative history of PAEA, including a floor statement by Senator Susan Collins, confirms that Section 3622(d)(3) allows the Commission to revoke Section 3622(d)(1) in the 10-year review.

(5) The Commission's prior statements concerning the binding effect of the CPI cap apply only to the system of regulation initially established under Section 3622(a), and not the adoption of an alternative system under Section 3622(d)(3).

These counterarguments are unfounded. We respond to each one in turn.

A. Differences between the wording of Sections 3622(a) and 3622(d)(3) do not authorize the Commission to disregard the CPI cap.

The Commission offers three textual arguments for treating Section 3622(d)(1) and (2) as inapplicable in the 10-year review proceeding. None are well-founded.

(1) The Commission asserts that, because Section 3622(a) merely authorized the Commission to "establish" or "revise" a system of regulation, but Section 3622(d)(3) allows the Commission either to "modify" the system *or*

replace it with an "alternative system," the "disjunctive" character of the latter choice of remedies implies that Section 3622(d)(3) allows the Commission to ignore Section 3622(d)(1). This reasoning has two flaws.

First, the Commission reads too much into the differences between "revise," "modify," and adopt an "alternative system." In fact, "revise" and "modify" are synonymous in this context, and adopting an "alternative" system is a way to "revise" or "modify" the original system. *See* "Revise," https://ahdictionary.com (Am. Heritage 5th ed.), *retrieved on* Feb. 23, 2018 (defined as "to reconsider and change or modify); *see also Application of Diamond State Tel. Co.*, 113 A.2d 437, 444–45 (Del. 1955) (in rate proceeding, noting that "revise" and "modify" mean "change, to alter, to amend or to reduce" and rejecting suggestion that "revise" is broader than "modify.").

Second, even if there were a meaningful difference between the option to "make . . . modification to" and the option to "adopt [an] alternative system," neither option would allow the Commission to ignore the "Requirements" of Section 3622(d). Even an "alternative system" must still be a "system." "System," as explained above, refers to the Commission's implementing rules, not the authorizing statute, including the "Requirements" of Section 3622(d).[4]

[4] In his supplemental views on Order No. 4257, Commissioner Hammond recognizes that "the system" could refer to "the rules and regulations adopted by the Commission to implement the price cap." Order No. 4257, Supplemental Views of Commissioner Tony Hammond at 1. While Commissioner Hammond also states that "the system" could also refer to "the price cap framework set forth in section 3622," a proposition with which we disagree, he is correct that if there is any ambiguity in the phrase, "it is important to consider both" meanings. The Commission's decision in Order No. 4257 and its proposal in Order No. 4258 would be overturned on review for failing to consider the

The Commission cannot replace the *statutory* "system" because no such "system" exists. Hence, even wholesale "replacement of the existing system" cannot entail replacement of the provisions of Sections 3622(d)(1) and (2) that make the CPI cap binding.[5]

(2) The Commission argues the ten-year review must be deemed to include authority to modify or eliminate the statutory CPI cap because section 3622(b) "provides that the system 'shall be designed to achieve'" the objectives. Order No. 4258 at 15. The premise of this argument is unexceptionable, but the Commission's conclusion does not follow. No one disputes that both the original "system" and any modified or alternative system should be "designed to achieve" the objectives of Section 3622(b). But the objectives are themselves bounded by the requirements of Section 3622(d). As noted above, the Commission has repeatedly held that the "objectives" of § 3622(b) cannot trump those requirements, including the CPI-based price cap. *See* pp. 13-15, *supra* (citing Commission decisions). Hence, the requirement that an alternative system of regulation comply with Section 3622(d) is subsumed in

alternative that "the system" refers to the rules established by the Commission. Either the plain language dictates this reading, in which case the Commission's interpretation fails under *Chevron* step one, or the Commission has failed to recognize the ambiguity in the language and interpret the statute accordingly under *Chevron* step two. *USPS v. PRC*, 640 F.3d 1263, 1268 (D.C. Cir. 2011) ("Exigency I").

[5] As ANM *et al.* explained in their March 2017 Comments, Congress could not constitutionally delegate to the Commission the authority to rewrite the statute as the Commission has proposed. *See, e.g.*, *Clinton v. State of New York*, 524 U.S. 417, 438–99 (1998); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

the requirement that an alternative system of regulation must be "designed to achieve" the objectives of Section 3622(b).

(3) The Commission argues that, because Section 3622(d)(3) requires the Commission to conduct a formal review of the system before modifying the system or adopting an alternative, those remedies must differ from the Section 3622(a) remedies of reviewing and revising the system on the Commission's own initiative. Order No. 4258 at 16–17. This is another *non sequitur*. A more natural reading is that the 10-year review provision was included in the statute to ensure the Commission would thoroughly reassess the performance of its system at least once after the first decade. While Section 3622(a) empowers the Commission to review (and revise) more often on its own initiative, Section 3622(d) sets an outer time limit on when the first review must begin. Congress gave the Commission broad discretion over the timing and frequency of its review(s) of the system of regulation. That is a far cry from authorizing the Commission to repeal or rewrite the statute.[6]

---

[6] Nor may the CPI cap be discarded on the theory that keeping it would reduce the 10-year review to an empty formality. The CPI cap leaves many compliance and implementation issues for the Commission to resolve. In Docket No. RM2007-1, the Commission considered many alternatives before settling on the system that was ultimately codified at 39 C.F.R. §§ 3010.10 through 3010.30. Docket No. RM2007-1, *Regulations Establishing System of Ratemaking*, Order No. 15 (May 17, 2007) at 2–5 (requesting comments in consideration of alternative methods for calculating CPI cap limitation and annual rate changes); *id.*, Order Nos. 26 and 27, 72 Fed. Reg. 50744 (Sept. 4, 2007) (further discussion of alternatives); *id.*, Order No. 43 (Oct. 29, 2007) (further discussion of alternatives and adoption of final rules).

Since Order No. 43, the Commission has considered and adopted a number of other changes to the system of regulation—all within the CPI cap. *See, e.g.*, Order No. 303 in Docket No. RM2009-8, *Amendment to the System of*

B. Differences between the language of Sections 3622(c)(4) and 3622(d)(3) do not authorize the Commission to disregard the CPI cap.

The notion that PAEA authorizes the Commission to abandon the CPI cap in the 10-year review proceeding likewise finds no support in the differences in wording between Sections 3622(c)(4) and 3622(d)(3). *Cf.* Order No. 4258 at 15. The Commission reasons that, because Section 3622(c)(4) expressly restricts the "alternative means of sending and receiving [mail] at reasonable costs" to alternatives that are "available," but Section 3622(d)(3) contains no restriction on any "alternative system" of regulation that the Commission might adopt (other than the requirement that the changes must be "necessary to achieve the objectives" of Section 3622(b)), the absence of such a restriction in Section 3622(d)(3) implies that the terms of the alternative systems open to adoption in the 10-year review proceeding are otherwise unrestricted. *Id.*

This logic is fallacious. The argument is an appeal to the negative-implication canon of construction, also known as *expression unius est exclusion alterius*. "'The force of any negative implication, however, depends on context.' The *expression unius* canon applies only when 'circumstances support[ ] a sensible inference that the term left out must have been meant to be excluded.'" *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017) (citations omitted). In

---

Ratemaking Regulations (Sept. 22, 2009); Order No. 1786 in Docket No. RM2013-2, *Review of Commission's Price Cap Rules* (July 23, 2013); Order No. 2086 in Docket No. RM2014-3, *Calculation of Percentage Change in Rates for Price Cap Purposes* (June 3, 2014); Order No. 4393 in Docket No. RM2016-6, *Rule on Motions Concerning Mail Preparation Changes* (Jan. 25, 2018).

fact, the context and circumstances of Sections 3622(c)(4) and 3622(d)(3) are quite different.

The former provision directs the Commission to account for "available alternative means of sending and receiving" mail in developing its system of ratemaking—that is, to consider competitive alternatives to the Postal Service. The use of "available" to modify "alternative means" serves to distinguish existing and useable alternatives from hypothetical competitive alternatives to Postal Service products for which the Commission need not account. This modifier serves a specific role in the context of defining this factor and directing the Commission as to its application.

By contrast, there is no reason to conclude, as the Commission does, that a lack of a similar modifier to "alternative system" within Section 3622(d)(3) itself grants the Commission unlimited discretion to develop an alternative system of ratemaking. The restriction on "alternative systems" imposed by the CPI cap appears in the two immediately preceding provisions, 3622(d)(1) and (2). Congress had no obligation to repeat the same restriction again in Section 3622(d)(3). To read Section 3622(d)(3) in isolation from the preceding parts of Section 3622(d) violates the whole-text canon, which requires that a statute must be construed as a whole, not by reading an individual provision in isolation. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

C. The Commission's obligation to maintain the CPI cap stems from the body of Section 3622(d), not just its title.

The Commission's next argument, that the title of Section 3622(d) ("Requirements"), standing alone, cannot contravene the plain language of the text, Order No. 4258 at 16, is an attack on a straw man. The undersigned parties have not argued that the title alone mandates the retention of a CPI-based cap. The requirement also appears in the *body* of Section 3622(d)(1): "The system for regulating rates and classes for market-dominant products shall . . . include an annual limitation . . . equal to the change in the [CPI]." The title "Requirements" summarizes in a word what the text spells out in unambiguous detail.[7]

D. Unexpressed legislative "purposes" and "intent" and the sparse legislative history of PAEA cannot override the text of Sections 3622(d)(1) and (2).

The Commission's main argument is an appeal to legislative history. The Commission contends that "subsection (d)(3) was the result of a legislative compromise to achieve 10 years of rate stability followed by a Commission-led review of the ratemaking system and, if warranted, modification or adoption of an alternative system to achieve the PAEA's objectives." Order No. 4258 at 17.

This reasoning begs the question. Subsection (d)(3) no doubt was intended to authorize the Commission to review the current system of ratemaking and modify or adopt an alternative as a result. The critical

---

[7] As the Commission recognizes, "[a] statute's title can aid in resolving ambiguity." Order No. 4258 at 16 (citing *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)). The Commission's further statement that a statute's title "has no power to enlarge the text or confer powers" has no applicability to the present case. Order No. 4258 at 16. It is the Commission that is attempting to "enlarge the text or confer powers" from its reading of the statute. ANM, *et al*. are arguing that the Commission cannot ignore the plain language of the statue *restricting* its powers.

question, though, is *what provisions* the modified or alternative system still must contain—in particular, whether the modified or alternative system may jettison features that Sections 3622(d) and (e) on their face *require* the system to contain. Whatever legislative compromises culminated in the enactment of PAEA, nothing in the version of the legislation ultimately enacted authorizes the Commission to jettison in the 10-year review proceeding the requirements of Sections 3622(d)(1) and (2).

To read Section 3622(d)(3) as the Commission does, one must assume that the term "system" refers to something *different* than the "system" established by the Commission pursuant to Section 3622(a), and that this "system" is not bound by the Section 3622(d)(1)'s dictate that "[t]he system for regulating rates and classes for market dominant mail shall" include a CPI-based limitation on rate increases. Here again, the Commission reads Section 3622(d)(3) out of context. The provision did not need a self-contained restriction on the Commission's authority over "alternative" systems in Section 3622(d)(3) because Congress had already embedded the same restriction in Sections 3622(d)(1) and (2), which require that *any* system of ratemaking implemented by the Commission "shall" comply with the CPI cap provisions. Restating these requirements in Section 3622(d)(3) would have been repetitive.[8]

---

[8] Using the Commission's own logic, if Congress wanted to grant the Commission authority to ignore the requirements of § 3622(d), it could have expressly stated that the Commission may "adopt such alternative system . . . as necessary to achieve the objectives . . . notwithstanding the requirements of § 3622(d)." These extra words presumably were not omitted just to save on printing costs.

The Commission's appeal to "Congress' manifest purposes" is likewise without merit. *Cf.* Order No. 4258 at 18. The purposes of Section 3622(d) are manifest in its text.[9] Subsection (d)(3) does not say that the Commission may adopt a system that omits or loosens the CPI-based price cap otherwise mandated by Section 3622(d). Subsection (d)(3) does not say that, "notwithstanding the requirements of subsection (d)(1), the Commission may adopt such alternative system . . ." It does not say, "such alternative system need not incorporate the annual limitation on price increases described in subsection (d)(1)." Congress could have easily codified such a "legislative compromise" into the law with this sort of language, but did not do so. Rather, this provision states plainly that "[t]he system for regulating rates and classes for market-dominant products *shall* . . . include an annual limitation" in the form of a CPI-based price cap. 39 U.S.C. § 3622(d)(1)(emphasis added). The unambiguity of this language ends any possible debate about what "Congress' manifest purposes" might be—assuming that those "manifest purposes" have any relevance here at all.

The plain language of the statute likewise cannot be overcome by its legislative history. First, virtually no legislative history exists. As the Commission acknowledges, none of the legislative history of PAEA speaks to the purpose or proper interpretation of the review provision of Section

[9] "In analyzing a statute, we begin by examining the text, not by 'psychoanalyzing those who enacted it.'" *Carter v. United States*, 120 S. Ct. 2159, 2169–70 (2000) (citations omitted). "Policy arguments cannot supersede the clear statutory text." *Universal Health Services, Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016).

3622(d)(3), which appears to have been added to H.R. 6407 without hearings, Committee consideration, or floor debate. *See* Order No. 4258 at 21. The Commission relates the history of the several predecessor bills, but those sources establish only that the provisions of the earlier bills differed in many respects from the provisions ultimately enacted as PAEA. *Id.* at 19–23.

The Commission and Senators Collins and Carper are surely correct that the final bill was "a difficult compromise." *Id.* at 23. But, as more recent legislative efforts have confirmed, any postal legislation is likely to require compromise among competing stakeholders and interests. And many aspects of the 2006 law obviously reflect compromise. These include the competing objectives; the limitations on worksharing discounts; the prefunding obligations; the complaint provisions. Bromides about "compromise" reveal nothing, beyond the actual text of the statute as enacted, about the terms of the particular compromises that led to the enactment of PAEA.

Moreover, even if there had been a compromise between a version of the bill that provided for a permanent rate cap and one that offered a rate cap as one option among several for the Commission to choose, the compromise resolving this conflict could well have been to require the Commission to review the operation of the rate system after 10 years and evaluate how to modify it to improve performance while still retaining the CPI-based limitation. Those, in any event, were the terms actually written into the law.

At bottom, the only direct support the Commission offers for its position that Section 3622(d)(3) authorizes it to ignore the statutory requirements of Section 3622(d) and dispense with the CPI-based limitation is a floor statement by Senator Collins in the Congressional Record. Order No. 4258 at 22 (quoting 152 Cong. Rec. S11674, S11675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins)). This statement cannot override the plain text of the statute, however.

First, while Senator Collins may have genuinely believed that Section 3622(d)(3) represented a compromise that allowed the Commission to replace the CPI-based price cap after 10 years, a floor statement cannot overcome the plain language of the statute. The courts have become increasingly skeptical in recent years of the probative value of such remarks. The "Supreme Court has repeatedly emphasized that courts should 'not resort to legislative history to cloud a statutory text that is clear.'" *Nat'l Ass'n of Manufacturers v. Taylor*, 582 F.3d 1, 12 (D.C. Cir. 2009) (citations omitted). In particular, "excerpts from committee hearings and scattered floor statements by individual lawmakers" are "the sort of stuff we have called 'among the least illuminating forms of legislative history.'" *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017) (per Kagan, J.) (citations omitted). "'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 Manufacturers*, 582 F.3d at 12 (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 456–57 (2002)). "Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record." *Begier v. I.R.S.*, 496 U.S. 53 (1990) (Scalia, J., concurring)).

Moreover, the Commission's use of the floor statement proves too much. By the same logic, the reference in subsection (d)(3) to an "alternative system" would authorize the Commission to disregard in the 10-year review the requirements of Section 3622(e) as well. But the Commission still treats Section 3622(e) as good law. Order No. 4258 at 87–98.

As Carl Sagan once noted, "Extraordinary claims require extraordinary evidence."[10] It would truly be extraordinary for Congress to have designed a comprehensive set of objectives, requirements, and limitations to govern a system of ratemaking that carefully balanced the competing interests of a regulated monopoly and its ratepayers, only to provide the Commission with the authority to abandon that carefully crafted structure without providing any guidance as to what the Commission should put in its place. Surely, reaching such a conclusion should require more evidence than a single floor statement in the Congressional Record.

E. The Commission's grounds for distinguishing its prior holdings recognizing the central role and binding effect of the CPI cap are arbitrary and capricious.

The Commission's current interpretation of Section 3622(d) also cannot be reconciled with the Commission's prior construction of the same provision. As noted above, the Commission held until recently that the role of the CPI cap in PAEA's statutory hierarchy is absolute, "central," "indispensable," and "it would undermine the basic regulatory approach of the PAEA if the Postal Service could pierce the price cap routinely." *See* pp. 13-15, *supra* (citing prior Commission holdings).

---

[10] *See also* DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 116 (1912 ed.) ("A wise man . . . proportions his belief to the evidence.").

The Commission tries to brush off these prior statements on the theory that they involved the role of the CPI in the system of regulation established under Section 3622(a), not the "alternative" system of regulation that the Commission proposes under Section 3622(d)(3). Order No. 4258 at 18. This is a distinction without a difference. The Commission's prior emphasis on the central role of the CPI cap is important not merely as an exercise in statutory construction but also as an acknowledgement that, as a matter of regulatory fact, the only effective way to protect captive mailers from abuse of the Postal Service's monopoly power is rigorous enforcement of the CPI cap. *See* pp. ___, *supra*. It is in the latter respect that the proposed alternative system most profoundly contradicts the Commission's previous findings.

For this reason, a final rule adopting the proposed breaches of the CPI cap would likely be overturned on judicial review not only as a violation of Section 3622(d), but also as an unexplained departure from the Commission's previous findings. *See, e.g., Great Lakes Gas Transmission L.P. v. FERC*, 984 F.2d 426, 433 (D.C. Cir. 1993) ("A full and rational explanation is especially important to this court when the condition imposed reflects a shift in FERC's policy"); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 799 (1990) (determining that where the agency "made no effort to explain the apparent inconsistency between" the decision on review and its prior analyses, "its order is invalid on that basis alone"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (finding that an agency changing its course by rescinding a rule must supply a reasoned analysis for the change); *Erie Boulevard Hydropower, LP v. FERC*, 878 F. 3d 258, 269 (D.C.

Cir. 2017) ("An agency decision that departs from agency precedent without explanation is [ ] arbitrary and capricious.").

II. THE PROPOSED REGULATORY SYSTEM VIOLATES THE TERMS OF THE REGULATORY BARGAIN THAT CONGRESS ADOPTED IN SECTION 3622(b).

Because the alternative system of regulation proposed in Order No. 4258 would violate 39 U.S.C. § 3622(d), analysis of the proposal in light of the objectives of Section 3622(b) is unnecessary. But even if Section 3622(d)(3) somehow empowered the Commission to discard the CPI cap, the proposal would need to be rejected for violating Congress' directive to design a ratemaking system that applies "*each*" one of the nine objectives of Section 3622(b) "*in conjunction with the others*."

The Commission's proposals in Order No. 4258 are geared toward a single goal: giving first priority to Objective 5 (assuring "adequate revenues, including retained earnings, to maintain financial stability"). 39 U.S.C. § 3622(b)(5). This approach is inconsistent with the language and structure of the statute, including its directive to apply each of the Objectives in conjunction with the others. Congress would have had no need to list any of the eight other objectives if gaining more revenue were the only goal. *See also* Dissenting Views of Commissioner Hammond at 1 ("[R]ather than balancing all the objectives of 39 U.S.C. 3622, the proposed changes elevate the financial stability objective above the others."). The Commission's approach likewise violates a fundamental canon of statutory construction: a statute must be construed as a whole, and not by reading an individual provision in isolation. *K Mart Corp*, *supra*, 486 U.S. at 291. "It is a great fallacy to think that by staring hard at an isolated sentence one can come up with a meaningful interpretation." *Alliance to End Repression v. City of Chicago*, 742 F. 2d 1007, 1013 (7th Cir. 1984) (en banc) (Posner, J.).

Even if (contrary to fact) Objective 5 could properly outweigh all other objectives, the Commission has misapplied that objective on its own terms.

A. The Commission has failed to apply all of the objectives or balance the interests of the Postal Service and its customers.

As the undersigned parties explained in Phase 1, the ratemaking provisions of PAEA required an updated version of the traditional regulatory bargain between a regulated monopoly and its captive ratepayers. *See* ANM *et al.* March 2017 Comments at 13–17. The objectives and factors of PAEA reflect both complementary and competing interests, seeking to allow the Postal Service revenues adequate to provide appropriate levels of service (Objectives 3 and 5), while preventing the Postal Service from abusing its market power at the expense of captive mailers by charging rates that cover inefficient or needlessly high costs (Objective 1 and Factor 12), rise faster than inflation (Objective 2), or exceed "just and reasonable" or "reasonable and equitable" levels (Objective 8, Factor 3, and 39 U.S.C. § 404(b)). The statute further recognizes that revenue adequacy (Objective 5) is a relative term, not a directive to fill the Postal Service's coffers without regard to cost control, operational and pricing efficiency, or the financial impact of rates on mailers and the public. Finally, the introductory phrase of Section 3622(b) explicitly requires that "each" objective "shall be applied in conjunction with the others," and the legislative history of Section 3622 confirms that this requirement was inserted deliberately. *See* ANM *et al.* March 2017 Comments at 15–16. Because traditional ratemaking principles and the introductory clause of Section 3622(b) require the system of ratemaking to balance all of the objectives listed in that provision, the Commission's task in Phase 1 of this docket was not to rate the performance of the existing system against each objective in isolation, but to determine whether the system was achieving the objectives as a whole. In other words, the Commission's task was to determine not just whether the system had achieved particular objectives, but whether it had struck the right balance among them.

The Commission professes to recognize this requirement in Order No. 4257, citing its earlier statement that "the objectives 'are presented as a group and the application of each is conditioned upon the need to recognize and reflect the others.'" At 17 (quoting Order No. 536 at 36). Indeed, the Commission recognizes the "tension" between the objectives and that "the PAEA is designed to achieve various goals . . . [and] these joint goals will best be achieved if they are balanced with one another." *Id.* at 17–18 (internal quotations omitted). The Commission further acknowledges its prior findings that its "'rules for applying the price cap and the application of those rules help to achieve several objectives of the PAEA. Enforcing the limitation that price increases for each class of mail do not exceed inflation, for example, incentivizes the Postal Service to reduce costs and increase efficiency (Objective 1).'" Order No. 4257 at 222 (quoting FY 2015 Annual Report at 22). Order Nos. 4257 and 4258, however, ultimately abandon these principles.

Rather than recognizing that the application of *each* objective must "recognize and reflect" *each other* objective, the Commission has arbitrarily grouped the objectives into three distinct buckets: structure, financial health, and service. *Id.* at 17. The Commission claims that this piecemeal approach "allows application of the objectives together as they relate to specific areas of the system." *Id.* at 22. But this is not so. The Commission has not *balanced* the objectives *across* these areas (for instance, objectives requiring improved service and objectives seeking revenue adequacy). Nor has the Commission considered whether the structure of the system is working to achieve the objectives *as a whole*. For instance, one of the subtopics the Commission identifies under the "structure" area is "pricing," a feature that is an integral component of subtopics under the financial stability area (reasonable rates, financial stability, operational efficiency). *Id.* at 22. By analyzing these areas separately, the Commission fails to evaluate in a principled way the effect of each area on other areas.[11]

[11] The empty formalism of this piecemeal approach is illustrated by the Commission's labored efforts to assign separate meanings to "just" and "reasonable" (*i.e.*, not too high and not too low) and analyze the two terms separately—"just" in the structural area and "reasonable" in the financial health area. Order No. 4257 at 113-1130 ("just"), 226-236 ("reasonable"). The Commission cites no authority for this approach, and none exists. "Just and reasonable" and "reasonable and equitable" (Objective 8 and 39 U.S.C. § 404(b), respectively) are synonyms, and each phrase is a doublet: a pair of nouns that lack separate meaning. *See* Antonin Scalia and Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 177 (2012). The zone of reasonableness established under these longstanding regulatory terms of art, and the factors that determine the breadth of that zone, are the product of more than a century of legislative, administrative, and judicial precedent. ANM *et al*. March 2017 Comments at 17–18 (citing authorities). As discussed further

The Commission perhaps could have mitigated this flaw by examining whether the current system achieved an appropriate balance *across* the three areas, but it neglected to do this as well. Instead, it simply checked off each objective in isolation, totted up the results—X objectives achieved, Y objectives not—and then proclaimed, without disclosing the Commission's weighting or interrelationship (if any) of the objectives, that the overall grade was an F.

This approach is both inconsistent with the Commission's own statements regarding the holistic nature of the statute and arbitrary on its own. Nothing in the statute suggests that the various objectives are susceptible to grouping into sub-areas, each assessed separately from the others; nothing in the statute identifies the three specific areas the Commission chose to group them into; and nothing in the statute endorses the "best two out of three" approach the Commission took to evaluating whether the system has achieved the objectives as a whole.

In the end, without admitting to doing so, the Commission implicitly (but necessarily) has determined that the current system gives too much weight to the factors protecting mailers, and not enough weight to Objective 5. The same implicit priority clearly underlies the rules proposed in Order No. 4258, which elevate the objective of revenue adequacy above all other objectives. The Commission, however, does not explain why the additional revenue it seeks to provide the Postal Service justifies the injury to mailers that will result. It does not explain how transferring $16 billion of extra

below, the Commission has not even attempted the analysis required by this precedent.

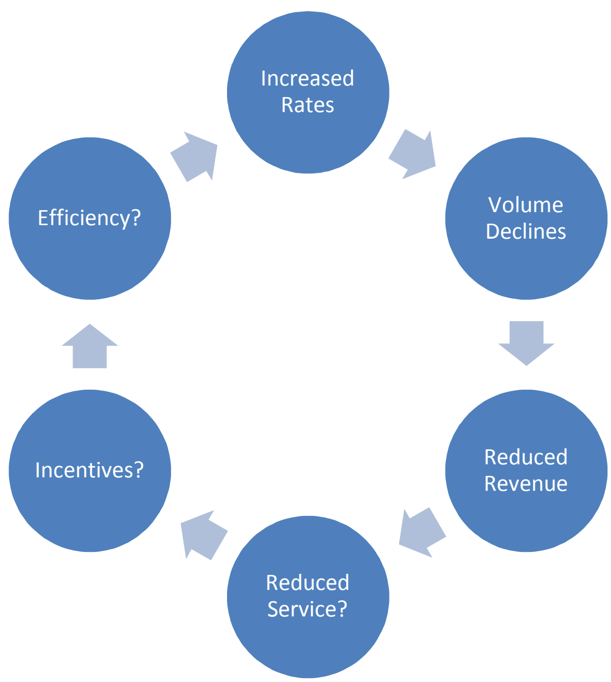
revenue from captive mailers to the Postal Service over the next five years, unconditioned on any improvement in efficiency or reduction in costs, will encourage more efficiency or reduce costs, or why rate increases, not cost reductions, are the only allowed path to financial stability. It does not explain why nominal rate increases as much as 40 percent over five years are a just and reasonable solution when postal labor is being compensated at about double the rates of compensation offered by the private sector for comparable work, and the Postal Service is allowed to continue operating its FSS money pit, maintaining worksharing passthroughs that are certain to cause inefficient mailing practices, and failing to reduce capacity enough. The Commission does not explain why its proposed solutions represent a good balance between protecting captive ratepayers, preventing monopoly abuse (and the disincentives toward cost reduction inherent in monopoly), and providing the Postal Service with the opportunity to earn adequate revenues. The proposed rules simply seek to meet Objective 5, while giving the other objectives lip service only.

B. The proposed alternative system of regulation would violate Objective 1, maximizing incentives for efficiency.

Objective 1 exemplifies why any modified or alternative regulatory system needs to strike an appropriate balance between the objectives of PAEA. If the proper incentives are provided for the Postal Service to reduce costs and maximize efficiency, then its financial stability should improve, its service performance may increase, and the Postal Service can achieve these goals while maintaining just and reasonable rates. Everybody wins.

By contrast, a system designed solely to enhance the Postal Service's financial stability could lead to greater and greater rate increases without increases in service levels or efficiency. In the resulting death spiral, higher rates would depress volume, requiring even higher per-unit rates to recover costs, driving volume down further, until the volume had permanently left the system and the Postal Service had no chance of recovering its operating costs. Everybody would lose. To adapt the figure on page 47 of Order No. 4258:

Figure 2



Further, focusing on the incentives to reduce cost focuses on factors within the Postal Service's control, whereas to some degree, the revenues the Postal Service earns are dependent on broader market factors that affect the demand for mail. Thus, the Commission must keep a close eye on the objective of maximizing incentives to reduce cost and increase efficiency, and this objective should provide a guiding principle for any redesign of the system for regulating rates.

The Commission found in Order No. 4257 that the current system of ratemaking had not achieved Objective 1, and that "the incentives to reduce costs and increase operational efficiency have not been maximized as intended by the PAEA." Order No. 4257 at 222. Although ANM *et al.* disagree with the Commission's approach to analyzing this objective,[12] we agree with the Commission's conclusion that Objective 1 was not achieved. While there were multiple reasons for this failure, it shows that the existing system of

[12] Among other things, the Commission focuses almost entirely on the results achieved under the current system—*i.e.*, whether and by how much the Postal Service reduced its costs and increased efficiency—and fails to analyze how the *incentives* provided by the *system of ratemaking* affected those results. *See* Order No. 4257 at 222 (finding the Postal Service did experience declines in costs and some improvement to efficiency under PAEA, but concluding solely from that finding that the "incentives . . . have not been maximized . . . because the reductions and improvements were insufficient to address the Postal Service's financial instability"). Additionally, the Commission's approach to analyzing Objective 1 concentrates on whether "a system . . . uses available mechanisms, such as flexibility under the price cap, pricing differentials, and workshare discounts, to the fullest extent possible to incentivize the reduction of costs and increases in operational and pricing efficiency." *Id.* at 182. None of these "incentives" are actually features of the system of ratemaking established by the Commission. Rather, they relate to pricing actions that are entirely within the Postal Service's purview. The Commission's approach was structurally incapable of properly evaluating whether the incentives to reduce costs and increase efficiency had been maximized because the inquiry omitted any analysis of how the primary incentive—the price cap—had affected the Postal Service's efforts to reduce costs and increase efficiency. The Commission also failed to analyze whether other features of its regulatory system, such as its approaches to evaluating workshare discount passthroughs and approving negotiated service agreements, affected the Postal Service's ability to take advantage of opportunities to increase efficiency.

ratemaking needs to be modified to provide stronger incentives for cost reductions and improvements in efficiency.

Unfortunately, the alternative regulatory system proposed in Order No. 4258 would have the opposite effect. The proposal would allow the Postal Service to raise market-dominant rates by as much as five percent above inflation, equivalent to about $16 to $24 billion in extra revenue over five years.[13] The idea that giving the Postal Service an extra $16-$24 billion in revenue over five years will increase its incentive to reduce cost and increase efficiency (as compared to the current system, which the Commission already found does not meet Objective 1) turns incentive ratemaking on its head. Moreover, none of the proposed surcharges, except for a single component of 0.75 percentage points, would require any showing of the Postal Service's efficiency gains or cost reductions.

This is a facial violation of Objective 1. As Commissioner Hammond notes in his dissent, giving the Postal Service additional rate authority based on its inability to recover all of its costs "would grant the Postal Service the benefits of both systems [*i.e.*, cost-of-service and incentive ratemaking] and require of it the sacrifices of neither." Dissenting Views of Commissioner Hammond at 1.

[13] Holding market-dominant volume constant, the Commission's proposal will give the Postal Service between $16 billion in additional revenue over five years (at CPI + 2%) and $24 billion in additional revenue over five years (at CPI + 3%). Library Reference ANM *et al.*–LR–RM2017-3/4, "Revenue Impacts", cells E3 & E4.

The Commission offers no cogent response. Instead, the Commission changes the subject, pivoting to the separate issue of whether the Postal Service has the *ability* to improve its efficiency and costs. The Commission asserts that the Postal Service is too starved for "retained earnings" to improve its efficiency or cost control, and that showering more money on the Postal Service would set off a "harmonious cycle" of greater earnings, more capital investments, reduced costs, higher service quality, and increased revenue. Order No. 4258 at 46–53.

This claim is irrelevant to Objective 1 and in any event unsupported by reasoned analysis and refuted by experience. We discuss in turn the incentive effects (*i.e.*, the effects that Objective 1 actually requires the Commission to consider), the income effects hypothesized by the Commission in Order No. 4258, and the historical record of how the Postal Service and other postal operators have actually performed when allowed to raise rates faster than inflation. Finally, we discuss the one element of the proposed system that purports to give the Postal Service stronger incentives for efficiency: the proposed annual surcharge of 0.75 percentage points for maintaining the same rate of productivity growth that the Postal Service achieved during Fiscal Years 2011 to 2016.

1. Objective 1 requires the Commission to consider the effect of an alternative regulatory system on the Postal Service's *incentives* to reduce costs and increase efficiency, not the Postal Service's *financial ability* to make investments.

The Commission's proposal to allow the Postal Service to surcharge market-dominant rates by a minimum of two percent above CPI is incompatible with the directive in Objective 1 to "maximize incentives to reduce costs and increase efficiency." 39 U.S.C. § 3622(b)(1). As the Commission has recognized, a price cap based on an exogenous index is the centerpiece of incentive regulation. The prospect of losing money if the costs of the regulated firm rise faster than inflation, or earning extra money if the costs of the firm rise more slowly than inflation, is the primary incentive to reduce costs and increase efficiency under index ratemaking. Order No. 547 in Docket No. R2010-4 (Sept. 30, 2010) at 11–13, *aff'd in relevant part*, *USPS v. PRC*, 640 F.3d 1263, 1264 (D.C. Cir. 2011); *see generally* ANM *et al.* March 2017 Comments at 19–22 (citing authorities).

Loosening the regulatory price cap necessarily weakens the incentives it provides. There is nothing controversial about this dynamic; it is indeed central to the theory of performance-based regulation. ANM *et al.* March 2017 Comments at 64–66; Nadol Decl. at ¶ 11. In the words of Order No. 547, the price cap "stands as the single most important safeguard for mailers." At 13. The "role of the price cap is central to ratemaking, and the integrity of the price cap is indispensable if the incentive to reduce costs is to remain effective. Therefore, *it would undermine the basic regulatory approach of the PAEA if the Postal Service could pierce the price cap routinely*." *Id.* at 49–50 (emphasis added). Because even the current system did not meet Objective 1, the weaker incentives offered by the proposed system could not either.

The Commission has acknowledged these principles again in Order No. 4257;[14] the Public Representative's affiants endorse them;[15] the GAO has recognized them;[16] and they can be found in many economics treatises.[17]

[14]Order No. 4257 at 32 ("A primary motivation for the PAEA's requirement of the inclusion of the CPI-U price cap in the new system of ratemaking was to provide the incentive for the Postal Service to reduce costs and increase efficiency. The market dominant ratemaking system, including the CPI-U price cap . . . was intended to incentivize the Postal Service to reduce its costs as a way to achieve retained earnings.") It further explained that "'the PAEA places an inflation-based cap on market dominant rate increases while simultaneously setting forth the objective that the Postal Service must maintain financial stability,' and '[t]his puts pressure on the Postal Service to reduce costs and increase efficiency.'" *Id.* at 33 (quoting Postal Regulatory Commission, Annual Report to the President and Congress, Fiscal Year 2009, January 1, 2010, at 23).

[15] *See* Declaration of Timothy J. Brennan for the Public Representative ("Brennan Decl.") at 6 ("[Price cap regulation] improves on traditional regulation by giving the regulated firm an incentive to control costs."); Declaration of John Kwoka for the Public Representative ("Kwoka Decl.") at 5 ("[Incentive regulation] seeks to harness the firm's natural profit-maximizing incentives to adopt best practices and lower its costs.").

[16] Through PAEA, Congress sought to create a profit motive for the Postal Service and improve efficiencies in the postal networks by eliminating the break-even mandate. *See* Gov't Accountability Office, Report No. GAO-07-684T, U.S. Postal Service: Postal Reform Law Provides Opportunities to Address Postal Challenges 1, 17–19 (2007), *available at* http://www.gao.gov/assets/120/116185.pdf.

[17] *See, e.g.*, Crew, Michael A. and Paul R. Kleindorfer, "A critique of the theory of incentive regulation: implications for the design of performance based regulation for postal service," in FUTURE DIRECTIONS IN POSTAL REFORM (Crew and Kleindorfer, eds.) (2001).

Perhaps the only party to dispute these principles in Phase 1 was the Postal Service itself.[18]

2. The Commission's "harmonious cycle" hypothesis is unsupported speculation.

Order No. 4258 makes no findings, and cites no evidence, that the incentive effect of index regulation is weaker today than in 2006 or 2010. Nor has the Commission attempted to reconcile its findings about the incentive effect of the CPI cap in Order No. 4257 with the Commission's proposals in Order No. 4258 to breach the cap. Instead, the Commission contends in Order No. 4258 that giving the Postal Service more money will increase the Postal Service's *ability* to invest in efficiency and productivity growth, a budget effect that the Commission touts as a "harmonious cycle." But the *ability* to invest in productivity and cost savings is distinct from the *incentive* to do so, and the latter may be undermined by over promoting the former. Section 3622(b) requires the Commission to consider *both*—the incentive through Objective 1,

---

[18] As the Commission relates, the Postal Service self-servingly claims that it does not need incentives in the system of ratemaking "to aggressively focus on increasing operational efficiency and reducing costs" and that the incentives provided by the price cap did not drive the efficiency gains it did make. Order No. 4258 at 59. The Postal Service's position that competitive pressures would drive it to find new efficiencies, if only it had the money to do so, is absurd. If the Postal Service were truly operating in a competitive environment, it would not be able to sustain above-CPI rate increases for long enough to gain the benefit of these revenue increases. It would be forced to drop its prices or go out of business. The Postal Service seems to have changed its position from when the current system of regulations was developed. *See* Docket No. RM2007-1, Initial Comments of the USPS (Apr. 6, 2007) at 22 ("A price cap system . . . provides greater incentives for efficiency due to the fact that it fundamentally changes the relationship between cost and price.").

the ability through Objective 5. By focusing on the ability to the exclusion of the incentive, the Commission has violated both Section 3622(b)(1) and the Commission's duty to provide reasoned justification for abandoning its previous findings.

The Commission's "harmonious cycle" hypothesis would be arbitrary even if (contrary to fact) Objective 1 focused on the Postal Service's ability, not its incentive, to reduce costs and increase efficiency. The notion that insufficient investment capital is the sole (or even primary) reason that the Postal Service does not operate more efficiently and at lower cost rests on unsupported speculation and a misunderstanding of how business enterprises finance investments.

The Postal Service has funds to make additional investments. It holds about $10 billion of cash, and has been generating about $3 billion in additional cash from operations each year. USPS Form 10-K for Fiscal Year 2017, at 48; *cf*. ANM *et al*. March 2017 Comments at 34–35.

The "analysis" offered by the Commission to support the "harmonious cycle" hypothesis consists of six pages of tables of post-2006 financial data purporting to show that the Postal Service is short of money, Order No. 4258 at 48–53, and a figure with circles and arrows depicting, at a purely illustrative level, how the Commission thinks that more money could lead to more spending on improved efficiency, *id*. at 47 (Figure III-2). This simplistic "analysis" proves nothing about how more revenue would affect the Postal Service's costs or efficiency.

The Commission is simply incorrect in assuming that retained earnings are necessary to fund capital investments. The accrued costs of capital investments are included in the Postal Service's reported expenses as non-cash depreciation expenses. Thus, if the Postal Service earns sufficient revenue in a year to cover its accrued operating costs, it will have earned enough revenue to fund capital investments. In other words, the Postal Service can fund capital investments so long as it is meeting the Commission's definition of *short term* financial stability.

While retained earnings certainly *could* be used to fund investment, this is not why Congress replaced the breakeven requirement of the Postal Reorganization Act with the right to retain earnings under PAEA. Rather, PAEA holds out the possibility of retaining earnings as an incentive for the Postal Service to reduce costs and improve efficiency, in line with the theory of incentive regulation. The purpose of allowing the firm to retain earnings is to delink prices from costs, thus incenting the firm to reduce costs so that it can realize the differential between the cost of providing service and the revenues collected for that service. Likewise, as John Kwoka explained last year on behalf of the Public Representative, retained earnings could be used to develop "a compensation system for senior managers . . . that provides rewards for achieving certain efficiency goals, thus replicating the incentives of a residual claimant." Kwoka Decl. at 14.[19]

---

[19] The development of such a system could mitigate the fact that the Postal Service, because it lacks shareholders (the traditional claimants to retained earnings), might be less inclined to respond to the incentives provided by an ability to retain earnings. *See* Kwoka Decl. at 14; Brennan Decl. at 8.

The Commission's statement that "[r]etained earnings can be used to pay down debt and borrowing can be used to finance capital investments," Order No. 4258 at 47, is likewise wide of the mark. While retained earnings *could be* used to pay down debt, this is a choice left to the management of the firm. The cost of debt service is a normal cost of business; if the firm has extra funds to pay down debt on an accelerated schedule, it may choose to do that instead of, for instance, providing employees with bonuses. And if the firm's goal is to pay down debt, then it has an incentive to reduce other costs to generate the retained earnings to do so.

The Postal Service's historical experience confirms that investments do not require retained earnings. The Postal Service managed to make capital investments in efficiency and cost reduction during 1971-2007, when the breakeven requirement of the Postal Reorganization Act forbade the Postal Service from retaining earnings as a matter of law.[20] The Postal Service has continued to make capital investments in the post-PAEA era. The most recent USPS Form 10-K shows that the Postal Service records its "Depreciation and amortization" as $1.677 billion in FY 2017, $1.740 billion in FY 2016, and $1.769 billion in FY 2015. Those amounts average $1.729 billion over the last 3 years.

[20] As the initial rates under PAEA were simply the rates carried over from the PRA era, these rates should be presumed to have been designed to cover the costs of capital investments. Moreover, PAEA permitted the Postal Service to file one final rate case before the price cap would take effect. Since the Postal Service declined this opportunity, one could reasonably conclude that it believed its revenues would continue to be sufficient to fund capital expenditures.

The Commission, while not disputing that the Postal Service has made (and continues to make) significant capital investments, claims that their amount is too low to meet the Postal Service's current and future needs. But the extent, if any, of a capital shortfall is a factual question. A serious analysis of this question would require the Commission to do (among other things) the following:

(1) Identify the investments that the Postal Service has failed to make for want of sufficient retained earnings.

(2) Identify the additional investments that the Postal Service would make if the rate surcharges proposed in Order No. 4258 were implemented.

(3) Quantify the likely return on those investments, including the net present value of the project, which depends on (among other factors) the capital required, the capital costs, the operating and capital costs avoided, and the increased revenue generated.

(4) Quantify the offsetting slackening of efficiency and cost control resulting from the gain in income.

See, *e.g.*, Stewart C. Myers and Richard A. Brealey, *Principles of Corporate Finance* 105–11, 119–40 (2003); Richard A. Brealey and Stewart C. Myers, *Capital Investment and Valuation* 103–28, 221–305 (2003).

Merely to list the necessary analyses is to make clear that the Commission has not performed them. The Commission has not identified *any* specific capital investments that the Postal Service has foregone other than the immediate upgrading of its transportation fleet.[21] Still less has the Commission quantified the investments (if any) that would have reduced the Postal Service's costs and increased its efficiency, the likely returns on those investments, the projected efficiency gains, the projected gain in revenue, or the magnitude of the offsetting reduction of incentives for efficiency and cost control. Indeed, the Commission *cannot* perform these analyses, for it has refused to allow discovery from the Postal Service of the information needed to conduct investment analyses of this kind. *See* Order Nos. 3763, 3807, and 4397.[22]

This failure of proof cannot be remedied by assuming, as the Commission apparently does, that the appropriate level of investment is or will be the same as during the era of the Postal Reorganization Act. There is no evidence in the record suggesting that the PRA-era level of investment was appropriate, or that the same level of investment is necessary in the current environment. To the contrary, one of the main defects of cost of service ratemaking, such as existed under PRA, is its tendency to encourage

---

[21] There is plenty of cash for this purpose, and the payback period should be quick, particularly given the large maintenance costs of the Postal Service's aging vehicle fleet. *See* OIG Report No. DR-MA-14-005, *Delivery Vehicle Fleet Replacement* 6-7 (June 10, 2014).

[22] The Commission's insistence that mailers enjoy "robust" opportunities for comment without this information, Order No. 4397 at 5, is disingenuous. Information about the anticipated cost of and returns on potential Postal Service investment projects is generally in the exclusive possession of the Postal Service. The Postal Service effectively admits this when it contends, undoubtedly correctly, that the information is "commercially sensitive." *Id.* at 4. "Commercially sensitive" information is by definition unavailable to the public. *See* 39 C.F.R. § 3007.1(b).

overinvestment. The more the firm expends, the more it can raise its rates.[23] One of the central advantages of performance-based ratemaking is that it eliminates this perverse incentive. Thus, one would expect capital expenditures to decline under the PAEA's price cap regime when compared to the cost of service system embodied in PRA. The price cap was intended in part to force the Postal Service to more carefully consider its capital expenditures and eliminate wasteful projects. The Commission does not consider whether the reduction in capital expenditures during the PAEA era represents a prudent frugality or a forced deprivation. Order No. 4258 simply assumes the latter from the very fact that expenditures declined.

Finally, the Postal Service has squandered its borrowing authority. Rather than use it to fund investments in efficiency, the Postal Service borrowed funds during the recession to make prefunding payments. *See, e.g.*, USPS OIG Report No. FT-WP-15-003, *Considerations in Structuring Estimated Liabilities* at 3 (Jan. 23, 2015) ("The $15 billion debt to the Treasury is a direct result of the prefunding mandate"); Kwoka Decl. at 20. This diversion of the Postal Service's limited borrowing authority was questionable at best, since it was foreseeable that the Postal Service could stop making the prefunding payments without a penalty—as has in fact occurred.

---

[23] Averch, Harvey, and Leland Johnson, "Behavior of the Firm Under Regulatory Constraint," 52 *American Econ. Rev.* 1053–69 (1962); Baumol, William J., and A. Klevorick, "Input Choices and Rate-of-Return Regulation: An Overview of the Discussion," 1 *Bell J. of Economics and Management Science* 162–190 (1970); Bailey, Elizabeth, *Economic Theory of Regulatory Constraint* (1973).

Ultimately, the Commission's "harmonious cycle" theory is contrary to fundamental principles of economic theory underlying the regulation of monopoly enterprises. Indeed, regulators have shifted to incentive regulation rather than cost of service regulation precisely because this "harmonious cycle" does not exist. Rather, when a regulated monopoly firm is guaranteed recovery of all of its capital investments, it tends to overinvest in facilities and ignore opportunities to reduce costs and increase efficiency. *See* pp. 46-47 & n. 23, *supra*.

3. The historical data confirm that the proposed alternative system would lead to ballooning costs and diminished efficiency.

A wealth of empirical data confirms the adverse incentive effects of breaching the CPI cap.

(1) Declines in Postal Service productivity growth historically have corresponded with periods during which the Postal Service had access to revenue above the CPI cap. When above-CPI rate increases have been allowed, productivity growth has declined and costs have increased. This relationship is confirmed by the events that followed the implementation in Fiscal Year 2014 of the exigent surcharge approved in Docket No. R2013-10. Between Fiscal Years 2010 and 2013, the Postal Service achieved productivity gains of 1.56 percent per year.[24] But productivity growth collapsed in 2014, after the exigent surcharge was approved and implemented, and became negative in

[24] *See, e.g.,* ACR 2015, USPS Response to Chairman Information Request No. 7, Question 16.

2016 and 2017,[25] when the Commission began its public campaign to allow above-CPI rate increases in the 10-year review:[26]

Table 1. TFP Average Annual Growth Rate (Selected Periods)

Period	Annual Productivity Change
Pre-PAEA (FY 1997 – FY 2006)	1.03%
PAEA – Before Exigency (FY 2007 – FY 2013)	0.91%
Before Exigency (FY 2010 – FY 2013)	1.56%
Since Exigency (FY 2014 – FY 2017)	– 0.08%

Source: Library Ref. ANM *et al.*-LR-RM2017-3/4, "Table 1 & Figure 3".

If the Postal Service had achieved annual productivity gains of even *one percent* over the last four years, it would have made a profit in FY 2017.[27]

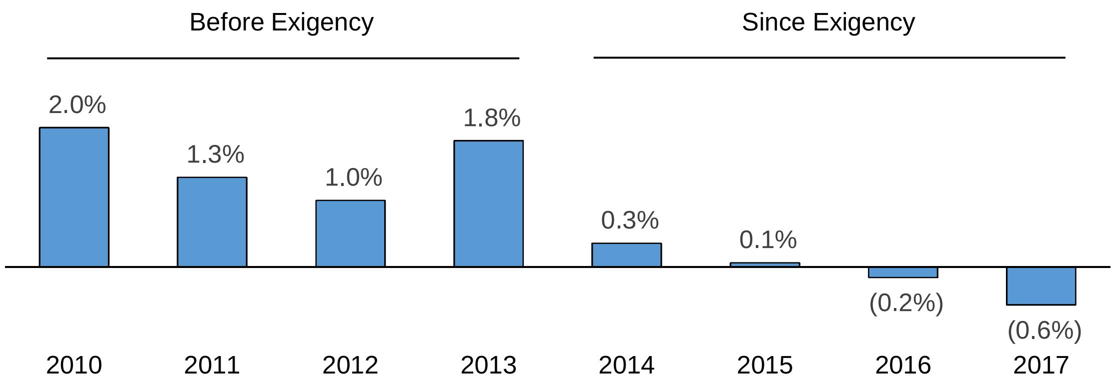
---

[25] Library Reference ANM *et al.*-LR-RM2017-3/4, "Table 1 & Figure 2", cells D23:D26.

[26] *See*, *e.g.*, *Nominations of Hon. Robert G. Taub and Hon. Mark D. Acton*, Hearings before the Senate Comm. on Homeland Security and Government Affairs, 114th Cong., 1st Sess. (Nov. 15, 2016) at 19 (statement of Chairman Taub) ("First, and foremost, the financials need to be fixed.")

[27] Library Reference ANM *et al.*-LR-RM2017-3/4, "Table 1 & Figure 2", cell D15 calculates how much lower the costs would have been in FY 2017 with a 1% growth in Total Factor Productivity. The calculation shows that costs would have been almost $3 billion less.

Figure 3. TFP Annual Growth Rate for FY 2010 – FY 2017



Source: Library Reference ANM *et al.*-LR-RM2017-3/4, "Table 1 & Figure 3".

(2) A similar dynamic has played out in European countries that have relaxed their limitations on maximum prices for postal products in recent years. The postal operators' finances have improved through large rate hikes (at least temporarily), but productivity and cost control have languished. If Section 3622(b) had applied to European postal operators, their performance would have violated Objectives 1, 2 and 8.

In late 2016, WIK-Consult studied the performance of six major foreign postal operators for the OIG. USPS OIG Report No. RARC-17-003, *Lessons in Price Regulation from International Posts* (Feb. 8, 2017). In Australia, where market-dominant postal services are subject to cost-of-service rate regulation (not index regulation), service quality has declined, and regulated prices experienced increases in the range of 40 percent to 114 percent in January 2016. *Id.* at 22, 26. In Canada, which replaced price cap regulation in 2009 with price regulation "based on political decisions rather than a fixed economic methodology," letter mail prices rose by approximately 35 to 59 percent in 2014. *Id.* at 28. In France, where the postal regulator allows a negative productivity adjustment for falling mail volume, price increases have exceeded inflation several times. *Id.* at 36–40. In the United Kingdom, which has eliminated or loosened maximum rate regulation for most mail products, the price of a 100 gram first-class letter increased by 88.2 percent between 2007 and 2016; the price of a 100 gram second-class letter more than doubled. *Id.* at 55–57.

Another study by WIK-Consult detailed the breakdown of Royal Mail's cost discipline that has followed the loosening of maximum rate regulation. The conclusions of the WIK report are chilling. "Targeted cost savings in delivery are relatively low." WIK-Consult report to OFCOM, *Review of the Projected Costs within Royal Mail's Business Plan* (Mar. 31, 2016) at 109. "The company relies on traditional ways of organising delivery and does not (yet) appear to be pursuing more innovative delivery models." *Id.* "We consider Royal Mail's parcel automation programme is less ambitious than its peers." *Id.* "[I]international peers in Denmark, Sweden, the Netherlands and Germany appear to have been more successful at managing the relationships with their employees and unions and, at the same time, agreeing [sic] higher levels of efficiency and cost flexibility, allowing them to meet market challenges more effectively." *Id.* at 110. "Overall, we conclude that Royal Mail's planned initiatives are technically feasible but, overall, less ambitious than its peers." *Id.* at 111.

The problems stemming from lax maximum rate regulation in these other countries have continued during the past 12 months. Just this month, Royal Mail announced above-inflation price hikes on first and second class stamps, which "will be of most concern to regular postal users and small businesses that rely on Royal Mail to send important documents and packages."[28] Australia Post, for its part, continues to experience service quality problems even as it has imposed a number of price hikes in recent years, with "small business noticing an increase in missing letters across the last 12 months."[29]

The historical record thus shows that providing the Postal Service with above-CPI rate increases would not result in faster productivity growth or lower costs. This outcome is unsurprising; in fact, it is predicted by established principles of incentive regulation.

ANM *et al.* noted these facts on pages 51-54 and 64-66 of their March 2017 comments. Order Nos. 4257 and 4258 ignore the point completely.

4. The 0.75 percent surcharge proposed for maintaining recent rates of productivity growth does not cure the violation of Objective 1.

The reduction in incentives created by loosening the price cap cannot be remedied by the one element of the proposal the Commission identifies as an incentive proposal—*i.e.*, the proposal to allow the Postal Service to surcharge rates by another 0.75 percent above CPI if it meets specified productivity goals. *See* Order No. 4258 at 56. Not only would this additional surcharge authority

[28] Edmund Greaves, "Royal Mail Announces Inflation-Busting Stamp Price Hikes," *Moneywise* (Feb. 19, 2018), *available at* https://www.moneywise.co.uk/news/2018-02-19/royal-mail-announces-inflation-busting-stamp-price-hikes.

[29] Daniel McGookin, "A Stamp of Disapproval," *Macarthur Chronicle (Australia)* (Dec. 5, 2017).

fail to outweigh the reduction in incentives resulting from the other proposed surcharges, none of which would be conditioned on achieving any productivity gains at all, but the 0.75 percent "productivity" surcharge would be available merely for *maintaining* recent meager productivity trends, and thus would provide no incentive for the Postal Service to improve them.

First, the notion of providing a regulated utility with *additional* pricing authority to reward improvements in productivity has it backwards. Contrary to the Commission's statement that a "Performance Incentive Mechanism" may "take[] the form of . . . a bonus (*e.g.*, additional rate authority) . . . tied to performance criteria," we are aware of no other price cap based regulatory regime that incorporates such a matching grant provision. Order No. 4258 at 55. To the contrary, the usual question facing regulators is the opposite: by how much should the index-based rate increase authority be *reduced* to force the regulated monopoly to *share* some of its realized productivity gains with its captive customers.

In a pure price cap system, the regulated firm is entitled to receive all of its gains in productivity against the index. That is, if the cap allows price increases of two percent in line with the expected industry-wide increase of costs, but the regulated firm is able to limit its cost increases to one percent by improving productivity, it can retain the benefit of its productivity—it gets the revenue from the full two percent price increase even though its costs only rose by one percent. Many regulatory regimes, however, include an "X" factor designed to force the regulated firm to share some of its productivity gains with its customers.[30] In the above example, an X factor of 0.5 percent would restrict the firm's price increases to 1.5 percent, rather than 2 percent. The firm would keep the benefit of its productivity increases between the one percent of cost increases and 1.5 percent of price increase; its customers would receive the benefit between the 1.5 percent price increase and two percent industry-wide cost increases.

The Commission's proposal, by contrast, would flip the CPI–X adjustment upside down. The Postal Service would keep not only the entire gain in contribution resulting from holding its cost reductions below the growth in the CPI, but captive mailers would be required to pay the Postal Service a matching grant of 0.75 percent. Perversely, the mailers would be worse off than if the Postal Service had achieved no productivity gains at all.

Second, even setting aside these concerns about regulatory design and equity, the Commission's proposal fails to "maximize incentives" to increase productivity because it provides no incentive for the Postal Service to increase productivity any faster than under the current system of ratemaking. The Commission proposes to condition the availability of this additional pricing authority on the Postal Service's continuation of its average rate of

---

[30] *See* ANM *et al.* March 2017 Comments at 70 (citing *Edison Electric Institute v. ICC*, 969 F.2d 1221 (D.C. Cir. 1992); *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 183–84 (D.C. Cir. 1993); *Bell Atl. Telephone Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996); *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1435, 1437 (D.C. Cir. 1996)); Viscusi, W. Kip *et al.*, *Economics of Regulation and Antitrust* 440 (4th ed. 2005). *See also* Brennan Decl. at 6 ("Because the primary rationale for [price cap regulation] is to give the firm an incentive for cost savings, the X term reflects a politically determined division of those expected gains between the firm and its ratepayers.").

productivity growth between FY 2011 and FY 2016: the Commission "anticipates that the Postal Service's operational efficiency for the next 5 years will continue to increase at least at the same rate that it has over the most recent 5 years of the PAEA era." Order No. 4258 at 62. But this rate of productivity growth, by the Commission's own admission, was deficient.

The Commission acknowledges that the Postal Service[31] was "unable to achieve increases in efficiency" during the post-PAEA era "at a greater rate than . . . the 10 years prior to implementation of the PAEA." Order No. 4258 at 58 (citing Order No. 4257 at 22–26).[32] Moreover, Order No. 4257's conclusion that the current system is not maximizing incentives for efficiency depends in part on the finding that the current rate of productivity growth is insufficient to place the Postal Service on a path to financial stability.[33] Yet

[31] The Commission actually states that "the system" was unable to achieve these gains. Order No. 4258 at 58. Its phrasing is consistent with the generally conclusory nature of Order No. 4257 in which every aspect of the Postal Service's financial condition is automatically attributed to the current system of rate regulation rather than potential alternative causes. As discussed throughout these comments, no system of rate regulation can force the Postal Service to make productivity improvements, reduce costs, or improve efficiency. The system can only provide the incentives and opportunities to do so; the Postal Service must take advantage of these. The Commission's primary, fundamental error in Order No. 4257 was ascribing the Postal Service's shortcomings to the current system of ratemaking, in particular the CPI-based price cap, without demonstrating a causal link.

[32] *But see* Order No. 4257 at 191 ("[B]ecause the Commission uses real unit market dominant attributable cost as the determinative metric, the Commission determines that costs were reduced during the PAEA era."), 211 ("Therefore, using TFP as the determinative metric, the Commission determines that efficiency increased during the PAEA era.").

[33] *See* Order No. 4257 at 221 (evaluating whether "gains realized through cost reductions and efficiency increases were sufficient to contribute to the overall

the Commission concludes that providing the Postal Service with additional rate authority simply for maintaining this meager rate of productivity growth "should incentivize the Postal Service to achieve efficiency gains sufficient to contribute to the financial stability of the Postal Service." Order No. 4258 at 62. This conclusion is nonsensical. The obvious purpose (and main effect) of this proposed productivity "incentive" is to give the Postal Service more revenue, not to encourage greater efficiency and cost reduction.

Third, the Commission offers no data or analysis to show that a surcharge of 0.75 percent is either necessary or sufficient to incent optimal rates of productivity growth. The value appears to have been "plucked out of thin air." *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002). Without reasoned support for the 0.75 percent figure, the surcharge lacks the "reasoned explanation" required by the courts. *Id.* (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *San Antonio, Texas v. United States*, 631 F.2d 831, 852 (D.C. Cir. 1980).

There are no other incentives to reduce costs and increase efficiency in the Commission's proposed rules.[34] One therefore cannot conclude that the proposed system would maximize these incentives to a greater degree than the

financial stability of the Postal Service"), 222 ("As shown in the preceding sections, the Postal Service was able to reduce costs and increase operational efficiency during the PAEA era. However, the results were insufficient to achieve overall financial stability for the Postal Service.").

[34] While the proposed changes to workshare rules would give mailers improved pricing signals to determine whether to perform worksharing, the changes would not affect the Postal Service's cost and efficiency in performing the remaining postal functions.

existing incentive. The 0.75 percent "performance" authority would reward the Postal Service for merely maintaining the status quo, and the other surcharges proposed in Order No. 4258 would weaken the incentives now provided by the CPI cap. If the existing system has not achieved Objective 1, still less would the proposed system.

* * *

In sum, the Commission's hypothesis that showering the Postal Service with $16 to $24 billion in extra revenue over five years would "maximize incentives to reduce costs and increase efficiency" is unsupported by meaningful analysis and contrary to regulatory economic theory, the policy of PAEA, previous Commission findings, and historical experience. The proposal is utterly incompatible with Objective 1.

C. The proposed system of regulation would violate Objective 2, rate stability.

The Commission's proposals would violate Objective 2, "to create predictability and stability in rates." 39 U.S.C. § 3622(b)(2). As noted above, the system proposed in Order No. 4258 would allow rates on market-dominant products to increase by 40 percent or more over five years.

Order No. 4258 contains almost no discussion of how the Commission's proposal would lead to stability in rates. Instead, the Commission tries to redefine Objective 2 by suggesting that rates are stable as long as the timing and magnitude of any rate increases are *predictable*. *See, e.g.*, Order No. 4258 at 38 ("Providing a discrete amount of supplemental rate authority on a steady and regular annual basis for 5 years should put the Postal Service on the path to medium-term financial stability while also taking into account pricing predictability and stability"); *id.* at 77 ("Given the substantial increase needed for some non-compensatory products to cover their attributable costs, a 2-percentage point rate increase represents an appropriate mechanism for improving cost coverage while simultaneously maintaining stability and predictability in rates, as required by Objective 2."). The Commission's redefinition of the statutory term "stability in rates" is untenable.

Objective 2 requires that the system of ratemaking do more than that rate increases be predictable. The objective protects mailers by limiting the *amount* of the rates as well. Rates are stable within the meaning of Objective 2 if they hold constant after adjusting for inflation. *Rates that increase measurably faster than inflation violate the stability objective.*[35]

The Commission has held repeatedly that "rate stability" means that average prices for a class do not increase materially faster than the CPI. Order No. 547 at 38 ("Section 3622(d)(1) of title 39 provides *rate stability* and predictability *through a cap on annual rate increases for each market dominant mail class at the level of CPI-U*") (emphasis added). Indeed, the Commission again acknowledged the correct meaning of the term in Order No. 4258 itself,

---

[35] Moreover, the rate increases that Order No. 4258 proposes to authorize would not achieve rate predictability either. Some of the proposed rate increases would be based on changes in Total Factor Productivity, which cannot be predicted in advance. The separate surcharge mechanism proposed for noncompensatory products and classes would generate additional unpredictability because the relevant cost coverage of a product or class will not be known until the "most recent Annual Compliance Determination" is filed. Proposed 39 C.F.R. § 3010.202(a).

and in another order issued only three weeks ago. In Order No. 4258, the Commission asserted that PAEA was intended to allow mailers "10 years of rate stability" before the Commission could change the rules to allow above-CPI rate increases. At 17. By necessary implication, the advent of above-CPI rate increases would mark the end of rate stability.

Order No. 4400 in Docket No. RM2017-12, *Periodic Reporting (Proposal Eight)* (Feb. 7, 2018), is even more to the point. The Commission held that a proposed one-time rule change that would have subjected Nonprofit Regular and Nonprofit ECR mail to rate increases of only 4.2 percent and 0.74 percent, respectively, "would contravene the objective of predictability and stability in rates pursuant to 39 U.S.C. § 3622(b)(2)". Order No. 4400 at 16. Order No. 4400 is particularly telling, since the rate increases proposed in that docket were not only smaller than the percentage increases that Order No. 4258 would allow, but would have been nonrecurring.

The Commission's longstanding interpretation of Objective 2 is supported by its structure. Objective 2 is stated in the conjunctive: to create "predictability *and* stability in rates" (emphasis added). Predictability and stability have distinct meanings: the first word denotes the foreseeability of a value or condition; the second denotes its immutability.[36] Construing Objective 2 as being satisfied by rate increases that exceed the CPI, albeit in a predictable amount and frequency, would conflate the two concepts, violating

[36] *See, e.g.*, Webster's New Collegiate Dictionary (1981) at 899, 1122; 12 Oxford English Dictionary 334 (2d ed. 1989) (predictability); 16 *op. cit.* at 429-–30 (stability).

the anti-surplusage canon of construction, which presumes that every word in a phrase be given effect if possible. *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 733 (D.C. Cir. 2005) ("It is a familiar canon of statutory construction that, 'if possible,' we are to construe a statute so as to give effect to 'every clause and word.'") (*quoting United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).[37]

The Commission's longstanding interpretation of the statutory term "stability in rates" is also consistent with the standard usage of the term "price stability" among economists. Economists in both the United States and in Europe define long-term price stability as a rate of inflation under two percent—not a rate of inflation that is higher by a predictable amount. *See* Federal Open Market Committee, *Statement on Longer-Run Goals and Monetary Policy Strategy* (as amended Jan. 30, 2018) *available at* https://www.federalreserve.gov/monetarypolicy/files/FOMC_LongerRunGoals.pdf (downloaded Feb. 27, 2018); Ben S. Bernanke, *Opening Remarks at the Ceremony Commemorating the Centennial of the Federal Reserve Act,* (Dec. 16, 2013) (explaining that Federal Reserve set two percent as inflation goal to meet Congressional mandate for price stability); Steven R. Blau, *The Federal Reserve and European Central Bank as Lenders-of-Last-Resort: Different Needles in Their Compasses,* 21 N.Y. Int'l L. Rev. 39 (2008) (noting the European Central Bank "has a quantitative definition of 'price stability' of 'close to, but below' 2 percent.").

---

[37] Because "predictability" and "stability" have distinct meanings, the phrase "predictability and stability in rates" does not fall within the exception to the anti-surplusage canon for doublets. *Cf.* pp. ___, *supra.*

The Commission's longstanding interpretation of the statutory term "stability in rates" is further supported by the legislative history of PAEA. In virtually every discussion of the principle of predictable and stable rates, the overriding concern is affordability. The committee report on the Senate bill made clear that the drafters regarded rate "stability" in terms of the rate of inflation, and as a concept distinct from "predictability":

> In hearings, witnesses from the mailing industry cited the need for predictable and stable rates. . . . Of primary importance, then, is the establishment of a regulatory system that will provide for limits on the percentage change in Postal Service rates. This system—frequently referred to as a rate or price cap—*shall be designed to limit annual rate changes based on the level of inflation.*

S. Rep. No. 318, 108th Cong., 2d Sess. 10 (July 22, 2004) (emphasis added).[38]

[38] The sponsors' floor statements, while of admittedly limited probative value, are in the same vein. Senator Carper tied the concept of rate stability directly to the CPI-based limitation: "the price of those products *cannot go up in a given year by more than the rate of inflation* . . . . That will provide a measure of ***stability*** to the huge industry that relies on the post office and a good postal service." Statement of Mr. Carper, 152 Cong. Rec. S00000-15, (Dec. 8, 2006) (emphasis added). Rep. Miller also endorsed this definition, explaining that "this bill will . . . implement a logical, reasoned process for increases in postal rates, which will generally be *in line with the rate of inflation*. Such stability and predictability will allow the Postal Service to grow along with the needs of its customers." Statement of Mrs. Miller, 152 Cong. Rec. H9160-02, (Dec. 8, 2006) (emphasis added). And Rep. Shays stated, "By limiting the amount of future postage rate increases . . . the bill also takes an important step towards encouraging the Postal Service to increase mail volume and keep the mailbags full while giving mailers predictability and stability." Statement of Mr. Shays, 152 Cong. Rec. H9160-02, (Dec. 8, 2006). These legislators all explicitly linked the concept of rate "stability" to price increases in line with inflation.

The above-CPI rate increases contemplated in Order No. 4258 would not come close to meeting the economists' definition of price stability, let alone the more restrictive definition of rate stability incorporated in Objective 2. When inflation is in the range of two percent, annual rate increases in the range of six to seven percent for noncompensatory products and four to five percent for other market-dominant products are inconsistent with rate stability under Objective 2 no matter how predictable the magnitude and timing of the increases.

D. The proposed alternative system of regulation would violate Objective 8 (39 U.S.C. § 3622(b)(8)) and 39 U.S.C. § 404(b), which require that postal rates be just and reasonable.

The alternative system proposed in Order No. 4258 would likewise violate Objective 8 (which calls for the ratemaking system to "establish and maintain a just and reasonable schedule of rates") and 39 U.S.C. § 404(b) (which authorizes the Governors to establish "reasonable and equitable rates of postage and fees," which are limited, *inter alia*, to levels "sufficient" to cover the costs of providing an appropriate level of postal services "under best practices of honest, efficient, and equitable management").

As the undersigned parties explained on pp. 17-18 of their Phase 1 comments, the phrase "just and reasonable" and its synonym "reasonable and equitable" are terms of art that in and of themselves incorporate the regulatory bargain. The standard requires, among other things, that captive ratepayers be protected from having to pay for needlessly high costs or needlessly low efficiency. *See*, *e.g.*, *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (stating that zone of reasonableness is "bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates") (quoting *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950)); *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (referring to "decades" of precedent holding that rates must fall within a "zone of reasonableness" where rates are neither "less than compensatory" nor "excessive," thus "striking a fair balance between the financial interests of the regulated company and the relevant public interests") (internal quotations omitted); *City of Chicago v. FPC*, 458 F.2d 731, 750–51 (D.C. Cir. 1971) (describing the necessary balance between a rate high enough to attract capital and low enough to prevent exploitation of consumers), *cert. denied*, 405 U.S. 1074 (1972). Congress is presumed to have understood Objective 8 and Section 404(b) in this sense when enacting them. *C.I.R. v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993).

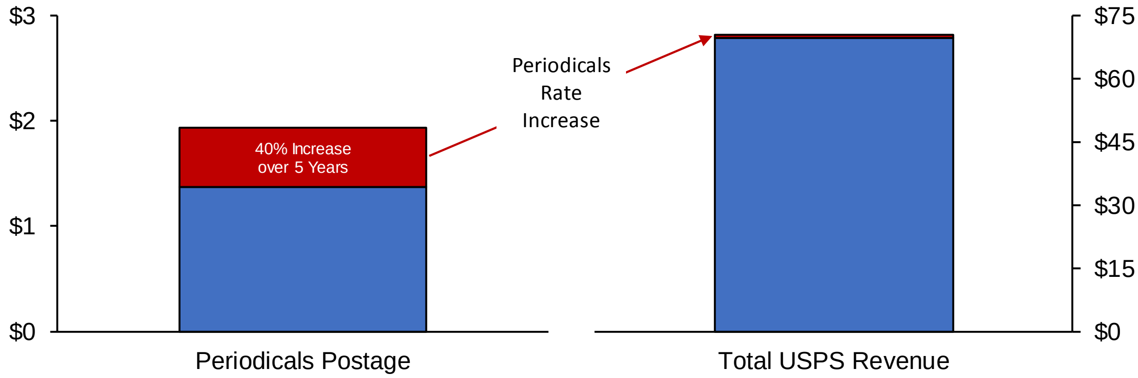
Orders No. 4257 and 4258 do not begin to justify the proposed alternative system in terms of these requirements. The discussion of the "just and reasonable" rate standard in Order No. 4257 is lengthy but uninformative. The Commission states that a rate is "unjust" if it is "excessive to mailers," Order No. 4257 at 116, but provides no objective benchmarks for determining when a rate is "excessive." Answering that question, the Commission states, requires a "highly fact and situation specific inquiry intended to be undertaken on a case-by-case basis." *Id.* at 121.

Order No. 4258 ignores the question entirely. The order, while briefly alluding to Objective 8 in the context of *minimum* rates, Order No. 4258 at 77 and 85, says nothing about the separate question of whether the rate increases permitted by the alternative system would fall within the *maximum* of the zone of reasonableness under Objective 8 or Section 404(d). The obvious issue raised by the proposed alternative system—whether it would be just and reasonable to raise prices on market-dominant products well above inflation even if the Postal Service does nothing to reduce its massively inflated costs or take advantage of the alternative sources of revenue and cost savings available to the Postal Service now and in the foreseeable future—is not mentioned at all.

The proposed rate increases thus would violate Objective 8 and 39 U.S.C. § 404(b) even if captive mailers could pay the proposed rate increases without serious injury. In fact, the proposed increases would likely devastate mailers. The destruction of "noncompensatory" mail would be especially severe, and the financial gains to the Postal Service would be surprisingly modest even in the unlikely event that the price increases caused no falloff in volume.

Periodicals Mail is a prime example. Holding mail volume constant, the proposed increase in Periodicals postage would increase total Postal Service revenue by *less than one percent*.

Figure 4. An Existential Threat to an Industry;
A Drop in the Bucket to USPS (Dollars in Billions)



Source: Library Reference ANM *et al.*--LR--RM2017-3/4, Figure 4.

In fact, the loss of mail volume caused by the proposed rate increases would likely be large. Our comments in Phase I included extensive analysis of the effects of above-CPI price increases on mail volume. *See* Cohen Decl. (Mar. 20, 2017) at 5–8; Faust Decl. ¶ 12. The results illustrated the dramatic effect that rate increases much smaller than those now proposed by the Commission would have on the publishing industry:

> Publisher responses dramatically illustrate the damage that postage increases will have on our industry. At CPI plus 10 percent, publishers estimated their Periodicals volume would decrease by 27 percent. At CPI plus 15 percent, the impact was even more dramatic, with survey respondents estimating volume decreases of 34 percent. Following compilation of the survey results, I summarized the responses at a meeting of the MPA Executive Committee. I told the members what the survey showed with respect to potential volume declines in the event of rates increases as big as CPI plus 10 percent and CPI plus 15 percent. I informed the members that the PRC has generally estimated that postal volumes are relatively inelastic, meaning that volumes decrease less than rates increase in the event of a rate change. Despite that, the group believed that the volume falloff could be even larger than survey responses indicated. Pressure on their business models, based on the recent changes

> in the media ecosystem, have left them much less room to withstand significant increases in any part of their business.

Cohen Decl. at 6–7. Magazine publishers would respond to the increases by closing titles, going digital only, cutting circulation or frequency, and reducing staffing. Cohen Decl. at 5–7; Faust Decl. at ¶ 12 (Time Inc.).

Based on the price sensitivities revealed by last year's survey, the much larger Periodicals rate increase proposed by the Commission in Order No. 4258—24-30 percent above inflation over a five-year period—would, by itself, cut Periodicals volume (and the related First-Class, Marketing and package volume) more than in half and cause many magazines to close or cut frequency and circulation:

Table 2. Response of Publishers to PRC-Proposed Rate Increase

Response If Periodicals Rates Increase By...	24% Above Inflation	30% Above Inflation
Close magazine	35%	44%
Go digital only	22%	28%
Cut frequency	35%	44%
Decrease paper weight and/or grade	53%	66%
Reduce trim size	27%	34%
Cut circulation	37%	46%
Increase use of alternate delivery	30%	38%
Reduce staffing	94%	100%

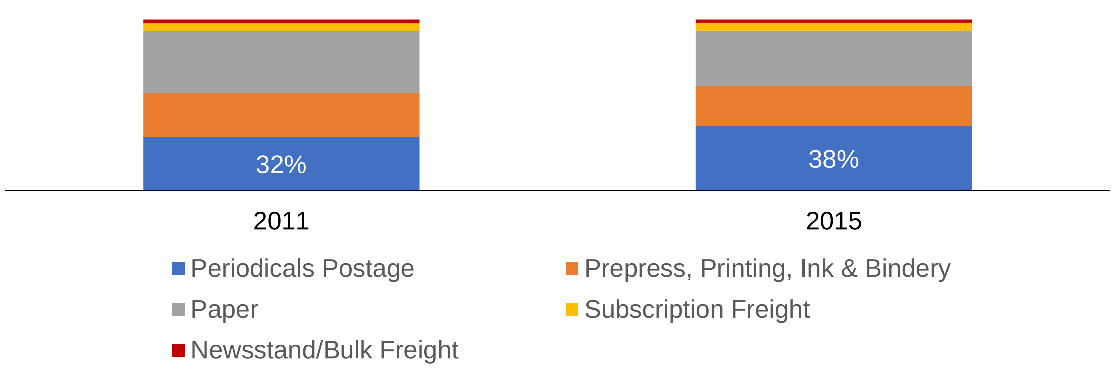
Source: Library Reference ANM *et al.*--LR--RM2017-3/4, "Table 2."

These effects are much larger than those resulting from the temporary exigent increase. The magnitude of the rate increase proposed in Order No. 4258 is between five and six times larger than the exigent rate increase.

Moreover, the PRC-proposed rate increase will last at least five years and will likely be built into the base for future rate increases and thus effectively be permanent.

In evaluating the justness and reasonableness of the Commission-proposed rate increases, it is important to keep in mind that recent increases in postage rates have far outstripped the increases in the costs of all other major inputs incurred in the manufacturing, production, and distribution of periodicals ("MPD costs"), even though suppliers of other inputs face similar declines in volume as the Postal Service. For example, postage costs increased from 32 percent of MPD costs in 2011 to 38 percent in 2015:

Figure 5. Manufacturing, Production, and Distribution (2011 v 2015)



Source: Library Reference ANM *et al.*–LR–RM2017-3/4, "Figure 5".

This trend has continued since 2015. A major publisher has calculated that the share of its total manufacturing, production, and distribution costs represented by postage increased by nine percent from 2015 to 2017.

The injury to publishers likely to result from the rate increases contemplated in Order No. 4258 is additionally problematic in light of Factor

11, the longstanding provision that requires consideration of "the educational, cultural, scientific, and informational value [of Periodicals]." 39 U.S.C. § 3622(c)(11). The statutory rate preference for mail matter with ECSI value, which predates PAEA, codifies the "the preferential rate treatment historically accorded periodicals to foster, among other things, diversity of views and nationwide availability, i.e., the widespread dissemination of information." Order No. 1446 in Docket No. C2004-1, *Complaint of Time Warner Inc. et al. Concerning Periodicals Rates* (Oct. 21, 2005) at App. A, p. 2; *see generally id.*, App. A at 1–20.

Nonprofit Marketing Mail: For nonprofit mailers of Marketing Mail, above-CPI rate increases would have a "crippling effect" on organizational effectiveness, forcing cutbacks in "fundraising appeals and renewals, magazine, and other important publications" and conversions to "alternative channels of communication," a move that would "greatly impair" the ability of nonprofits to carry out their qualifying nonprofit missions. Brophy Decl. at ¶ 11 (Consumer Reports); Burgoon Decl. at ¶¶ 7–10 (Disabled American Veterans); Finstad Decl. at ¶¶ 9–10 (American Lung Association); Maio Decl. at ¶ 12 (National Wildlife Federation); O'Sullivan Decl. at ¶ 8 (Guideposts). Many, perhaps most, nonprofits rely on mail to raise the majority of their revenue. Some raise all or nearly all of their funds through the mail.

Nonprofit industry watchdogs that evaluate charities (*e.g.*, Charity Navigator, Consumer Reports, the Better Business Bureau, Charity Watch, and Guidestar) have a major influence on donors' decisions about which charities to support. These ratings agencies encourage donors to consider the percentage of revenue that charities spend on program expenses, and discourage support for charities with higher overhead and fundraising expenses. To compete effectively for donations, nonprofits need to keep their overhead below acceptable levels (typically between 25 and 35 percent). Nonprofits thus face real pressure to keep their fundraising expenses, of which postage costs are a large part, low.[39]

If postage rates were to increase faster than normal inflation, most nonprofits would be forced to reduce mailings and receive less revenue. This would have a direct impact in their programmatic missions. Five years or more of upward spiraling postage rates would cause devastating harm to the nonprofit sector and weaken its ability to deliver beneficial and needed services and aid to the public. The Commission has received dozens of comments and letters from nonprofits in this and other proceedings that verify these facts.

Commercial Marketing Mail Flats: For-profit mailers and mail service providers would be harmed by the proposed above-CPI rate increases as well, curtailing marketing campaigns, reducing services, and passing costs on to customers and consumers (leading to further reductions in mail volume). Smith Decl. at ¶ 4 (Publishers Clearing House); Rosser Decl. at ¶ 5 (IWCO Direct).

[39] For example, to meet Charity Watch's criteria for high efficiency, a charity must spend at least 75 percent of its expenses on program services (and, thus, less than 25 percent of its expenses on overhead). The Better Business Bureau's Wise Giving Alliance expects charities to spend at least 65 percent of expenses on program services, and no more than 35 percent on fundraising.

These harms would be exacerbated because the proposed rate increases would not occur in a vacuum. As further described in our initial comments, while most inputs used by mailers have become less costly since 2007,[40] the one core cost that has increased annually during the past decade for most mailers is postage. Faust Decl. at ¶¶ 6, 8; Smith Decl. at ¶ 6.[41] *See* ANA *et al.* March 2017 Comments at 71. That is, mailers and mail service providers have been able to absorb postage increases, including during the exigency surcharge, by cutting costs for other inputs and becoming more productive in other aspects of their business. This process can only carry on so long. If the cost of postage begins to increase at rates much higher than CPI, the industry will not be able to cut costs in other areas drastically enough to keep pace. Alternative media channels will become more attractive, or, in some cases, the cost of doing business will simply become too high, and the mailer will shut down entirely. This danger is especially acute for mailers of Periodicals and Marketing Mail Flats, which face potential rate increases of at least 40 percent under the Commission's proposal.

Finally, the proposed "noncompensatory" surcharge for Marketing Mail Flats would generate no additional revenue at all because it would be offset by lower increases on other Marketing Mail products. *See* proposed 39 C.F.R.

---

[40] *See, e.g.*, Faust Decl. at ¶¶ 6, 8; Rosser Decl. at ¶ 10 (relating how IWCO Direct, a mail service provider, reduced its prices in response to client demand).

[41] In addition to postage increases, the costs of complying with Postal Service requirements has increased as well, as the Postal Service has shifted certain mail preparation and entry costs to mailers. *See* Rosser Decl. at ¶¶ 11–15; Faust Decl. at ¶ 9.

§ 3010.201 ("This section does not create additional rate authority applicable to any class of mail.").

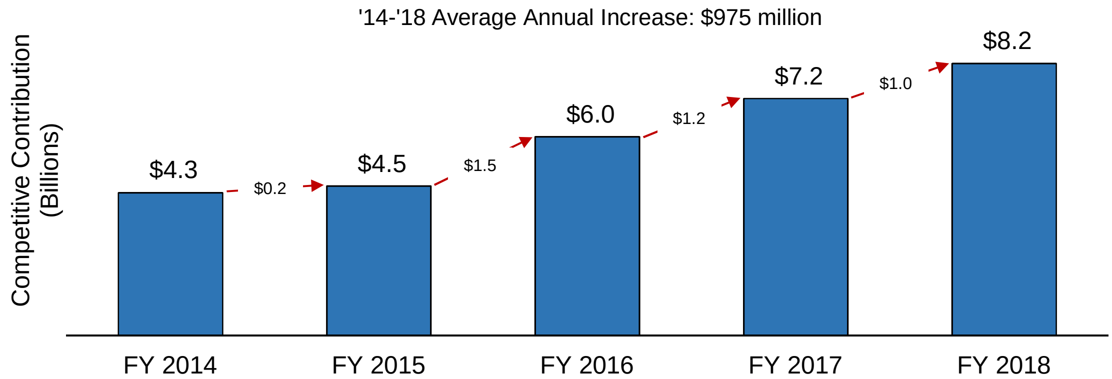
E. The Commission's analysis of Objective 5 (revenue adequacy or financial stability) is flawed.

As discussed above, Order Nos. 4257 and 4258 have improperly elevated Objective 5, financial stability, over all other statutory objectives. Moreover, even Section 3622(b) allowed this priority, the Commission has grossly misapplied Objective 5 on its own terms.

(1) The Postal Service has achieved short-run financial stability, as the Commission acknowledges. *See* Order No. 4257 at 4 ("[T]he Postal Service has generally achieved short-term financial stability"); *id.* at 162 (detailing operating profit in Table II-7). As noted above, the Postal Service holds more than $10 billion of cash, and has been generating about $3 billion in additional cash from operations each year. USPS Form 10-K for Fiscal Year 2017, at 48.

(2) The Postal Service's *longer-term* financial prospects are far brighter than the Commission portrays in Order No. 4257. In particular, the contribution generated by delivering packages in e-commerce has been increasing rapidly, by an average of about $1 billion per year.

Figure 6. Competitive Product Contribution (FY 2014 – FY 2018)



Source: Library Reference ANM *et al.*–LR–RM2017-3/4, "Figures 6 & 7".

These trends are predicted to continue. According to a 2016 eMarketer projection, retail ecommerce sales will experience double-digit growth until 2021. *See* eMarketer report, *Worldwide Retail and Ecommerce Sales: eMarketer's Updated Forecast and New Mcommerce Estimates for 2016–2021* (Jan. 29, 2018). Similarly, according to Statista, e-commerce revenue in the U.S. is forecasted to grow 12.6 percent in 2018 ($474.5 billion) and 11.1 percent in 2019 ($526.9 billion) from $421.1 billion in 2017; while retail e-commerce sales in the U.S. is expected to grow to $461.6 billion in 2018, $513.5 billion in 2019, and $561.5 billion in 2020. Furthermore, Forrester predicts that online sales will account for 17 percent of all U.S. retail sales by 2022, up from a projected 12.7 percent in 2017. *See Forrester Data: Online Retail Forecast, 2017 To 2022 (US)*, FORRESTER REPORT (Aug. 1, 2017). Wal-Mart, alone, projects that its U.S. e-commerce business will grow sales by roughly 40 percent in fiscal 2019. *See* Lauren Thomas, *Wal-Mart Calls for 40 Percent e-commerce Sales Growth in Fiscal Year 2019*, CNBC (Oct. 10, 2017) *available at* https://www.emarketer.com/Report/Worldwide-Retail-Ecommerce-SaleseMarketers-Updated-Forecast-New-Mcommerce-Estimates-20162021/2002182.

The undersigned parties examined this trend at length in their comments last year. ANM *et al.* March 2017 Comments at 26–32. The Commission, after acknowledging that the contribution from competitive products is growing, Order No. 4258 at 29), simply assumes in the Commission's shortfall analysis that the future contribution from competitive products will never exceed the current level, and that the Postal Service must close its revenue shortfall entirely through rate increases on market-dominant mail products. *Id*. at 41 n. 58.

This assumption is indefensible. A reasoned assessment of the Postal Service's finances in the medium and long run must reflect the projected contribution from both competitive and market-dominant products. Both sets of products use the Postal Service network; both contribute to its institutional costs; and PAEA requires both to do so. Order No. 4257 at 246; Order No. 4402 in Docket No. RM2017-1, *Institutional Cost Contribution Requirement for Competitive Products* (Feb. 8, 2018) at 52; 39 U.S.C. §§ 3622(b)(9), 3633(a)(3), 3633(b). "Any revenues provided by competitive products above their attributable costs advances [sic] the achievement of the Postal Service's financial stability." USPS Comments (Mar. 20, 2017) at 78. Hence, ignoring the likely growth in contribution from competitive products would require market-dominant products to bear an unjustly high share of institutional costs. That would violate Sections 404(b), 3622(b)(8) and 3622(b)(9).[42]

The Commission may not ignore the projected growth in contribution from competitive products on the theory that the growth may slow eventually. *Cf*. USPS Comments (Mar. 2017) at 115 n. 216. Analysis of the Postal Service's future financial stability requires that the Commission estimate the future value of many relevant revenue and cost variables (*e.g.*, future volumes, competition, inflation, and interest rates), none of which can be known with certainty today. The only sensible approach, as with any projections of this kind, is to rely on the best evidence of record available today.[43] The best current evidence shows that the revenue and contribution from competitive products will continue to grow for the foreseeable future. *See* pp. 71-73, *supra*; *accord*, ANM *et al*. March 2017 Comments at 30–34.

---

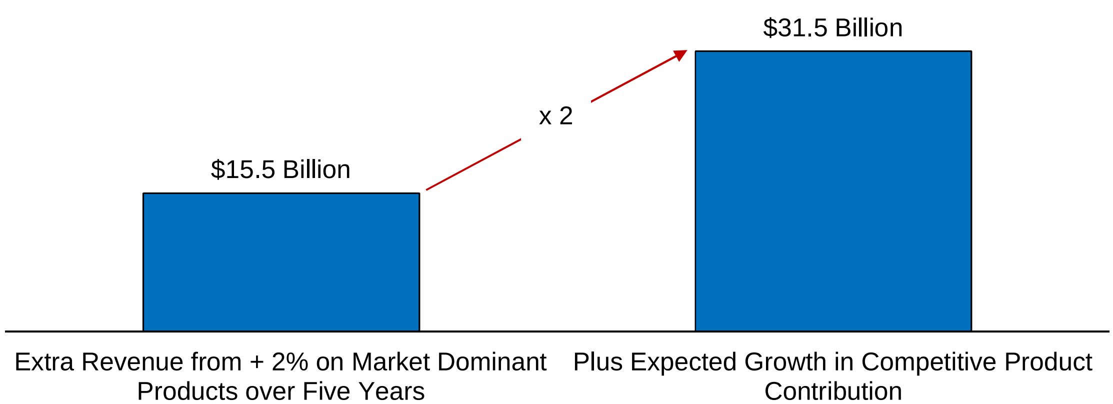
[42] The Interstate Commerce Commission and the Surface Transportation Board have held, in the analogous context of setting maximum rates for the market-dominant transportation of coal by railroad, that a coal shipper is entitled to offset the expected contribution from other market-dominant and competitive traffic against the railroad's fixed and common costs; otherwise "the captive shipper would be deprived of the benefits of any inherent production economies." *Coal Rate Guidelines—Nationwide*, 1 I.C.C.2d 520, 544 (1985), *aff'd*, *Consolidated Rail Corp. v. United States*, 812 F.2d 144 (3d Cir. 1987).

[43] *See*, *e.g.*, *Burlington N. R. Co. v. STB*, 114 F.3d 206, 212–13 (D.C. Cir. 1997) (upholding decision of the Surface Transportation Board, in setting maximum rates for market-dominant coal transportation, to consider the best evidence of record concerning the effect of competitive, volume and price trends that would influence the future contribution from other freight volume over the expected life of the railroad); *Bituminous Coal—Hiawatha, Utah, to Moapa, Nevada*, 10 I.C.C.2d 259, 268–71 (1994) (same).

In any event, if the projections prove inaccurate in the future, the Commission can revisit its findings: the Postal Service's short-run financial stability avoids any need for the Commission to act precipitously now. By contrast, if the Commission overcharges mailers in the short-term to protect against the speculative possibility that the growth in the Postal Service's contribution from competitive products may reverse itself, the injured mailers can never be made whole.

The error created by ignoring the projected growth in contribution from competitive products is large. Over the five-year term of the proposed surcharges, that contribution growth is projected to equal the *entire amount* of the projected contribution from the proposed two percent "supplemental rate authority" over the same period:

Figure 7. Ignoring Competitive Product Contribution Growth Charges USPS Customers Twice



Source: Library Reference ANM et al.–LR–RM2017-3/4, "Figures 6 & 7".

(3) While the current reported net earnings of the Postal Service are still negative and the Postal Service still has "accumulated deficits" in the post-

PAEA era, the Commission admits that the these shortfalls are due largely to the accelerated prefunding obligations imposed by PAEA, not to operating losses. *See* Order No. 4257 at 171 ("The accumulated deficit of $59.1 billion includes $54.8 billion in expenses related to prefunding the RHBF"). As we showed in our March comments, the prefunding obligations are no measure of the Postal Service's actual ability to honor its obligations to its retirees. *See* ANM *et al*. March 2017 Comments at 40–44. In fact, even as the Postal Service has stopped prefunding these obligations, its retiree benefit programs remain better funded than the vast majority of public and private sector retirement programs.

Figure 8. Pension Funding Levels

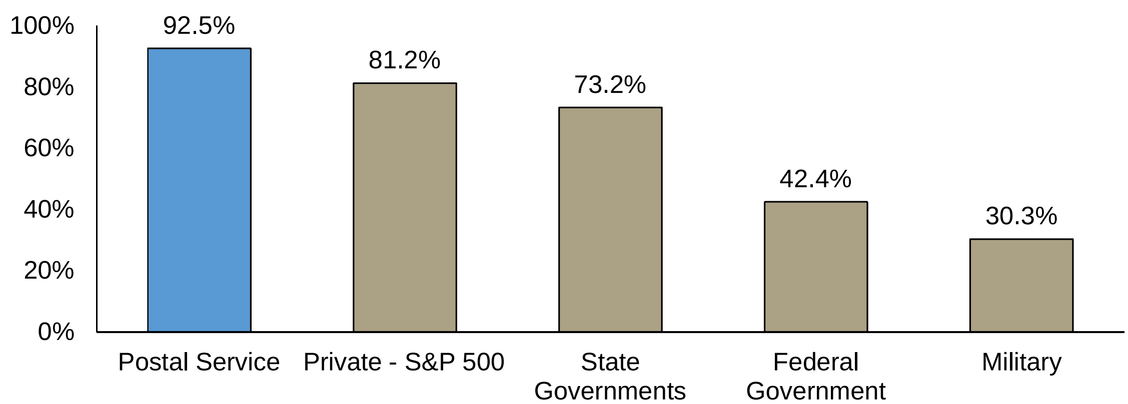
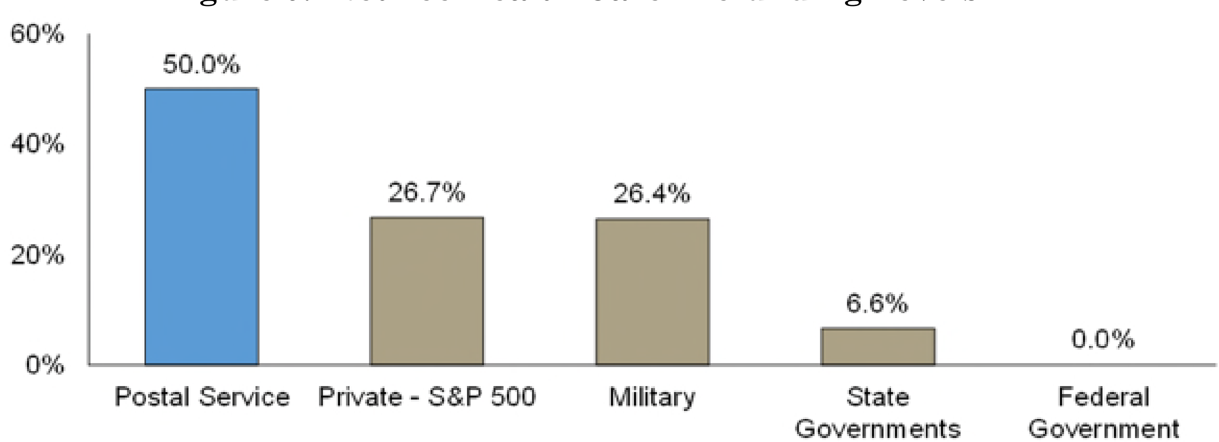


Figure 9. Retiree Health Care Prefunding Levels



Source: Nadol Decl. at 3–5, 12–23; *see also* ANM *et al*. March 2017 Comments at 40–44. In Order No. 4258, however, the Commission has calculated the shortfall that must be recovered from above-CPI surcharges as if the statutory funding schedule is immutable even though the Postal Service has not met it, and the Congress and the Administration have taken no action to force the Postal Service to comply with it. The status accorded by the Commission to the nominal prepayment schedule elevates formalism over financial reality.

(4) In their March 2017 comments, the undersigned parties identified a number of other steps that the Postal Service could take to improve its finances. ANM *et al*. March 2017 Comments at 47–63. Some of these steps would require Congressional action, but others would not. The latter would include (a) taking measured steps toward compliance with the existing pay comparability requirement, (b) reviving the cost reduction initiatives that the Postal Service abandoned in Fiscal Year 2014 (not coincidentally, the year when the exigent surcharge authorized in R2013-11 took effect), (c) making better management and pricing decisions (e.g., abandoning the Flats Sequencing System ("FSS") and establishing appropriate worksharing discounts), and (d) looking creatively for new revenue sources as well-run businesses do. ANM *et al*. March 2017 Comments at 47–57.

As shown in the roll-forward analysis included with our March 2017 comments, the Postal Service could have improved its annual controllable operating income between Fiscal Year 2015 and Fiscal Year 2019 by approximately $2.7 billion just by limiting its cost increases to the rate of inflation. *Id.* at 33; *see also* Library Reference ANM *et al.*-LR-RM2017-3/1, Rollfwd.xlsx. In Order No. 4258, however, the Commission has ignored all of the alternative sources of extra revenue and cost savings identified by the mailers.

(5) Even if the Commission were entitled to ignore all alternative ways to reduce or eliminate the Postal Service's revenue shortfall, the *gross* amount of the revenue shortfall appears to have been pulled out of thin air. The Commission began its analysis with the $2.7 billion in losses (including prefunding obligations that the Postal Service never paid) ostensibly incurred by the Postal Service in Fiscal Year 2017. *See* Order No. 4258 at 40–41. After noting, however, that factors "such as changes in inflation, the cost of inputs, changes in operational efficiency, secular volume trends, and mailers' responses to price changes" could affect the Postal Service's future financial position, the Commission states that "it is not possible to precisely calculate the exact amount of additional pricing authority that will achieve medium-term stability." Order No. 4258 at 41. Thus, while the Commission proclaims that "the proposed supplemental rate authority is designed to provide the opportunity to generate additional revenue that is sufficient, when combined with cost reductions and operational efficiency gains, to improve the financial stability of the Postal Service," *id.*, the total assumed shortfall is not derived from any actual projection of the Postal Service's future revenues and costs.

As a result, the Commission does not (and could not) explain why rate increases equal to CPI + 2% would be "sufficient," but CPI + 1% would not. The Commission also does not explain what level of cost reductions or operational efficiency gains must be combined with this additional authority, an especially egregious oversight since the Commission has simultaneously weakened the incentives for the Postal Service to engage in these activities. Additionally, the Commission has performed no econometric studies to model the volume effect of a CPI + 2% price increase versus other potential increases. In short, the Commission provides no justification for *this* level of supplemental rate authority as opposed to any other level.

In this respect, the two percent additive is akin to the seven percent additive above fully allocated costs that the Interstate Commerce Commission authorized in 1979 to enable western railroads to avoid under recovery of their equivalent of institutional costs. Every court that reviewed the ICC approach struck it down as arbitrary and capricious. As the D.C. Circuit explained in 1980, the ICC

> did no more than make the general assertion that it could not find that the railroads had achieved revenue adequacy. There is nothing in the record in the way of findings, evidence, or rationale to support the seven percent solution or any percentage solution. The Commission's general allusion to the need to consider the revenue requirements of the carriers and the economics of differential pricing is so broad as to be meaningless as a standard — this rationale could be put forth just as readily in an attempt to justify a 1%, 21%, 45%, or even a 99% additive. The Commission here defends its action on the ground that adoption of the appropriate additive involves a policy judgment that is not susceptible to precise quantification. Concededly the problem is a difficult one, but that does not excuse the Commission from articulating "fully and carefully the methods by which, and the purposes for which, it has chosen to act."

San Antonio, Texas v. United States, 631 F.2d 831, 852 (D.C. Cir. 1980).

(6) In any case, the Commission's attempt to guarantee the Postal Service financial stability by providing it with additional revenue is a fool's

errand. If the Postal Service's financial prospects were truly as dire as the Commission contends, the rate increases contemplated in Order No. 4258 could not solve the problem. "[W]hen a regulated industry is in financial trouble . . . there is nothing a regulator can do to guarantee a 'fair rate of return.'" WILLIAM J. BAUMOL AND ALAN S. BLINDER, MICROECONOMICS: PRINCIPLES AND POLICY at 442 (7th ed. 1998). If the regulator attempts to solve the firm's problems by raising prices, the higher prices will simply cause the firm to lose more business and its profits will drop further. *Id.*

In fact, the price increases contemplated by Order No. 4258 are more likely to worsen the Postal Service's finances than improve them. The Commission recognizes that its estimates of the future revenues its supplemental rate authority proposal will provide assume that volume will remain constant. Order No. 4258 at 42. And the Commission admits that this assumption is inconsistent with "recent volume trends and the effects of price elasticity." *Id.* Yet the Commission simply assumes away this problem, stating that "it intends for the Postal Service to achieve cost reductions and operational efficiency gains sufficient to close the gap between total revenue and total costs." *Id.* at 43.

The Commission has underestimated the effect of its proposed rate increases. The falloff in volume and revenue is likely to be much larger than the Postal Service has experienced to date, and could even set off a death spiral. *See* pp. 64-70, *supra*. This effect does not appear in existing elasticity data because postal price increases of this magnitude have not occurred in recent decades. As shown in Table II-4 of Order No. 4258, "price changes over time [during the PAEA era] were relatively consistent with the overall change in CPI-U." Order No. 4258 at 121. In other words, prices stayed essentially flat in real terms.

The Commission has not seriously considered the likely effect of its proposals on volume. Simply assuming the Postal Service will make sufficient productivity gains to offset the declines in volumes the rate increases will cause is not enough. There is no basis for believing this to be so, especially since the Commission's proposals remove the Postal Service's incentives to engage in cost reduction and efficiency improvements. Moreover, the analysis (such as it is) does not account for the multiplier effect, which is especially important for catalogs and magazines. *See* Op. and Rec. Decis., Docket No. MC2005-3, *Rate and Service Changes to Implement Baseline Negotiated Service Agreement with Bookspan* (May 10, 2006) at 3, 6, 9, 43, 45, 50–53, 80. If catalogs and magazines leave the mail, the Postal Service will lose not just that volume, but the invoice and fulfillment volume it generates.

In sum, the Commission is shortsightedly trying to guarantee the Postal Service additional revenue while ignoring the significant volume impacts its radical and unprecedented rate increases are likely to have. Rather than foster a "harmonious cycle," the proposed rate increases will likely lead to a death spiral—exactly the situation PAEA was intended to avoid. *See also* Cong. Rec. S11674 (Dec. 8, 2006) (Sen. Collins) (supporting a price cap to avoid "a potential 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."; *accord* Cong. Rec. H6513 (July 26, 2005) (Chairman Davis comments on H.R. 22).

F. The Commission's treatment of Objective 3 (high quality service standards) is arbitrary.

The Commission's analysis of Objective 3, "to "maintain high quality service standards established under section 3691" (39 U.S.C. § 3622(b)(3)), is also arbitrary.

(1) The Commission invokes Objective 3 to buttress Objective 5, asserting that criticisms of the Postal Service's "service performance over the past 10 years" are evidence that the Postal Service has failed to achieve financial stability. *See*, *e.g.*, Order No. 4257 at 259–60. But the Commission ignores the qualification of Section 3691 that service quality cannot be assessed in isolation, but must be evaluated in conjunction with the cost of services and their net value to senders and recipients. 39 U.S.C. § 3691(b)(1) (directing that service standards be designed to "enhance the value of postal services to both senders and recipients"); 39 U.S.C. § 3691(b)(1)(C) (to "reasonably assure Postal Service customers delivery reliability, speed and frequency *consistent with reasonable rates* and best business practices") (emphasis added); 39 U.S.C. § 3691(c)(6) (to take into account "the current and projected future cost of serving Postal Service customers"). Service performance quality is not a free good. If cost were no object, mailers would want overnight delivery for nearly everything. That Express Mail (and competing private delivery services) carry only a fraction of all letters and

packages confirms that faster and more reliable service is not better than slower or less reliable service unless the benefits outweigh the added costs.[44]

The Commission has apparently conducted no such cost-benefit analysis, rather simply pulling from the record any statement by any commenter, whether or not a user of market-dominant products, that faster and more consistent service would be better than the opposite. Order No. 4257 at 257–73. The Commission does not appear to have asked whether the American people, as mailers, consumers and taxpayers, are in fact willing to pay enough for the faster and more consistent service to cover its cost.

(2) In Order No. 4258, the Commission proposes to allow the Postal Service to collect an additional annual surcharge, dubbed a "Performance Incentive Mechanism." Under this proposal, the Postal Service could impose an extra 0.25 percent rate increase on a market-dominant class each year if the Postal Service maintains or improves the nominal service standards for the class. Order No. 4258 at 70-73. The proposal is completely arbitrary.

First, the surcharge is tied not to actual service performance, but to the published standards, which the Postal Service may or may not achieve. The Postal Service will be allowed the additive merely for the performance that it predicts, regardless of whether this is actually achieved. The Commission

---

[44] The performance of the passenger airline industry before deregulation also illustrates how consumers can be harmed by regulation that causes service quality to exceed what consumers would voluntarily pay for. *See*, *e.g.*, 2 Alfred E. Kahn, *The Economics of Regulation* 209–220 (1971) (describing harms of excessive non-price competition by airlines before the deregulation of passenger air fares); Stephen Breyer, *Regulation and its Reform* 205 (1982) (same).

proposes to continue relying on its annual compliance review mechanism to oversee actual service performance. Order No. 4258 at 71–72. This is the same enforcement mechanism that has produced the service performance that the Commission describes in Order No. 4257 as declining and degraded. Order No. 4257 at 250–63. The Commission proposes no new enforcement mechanism that would change this.

Second, allowing the Postal Service to collect extra revenue from captive mailers without a showing that the Postal Service is maximizing its operational efficiency and minimizing its costs would violate Objectives 1, 2 and 8 even if the proposed mechanism were modified by conditioning it on enforceable actual performance. The objective of incentive ratemaking is to offer the Postal Service the prospect of gaining additional profits by reducing its costs while holding service quality constant. We are unaware of any regulatory system that gives a regulated monopoly a financial participation trophy merely for holding its service constant without reducing its costs.

III. THE EXTRA SURCHARGES PROPOSED FOR PERIODICALS MAIL AND MARKETING MAIL FLATS ARE UNLAWFUL.

In Order No. 4258, the Commission proposes that prices for "non-compensatory" products—*i.e.*, products whose revenue is found not to cover attributable costs—shall be increased by a "minimum of" two percentage points annually *in addition to* the above-CPI increases proposed elsewhere in Order No. 4258. At 77; proposed 39 C.F.R. §§ 3010.201. When the Commission finds that an entire class of mail is noncompensatory on average, the annual surcharge would be fixed at *exactly* two percentage points for the class as a whole—again in addition to the above-CPI price increases proposed elsewhere in Order No. 4258. *Id.* Combined with the other above-CPI surcharges proposed by the Commission, these extra surcharges would saddle mailers of periodicals and Marketing Mail Flats with cumulative five-year price increases of as much as *40 percent* if the CPI rises by two percent each year. *See* pp. 9-10, *supra.*

Here again, the Commission has erred by ignoring the pro-mailer objectives of Section 3622(b), the Commission's own findings during the past decade (most recently in October 2017) about the Postal Service's management failures in controlling the cost and improving the productivity of flats handling, and the substantial evidence in Phase 1 of this case about the actual causes of the Postal Service's losses.

The failure of Periodicals Mail and Marketing Mail Flats to cover attributable costs is a cost-control problem, not a revenue problem. Rates for these products have increased as fast as the CPI since 2007, and flat-shaped mail has been increasingly workshared before entry. These two trends should have made Periodicals Mail and Marketing Mail Flats compensatory. Instead, the unit transportation and carrier costs of flats have skyrocketed and mail processing productivity has collapsed.

This dismal performance has resulted from a series of Postal Service management bungles. These include (1) failing to scale down its operations in response to declines in mail volume; (2) making and then doubling down on a misguided investment in the Flats Sequencing System ("FSS") against the advice of mailers and many within the Postal Service's own management; (3)

deliberately mispricing Carrier Route Basic flats, a strategy that has stifled the potential growth in co-mailing, and encouraged inefficient mail preparation; and (4) failing to address the Postal Service's longstanding personnel compensation issues. Eliminating these unforced errors would allow flats to become fully compensatory, or nearly so—even without considering the related contribution from First-Class Mail, letter-shaped Marketing Mail and package volumes that periodicals and catalogs generate.

As with the other proposed surcharges, the Commission's proposed focus on revenue enhancement to the exclusion of cost control, efficient operation, rate stability, and ratepayer protection is a clear violation of Objectives 1, 2 and 8, and cannot be excused by invoking Objective 5.[45]

A. The Postal Service, not its captive customers, is causing the losses on Periodicals Mail and Flat-Shaped Marketing Mail.

Since 2007, the Postal Service's performance in handling flat-shaped mail has been abysmal. As flats volume has declined over the last decade, the Postal Service has not sufficiently rightsized its network, resulting in excess capacity, declining productivities and increasing unit costs. We first discuss the effect of these problems in the context of Periodicals and then apply similar analysis to Marketing Mail Flats.

[45] Further, regardless of what entity is responsible for causing the losses, Congress intended that the Postal Service should not be allowed to recover its losses under a price cap system outside of extraordinary circumstances. *See* H.R. Rep. No. 109-66, Part 1, at 43–44 (2005) ("In the same way, losses could not be recovered by increasing rates beyond specified parameters without regulatory approval.").

1. During the past decade, the costs of handling flat-shaped mail have skyrocketed, while Postal Service productivity has plummeted.

Sorting: Postal Service sorting productivity in key flat and bundle sorting operations has declined by 29 percent since 2007, increasing Periodicals Outside County attributable mail processing costs by 5.2 cents per piece. Library Reference ANM *et al.*–LR–RM2017-3/4, "Figure 15 & Table 3", cell D30.[46] The Commission has acknowledged this trend. In the last two Annual Compliance Determinations, the Commission has identified the huge declines – ranging from 24 percent to 52 percent[47] – in productivity for key flat sorting operations over the last decade as a major issue. In the FY 2015 ACD, the Commission stated:

> One of the major issues causing the increased cost of flats is the decline in productivity on automated equipment. Over the past decade, the productivities measured in pieces per hour (pph) for these machines [SPBS/APBS, APPS, AFSM 100[48]] declined. When productivities go down, the cost efficiency of the Postal Service's operations declines.

Annual Compliance Determination Report, Fiscal Year 2015, at 168.

In Fiscal Year 2016, the Commission referred to and updated its earlier statements:

---

[46] The cost analyses discussed in this section focus on the Outside County product because it represents 95 percent of the Periodicals class revenue. Docket No. ACR2017, USPS-FY17-1, Public_FY17CRAReports.xlsx, "Cost1".

[47] Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 10", cells H10 and H12, respectively.

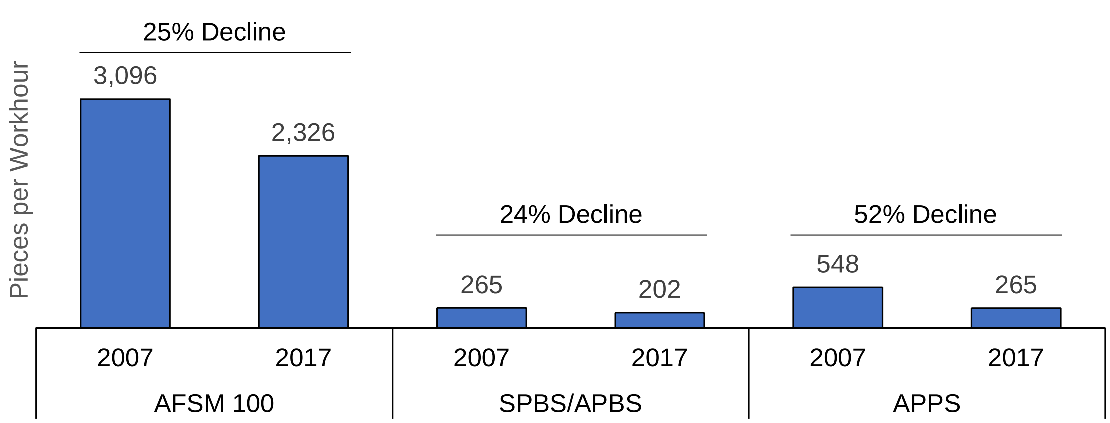
[48] Small Parcel Bundle Sorter / Automated Parcel and Bundle Sorter (Incoming), Automated Package Processing System (Incoming), Automated Flat Sorting Machines 100 (Incoming Secondary).

> In FY 2015, the Commission found that the primary machines used to process flats . . . had declining productivities. . . . [T]hese productivities continue to decline, which leads to reduced operational efficiency of the Postal Service.

Annual Compliance Determination Report, Fiscal Year 2016, at 165-166.

On average, flat sorting productivity in these operations declined by 29 percent over the last decade. Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 10", cell I8. Applying this figure to all mail processing costs, the lower productivity has increased FY 2017 Periodicals Outside County attributable cost per piece by 5.2 cents. Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 15 & Table 3", cell D30. Indeed, applying the productivity decline in these flat sorting operations to all mail processing costs may result in an understated adjustment, because "[t]he productivity of allied operations has declined and this decline has negatively impacted both the cost and service performance for flats . . . . [T]he costs of preparing and moving the mail for processing increased faster than the cost of processing." FY 2015 ACD at 173.

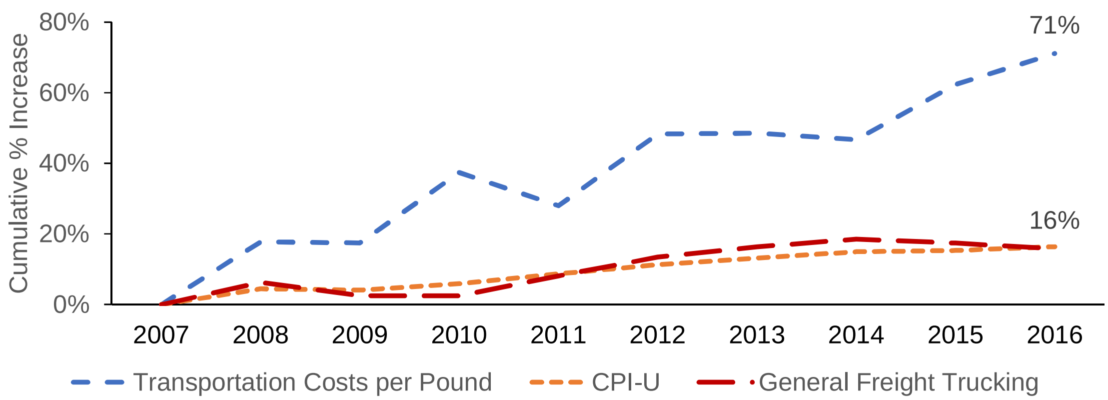
Figure 10. Key USPS Flat Sorting Machine Productivities



Source: Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 10."

Transportation costs. Since 2007, Periodicals Outside County attributable transportation cost per pound has increased by 71 percent[49], an increase more than four times the rate of inflation, despite the growing percentage of Periodicals Outside County mail being entered at DSCF/DFSSs. *See* Figure 11. This trend increased FY 2017 Periodicals Outside County cost per piece by 1.4 cents per piece. Library Reference ANM *et al.*–LR–RM2017–3/4, "Figure 15 & Table 3", cell D31.

Figure 11. Percent Increase in Periodicals Outside County Transportation Costs per Pound v. Inflation[50]



Source: Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 11."

The Commission has acknowledged this trend. In the FY 2016 ACD, the Postal Service found, "[i]n the past 4 years, [per-piece attributable transportation costs for flats] have increased 26.5 percent . . . . From Fiscal Year 2015 to Fiscal Year 2016, unit transportation costs increased 11.6

[49] Library Reference ANM *et al.*-LR-RM2017-3/4, "Dropship Data", cells E16 and F16, respectively.

[50] FY 2017 excluded due to change in costing method.

percent. The Postal Service has not provided an explanation for this large increase in unit costs."[51]

Delivery and carrier costs. Since 2007, the Postal Service's attributable cost per piece to deliver Periodicals Outside County increased at a rate twice the rate of inflation even though FSS shifted workload—sorting flats into delivery point sequence—for some zones from carriers to mail processing clerks. This trend increased the costs attributed to Periodicals Outside County pieces by 2.1 cents per piece. Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 15 & Table 3", cell D32.

Despite substantial declines in flats volume and the shift of carrier in-office workload into mail processing operations, the Postal Service has barely cut its carrier *in-office* costs for flats since Fiscal Year 2008. The Commission has acknowledged this:

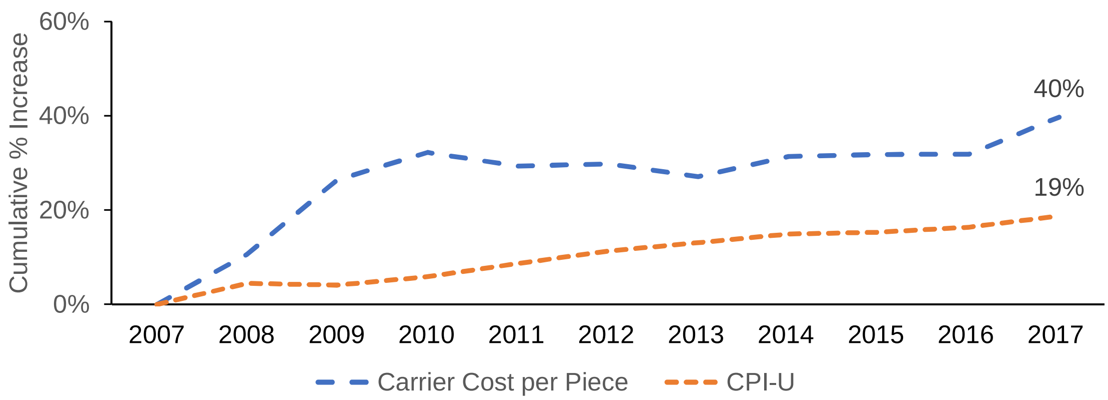
> The unit costs for city carrier in-office processing (casing) were higher in FY 2015 than FY 2008 for the five different flats products . . . . When the additional mail processing costs associated with the FSS are added to the city carrier in-office costs, the Postal Service spent over $1.3 billion processing flats to DPS in FY 2015. This is nearly the amount spent casing flats in FY 2008, when volume was 60 percent higher than FY 2015. In FY 2008, the Postal Service had to manually case all flats because there were no FSS machines. Despite the addition of 100 FSS machines and lower volume, the Postal Service spent nearly the same total amount in processing flats in FY 2015.[52]
>
> The Postal Service spent a total of $1.1 billion in city carrier in-office costs, which include casing costs for flats in FY 2016 . . . . When the additional mail processing costs associated with the

[51] Annual Compliance Determination Report, Fiscal Year 2016, at 168.

[52] Annual Compliance Determination Report, Fiscal Year 2015, at 178-179.

> FSS are added to the city carrier in-office costs, the Postal Service spent $1.319 billion processing flats to Delivery Point Sequence (DPS) in FY 2016 . . . . This is nearly the amount spent casing flats in FY 2008, when volume was 67 percent higher than FY 2016.[53]

Figure 12. Percent Increase in Periodicals Outside County Unit Carrier Costs v. Inflation[54]



Source: Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 12."

2. These adverse cost trends have resulted from needless excess capacity and other avoidable investment and pricing errors by the Postal Service.

These unfavorable cost trends have resulted from unforced errors in investment and pricing. The record on this issue in Phase 1 is extensive, if almost entirely ignored by the Commission in Order Nos. 4257 and 4258. ANM *et al.* March 2017 Comments at 11–12, 54–57, and supporting Declarations of Rita Cohen, Jerry Faust, Michael Nadol (at 11), Michael Plunkett, Quad/Graphics, and Halstein Stralberg.[55]

---

[53] Annual Compliance Determination Report, Fiscal Year 2016, at 168.

[54] Controlled for FY 2015 change in city carrier costing method.

[55] As explained in the declaration of Michael Nadol for the undersigned parties in Phase 1 of this case, the Postal Service also has not meaningfully addressed

(1)

Despite concerns raised by the flats mailing industry as well as experts within the Postal Service, it invested in and deployed equipment—the Flats Sequencing System ("FSS")—that has increased the Postal Service's cost to sort Periodicals Outside County by 2.8 cents per piece. Library Reference ANM *et al.*--LR--RM2017-3/4, "Figure 15 & Table 3", cell D29; *accord*, ANM*et al. March 2017* Comments at 55; Stralberg Decl. (March 20, 2017); Plunkett Decl. (March 20, 2017); Library Reference ANM *et al.*-LR-RM2017-3/2. .

The Commission recognized this, if obliquely, in its FY 2015 Annual Compliance Determination:

> [The] FSS did not have the intended effect of improving cost or service . . . . The inability of the Postal Service to achieve [delivery point sequence] percentages above 81.9 percent creates cost and service issues for flats across all classes and products. However, the Postal Service did not clearly identify the cost or the service impact of the FSS implementation."[56]

The Commission is correct that the FSS deployment has greatly increased Periodicals costs. As Mr. Stralberg explained a year ago: "[t]he Postal Service took . . . the most efficient portion of the flats mailstream [Carrier Route mail] and turned it into something much less efficient [FSS mail]. Far from reducing flats costs as the Postal Service had hoped, the FSS program has increased those costs significantly, and there is no evidence that

---

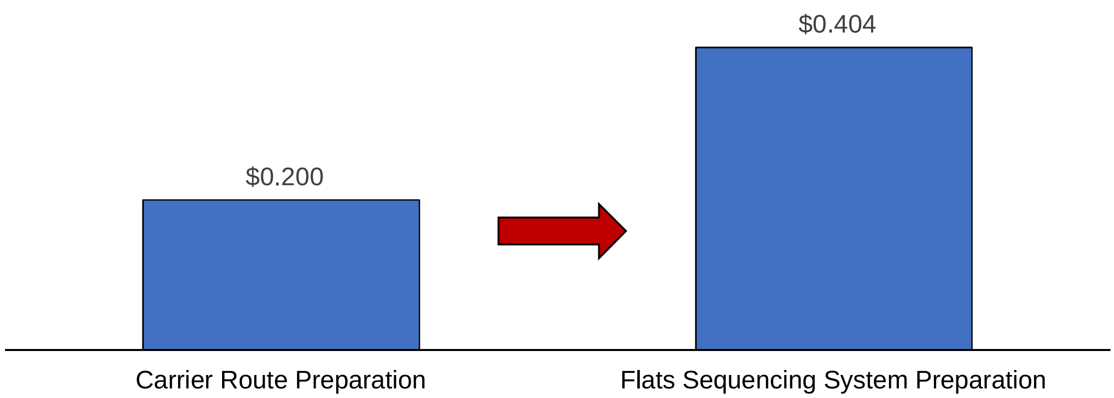
its longstanding compensation issues over the last decade. Cost reductions from doing so would meaningfully lower the Postal Service's cost to handle Periodicals. Nadol Decl. (Mar. 20, 2017) at 11.

[56] Annual Compliance Determination Report, Fiscal Year 2015, at 170.

the Postal Service knows a way forward to make the program produce real cost reductions." Stralberg Decl. at 3.

Given the poor performance of the FSS, the main effect of its deployment has been to force a substantial amount of Periodicals from Carrier Route preparation into FSS preparation and in so doing, doubling the mail processing and delivery costs for this mail.[57] Library Reference ANM *et al.*–LR–RM2017–3/4, "Figure 13", cells D32 and D33.

Figure 13. Mail Processing and Delivery Cost of Periodicals Outside County Carrier Route and FSS Flats



Source: Library Reference ANM *et al.*--LR--RM2017-3/4, "Figure 13".

Averaged across the entire product, the FSS deployment increased FY 2017 Periodicals Outside County cost per piece by 2.8 cents because FSS were not deployed everywhere. Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 13", cell D30.

[57] FSS flats are also more costly for the Postal Service to sort and deliver than 5-Digit Automation flats, but the difference is smaller. Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 13", cells E21 and F21.

The Postal Service defended these results on the theory that the FSS "is in its relative infancy, and the Postal Service is still learning about which operational flows will minimize the cost of FSS processing." Docket No. ACR2016, USPS Report USPS-FY16-44, *Update to Periodicals Pricing Report* (Dec. 29, 2016) at 6. Data recently reported by the Postal Service, however, show that the performance of the FSS is getting worse, not better. In the past two years, the average number of mail pieces processed per machine hour has decreased by eight percent, the proportion of "mail pieces at risk" of jams or other mishaps has risen by eight percent, and the proportion of FSS-zone flats that get fully sorted by the FSS machines has declined nearly 10 percent. Docket No. ACR2017, Response of the USPS to Chairman's Information Request No. 5, Question 1 (Jan. 26, 2018).

(2)

A third factor that has needlessly inflated the attributable costs of flats is the Postal Service's deliberate mispricing of Carrier Route Basic flats. Despite serious concerns raised by publishers and the Commission, the Postal Service has reduced the Carrier Route Basic passthrough for Periodicals Outside County flats to 52 percent. Library Reference ANM *et al.*–LR–RM2017-3/4, "Figure 14", cell L7. This mispricing has caused—and continues to cause—inefficient mail preparation by mailers and needlessly high costs for Periodicals Mail. *See also* ANM *et al.* March 2017 Comments at 56; Quad/Graphics Decl. (Mar. 20, 2017) at 2–3; Plunkett Decl. ¶¶ 6–8; Stralberg Decl. (Mar. 20, 2017) at 3, 12–14; and Library Reference LR-ANM *et al.*-RM2017-3/2.

The inadequacy of the Carrier Route discount is particularly problematic because the discount is the most important single discount for encouraging efficient preparation and reducing Periodicals costs:

> [T]he low passthrough underlying the Carrier Route Basic discount has limited the growth in co-mailing and caused flats processing to be more costly for the USPS than it should be. Passing through the entire Carrier Route Basic cost avoidance would result in massive growth in a number of publishers and marketers that participate in co-mailing, and a substantial improvement in the end-to-end efficiency of the flats mailstream overall.

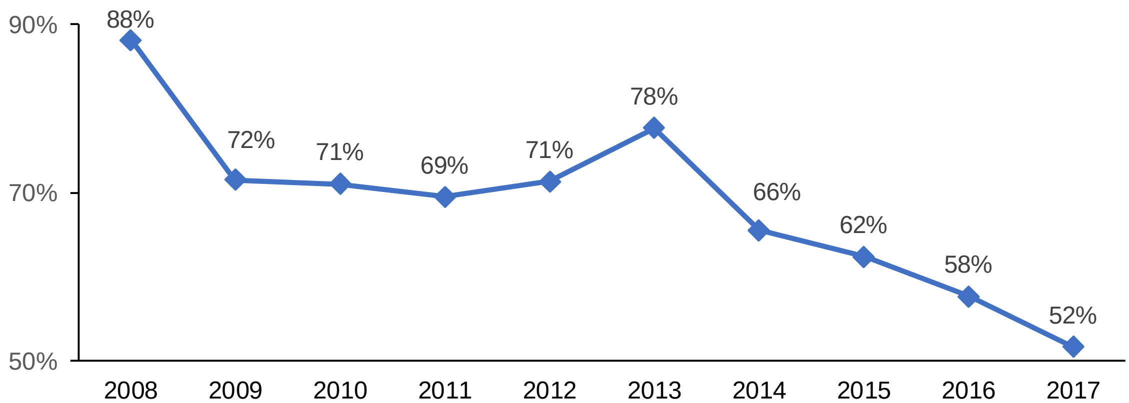
Quad/Graphics Decl. (Ma. 20, 2017) at 3.

The Commission, while chiding the Postal Service for refusing to give efficient price signals for Carrier Route preparation, has failed to enforce its words with adequate action. "For several years, and again in this docket, the Commission has highlighted the growing disparity between the pricing signals the Postal Service sends mailers that encourage 5-Digit presortation and discourage Carrier Route presortation."[58]

The Postal Service nonetheless has consistently reduced the Carrier Route passthrough, from 88 percent in FY 2007 to just 52 percent in FY 2017. Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 7", cells C7 and L7, respectively.

[58] Annual Compliance Determination Report, Fiscal Year 2014, at 16.

Figure 14. Periodicals Outside County Carrier Route Basic Passthroughs



Source: Library Reference ANM *et al.*--LR--RM2017-3/4, "Figure 14."

In ACR2017, the Commission went so far as to require the Postal Service to file a report on the issue. In the Update to Periodicals Pricing Report filed in Docket No. ACR2017 (USPS-FY17-44), the Postal Service tried to quantify the minor changes in mail preparation that have occurred in the last year in response to changes in classification and rate design. The report merely confirms how dysfunctional the current discount structure remains. As the Quad/Graphics Declaration in Phase 1 showed, the increases in efficiency that would result from providing an efficient (full) Carrier Route discount would be substantial, as this discount is the key discount for encouraging co-mailing. Put differently, the Postal Service's current practice of setting the Carrier Route discount well below the corresponding cost avoided has resulted in substantial inefficiencies, regardless of the minor changes in mail preparation discussed in USPS-FY17-44.

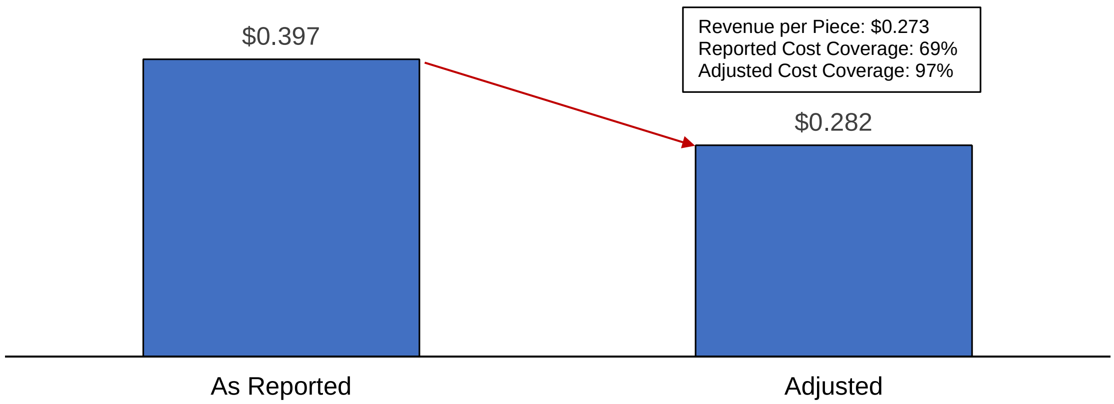
In Order No. 4258, the Commission has finally proposed to require the Postal Service to deepen worksharing discounts to some extent. At 87–98;

proposed 39 C.F.R. §§ 3010.260 through 3010.262. But the proposal, although welcome, is only the first step toward improving efficiency, and would not prevent the surcharges or offset their devastating effects. The Postal Service would enjoy a three-year "grace period" before the rule change would become binding, and the minimum required passthroughs for Periodicals Mail at the end of the grace period would still be only 75 percent, not 100 percent. Proposed 39 C.F.R. §§ 3010.261(b), 3010.262(a). In contrast, the extra surcharges proposed in Order No. 4258 for "noncompensatory" flats would take effect immediately. It would be more appropriate to reverse this order: raise the minimum passthrough levels more quickly, and delay further price increases until the Postal Service has had an opportunity to realize the efficiencies these changes will bring. Indeed, once proper incentives for preparation and entry are in place, the issue of "noncompensatory" products may eventually resolve itself.

(3)

The Postal Service's inefficient downsizing and poor investment and pricing decisions over the last decade are the primary reasons for the reported revenue shortfall. Had the Postal Service maintained the status quo over the last decade, Periodicals Outside County unit attributable costs would have been 28.2 cents, close to its 27.3-cent revenue per piece. Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 15 & Tables 3", cells D16 and D15, respectively.

Figure 15. FY 2017 Periodicals Outside County Cost Per Piece



Source: Library Reference ANM *et al.*-LR-RM2017-3/4, "Figure 15 & Table 3."

The remaining minor shortfall (less than a penny per piece) between revenue and attributable costs would be swamped by the large positive contribution from the First-Class Mail and Marketing Mail that Periodicals Mail generates. This secondary volume in other classes includes acknowledgments, renewal notices, invoices, and solicitations that publishers send in support of their publications. The contribution of these First-Class and Standard mailings from this multiplier effect averages about 6.7 cents for every magazine mailed at Periodicals rates:

Table 3. Adjusted Periodicals Outside County Cost Coverage

	Revenue per Piece	Cost per Piece	Cost Coverage
Without Multiplier Effect	$0.273	$0.282	96.9%
With Multiplier Effect	$0.340	$0.282	120.6%

Source: Library Ref. ANM *et al.*-LR-RM2017-3/4, "Figure 15 & Table 3."

(4)

The story for Marketing Mail Flats over the last decade is essentially the same:

- The decreased flats sorting productivity discussed above has increased FY 2017 Marketing Mail Flats attributable cost per piece by 8.1 cents. Library Reference ANM *et al.*-LR-RM2017-3/4, "Table 4", cell D26.

- Marketing Mail Flats transportation costs per pound increased by 63 percent from FY 2008 to FY 2015, over six times the rate of inflation, raising FY 2017 Marketing Mail Flats attributable cost per piece by 1.3 cents. Library Reference ANM *et al.*-LR-RM2017-3/4, "Table 4", cell D27.[59]

- Unit carrier costs for Marketing Mail Flats increased by 29 percent from FY 2008 to FY 2015, almost three times the rate of inflation, raising the FY 2017 Marketing Mail Flats attributable cost per piece by 2.8 cents. Library Reference ANM *et al.*-LR-RM2017-3/4, "Table 4", cell D28.

As shown in Table 4, adjusting for these factors, the FY 2017 unit cost for Marketing Mail Flats declines from 52 cents to 39.8 cents and its cost coverage increases from 74 percent to 97 percent.

[59] FY 2008 is the first year for which Marketing Mail Flats cost data are available in the Cost and Revenue Analysis. Excluding FY 2016 and FY 2017 avoids cost effects related to the rate design treatment of FSS mail.

Table 4. Adjusted Marketing Mail Flats Cost Coverage

	Revenue per Piece	Cost per Piece	Cost Coverage
As Reported	$0.384	$0.520	73.8%
Adjusted	$0.384	$0.398	96.6%

Source: Library Reference ANM *et al.*-LR-RM2017-3/4, "Table 4"

(5)

In Order No. 4257, the Commission speculates that the reductions in flat and bundle sorting productivity could possibly be due to (1) lost scale economies resulting from volume declines; or (2) a lack of capital investment. Order No. 4257 at 216. This speculation is unsupported.

With regard to volume declines, Commission-approved costing methods assume that mail processing workhours are essentially fully volume-variable. If this assumption is valid, volume declines should not hurt productivity. If the assumption is incorrect, then the mail processing costs attributed to Periodicals Outside County and other classes of mail are greatly overstated and should be reduced accordingly. The Commission cannot have it both ways.

The facts also refute the notion that the productivity declines have resulted from insufficient funds for capital investment. The Postal Service can maintain its flats sorting equipment if it uses its funds prudently. The Postal Service generated $3.8 billion in cash from operations in Fiscal Year 2017 and ended the year with $10.8 billion in cash. USPS Form 10-K, FY 2017, at 48. It would be irrational for the Postal Service to not make productive investments, if necessary, to prevent declines in flats sorting productivity. The real problem is that the Postal Service's main investment in flats sorting equipment over the last decade, the FSS, has increased costs, not reduced them. *See* pp. 87-94, *supra*.

B. The Commission has failed to reconcile the proposed surcharges for "noncompensatory" products and classes with Objective 1 and other provisions of PAEA.

The above facts make clear that the proposed extra surcharges for "noncompensatory" flats would violate multiple provisions of the PAEA. We have discussed all of the relevant objectives of 39 U.S.C. § 3622(b) and the CPI cap mandated by Section 3622(b)(1) and (2) in previous sections of these comments. The following discussion focuses in more detail on Objective 1 (maximizing incentives to reduce costs and increase efficiency). The proposed surcharges for "noncompensatory" flats mail would violate Objective 1 by rewarding the Postal Service with extra revenue for its own poor performance. Far from "maximize[ing] incentives to reduce costs and increase efficiency," the surcharges would do the opposite.

The seriousness of this violation is compounded by the Commission's refusal to take it seriously. The undersigned parties discussed the Postal Service's mismanagement of flats mail at length in Phase 1.[60] In Order Nos. 4257 and 4258, however, the Commission has ignored the issue. In Order No. 4257, the Commission's discussion of the flats coverage issue consists almost entirely of disparaging remarks about the "inhibiting" effect of the class-level price cap on the Postal Service's ability to "ensure that each class or

---

[60] ANM *et al.* March 2017 Comments at 11–12, 54–57, and supporting Declarations of Rita Cohen, Jerry Faust, Michael Nadol (at 11), Michael Plunkett, Quad/Graphics, and Halstein Stralberg.

type of mail covers its attributable costs," achieve allocative efficiency, and avoid unreasonably low rates and a net drain on the Postal Service's finances. At 129, 133, 142, 227, 232–25, 274. The Commission's discussion of Marketing Mail Flats is similar. *Id*. at 129, 140–42, 233–36, 274.

The Commission's sole nod to the possibility that the Postal Service's losses on flats might result from its own management decisions is a brief citation to a few of the mailer comments making this point, *id*. at 133 (2nd ¶), and an equally brief summary of some past Commission statements chiding the Postal Service for not doing more to study and control flats costs, *id*. at 203. These two points receive no further mention in the order, however. The Commission does not pause to explain why it has chosen to disregard the cited mailer comments, or why the Postal Service's admitted failure to process flats efficiently should be irrelevant under Objectives 1 or 8. Instead, the Commission, once again blaming "the system," sails undisturbed to the conclusion: "Non-compensatory products and classes further threatened the financial integrity of the Postal Service, as the system did not generate reasonable rates." *Id*. at 274.

Order No. 4258 is equally blinkered. It denounces noncompensatory products and classes at length. At 73–81 (noncompensatory products other than Periodicals Mail), 81–87 (Periodicals Mail). By contrast, the mailers' contention that "the 'underwater' condition of the [Periodicals] class is a function of excess costs, not overly-constrained prices" is relegated to a single parenthetical quotation, which the Commission then proceeds to ignore. *Id*. at 84. Mailers of flats should be grateful, the Commission concludes, because it is not proposing to eliminate the CPI cap outright or make the Postal Service close the entire coverage gap immediately. *Id*. at 85–86.

The Commission's brushoff of flats mailers' concerns is particularly baffling in light of the Commission's findings in its recent Annual Compliance Determinations and Docket No. RM2018-1. As discussed above, the Annual Compliance Determinations document problematic trends in the Postal Service's costs and service performance for flats generally and Periodicals in particular. ACD for Fiscal Year 2014, at 16; ACD for Fiscal Year 2015 at 168–79; ACD for Fiscal Year 2016 at 165–66, 168; *see also Periodicals Mail Study*, Joint Report of the USPS and PRC (Sept. 2011).

Likewise, the Commission's stated reason for beginning Docket No. RM2018-1, *Data Enhancements and Reporting Requirements for Flats*, less than five months ago was to "lead to the development of measurable goals to decrease the costs and improve the service performance of flats." Order No. 4142 in Docket No. RM2018-1 (Oct. 4, 2017), at 5. The issues identified by the Commission for study in RM2018-1 have inflated Periodicals Outside County unit costs by 11.5 cents per piece and Marketing Mail Flats unit costs by over 12 cents per piece, and are the main cause of the failure of Periodicals Outside County and Marketing Mail Flats revenues to cover their costs:

Table 5. Adjustments to Periodicals Outside County and Marketing Mail Flats Costs

	Periodicals Outside County	Marketing Mail Flats
Reported Unit Cost	**$0.397**	**$0.520**
FSS Adjustment	- $0.028	N/A[61]
Mail Processing Adjustment	- $0.052	- $0.081
Transportation Adjustment	- $0.014	- $0.013
Carrier Adjustment	- $0.021	- $0.028
Adjusted Unit Cost	**$0.282**	**$0.398**

Source: Library Reference ANM *et al.*-LR-RM2017-3/4, "Table 5"

Docket No. RM2018-1 is still ongoing. In Order Nos. 4257 and 4258, however, the concerns expressed by the Commission about flats mail in the Annual Compliance Determinations and Docket No. RM2018-1 have vanished without a trace.

The one-sided nature of the Commission's "noncompensatory" surcharge proposal is underscored by comparing it with the surcharges proposed in the 21st Century Postal Service Act of 2012 (S. 1789) and the Postal Reform Act of 2013 (H.R. 2748), the bills that may have been a model for the proposal in Order No. 4258. The 2012 and 2013 bills limited the proposed surcharges by including safeguards designed to avoid penalizing mailers of

[61] As discussed above, the FSS Adjustment adjusts for the added cost of flats shifting from Carrier Route to FSS preparation. This increases the cost of all flat-shaped Marketing Mail, including flats in the Carrier Route product. It, however, does not affect the cost of the Marketing Mail Flats product, which does not include Carrier Route flats.

noncompensatory mail for losses resulting from Postal Service excess capacity or similar inefficiencies.

Section 402 of S. 1789, the 21st Century Postal Service Act of 2012, would have authorized an annual surcharge of two percent above the CPI for any class of mail that "bears less than 90 percent of the costs attributable to the class of mail." But the bill would have required the Commission to adjust the attributable costs used in the adjustment "to account for the quantitative effect of excess mail processing, transportation, or delivery capacity of the Postal Service on the costs attributable to the class of mail." S.1789 § 402. The bill also called for the Commission to "maximiz[e] incentives to reduce costs and increase efficiency with regard to the processing, transportation, and delivery of such mail by the Postal Service." *Id.* The legislation passed the Senate on April 25, 2012, but was not taken up by the House.

H.R. 2748 would have required the Commission to determine the effects of excess capacity on the attributable cost of money-losing classes of mail *before* allowing the Postal Service any supplemental rate adjustment authority:

> Within 90 days after the end of the first fiscal year beginning after the date of enactment of the Postal Reform Act of 2013, the Postal Regulatory Commission shall complete a study to determine the quantitative impact of the Postal Service's excess capacity on the direct and indirect postal costs attributable to any class that bears less than 100 percent of its costs attributable . . ., according to the most recent annual determination of the Postal Regulatory Commission.

H.R. 2748 at 82-83.

Furthermore, H.R. 2748 would have authorized the Postal Service to raise the rates on noncompensatory classes of mail faster than the CPI only to the extent that the revenue generated was less than *90 percent* of adjusted attributable cost, a threshold clearly met by Periodicals:

> Unused rate authority shall be annually increased by 2 percentage points for each class of mail that bears less than 90 percent of its costs attributable . . . adjusted to account for the quantitative effect of excess capacity on the costs attributable of the class.

H.R. 2748 at 84-85.

While the surcharges proposed in Order No. 4258 for "noncompensatory" flats resemble the surcharge proposed in the 2012 and 2013 bills, the Commission has stripped out the conditions that the legislation would have required to be met before the surcharges could be applied. This is a crucial omission. As noted above, the cost coverage for Periodicals Mail and Marketing Mail Flats, when adjusted for excess capacity, is close to 100 percent. This would have avoided the surcharges under the proposed legislation. *See* pp. 97-101.

The Commission's dismissive treatment of the efficiency issues that flats mailers and the Commission itself have raised is the antithesis of reasoned decision-making. An agency decision must be overturned as arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem," or "'fail[ed] to respond meaningfully' to objections raised by a party."[62] Reasoned decision-making requires that the Commission provide an

---

[62] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *AEP Tex. N. Co. v. STB*, 609 F.3d 432, 441–44 (D.C. Cir. 2010); *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 216 (D.C. Cir. 2011); *LePage's 2000, Inc. v. PRC*, 642 F.3d 225, 230–31, 234 (D.C. Cir. 2011); *GameFly, Inc. v. PRC*, 704

appropriate adjustment for excess capacity and related problems before considering surcharges of the kind proposed in Order No. 4258. Certainly, no surcharge for noncompensatory classes should be considered until the Postal Service: (1) ends the failed FSS experiment by removing these machines from all facilities; (2) returns flat sorting productivities and real unit transportation and carrier costs to 2007 levels; and (3) promotes efficient preparation by passing through 100 percent of Carrier Route Basic cost avoidance.

C. Despite the Postal Service's needlessly high costs, Periodicals Outside County Carrier Route mail already covers its attributable costs.

Even if (contrary to fact) Objective 5 could justify the Commission's proposal to impose extra surcharges on mail found to be noncompensatory, the proposed surcharges would be overbroad. Even without adjustment for the needless extra costs caused by the Postal Service's insufficient downsizing, the revenue from typical Periodicals Outside County Carrier Route mailings covers reported attributable costs today.[63] As Halstein Stralberg explained in his declaration for the undersigned parties in Phase 1 of this docket, the cost coverage for the most common Periodicals Outside County Carrier Route preparation—DSCF-entered Carrier Route flats entered on 3-Digit/SCF pallets—was approximately 100 percent in Fiscal Year 2016 despite the dismal

F.3d 145, 148–49 (D.C. Cir. 2013); *BNSF Ry. Co. v. STB*, 741 F.3d 163, 168 (D.C. Cir. 2014).

[63] Similarly, the Marketing Mail Carrier Route product covers its cost and the Commission does not propose applying a noncompensatory surcharge to it.

trends in the Postal Service's efficiency in handling Periodicals Outside County over the last decade. Stralberg Decl. (Mar. 20, 2017) at 14–16.[64]

This remained true in Fiscal Year 2017. Moreover, adjusting the attributable cost data to reflect the effect of the Postal Service's insufficient downsizing efforts on Periodicals costs and the multiplier effect, the contribution of Carrier Route mailings exceeds 12 cents per piece:

Table 6. Reported and Adjusted Periodicals Outside County Carrier Route Cost Coverage

	Revenue per Piece	Cost per Piece	Cost Coverage
Unadjusted	$0.230	$0.221	104.3%
Without Multiplier Effect	$0.230	$0.175	131.7%
With Multiplier Effect	$0.297	$0.175	169.9%

Source: Library Reference ANM *et al.*--LR--RM2017-3/4, "Table 6."

CONCLUSION

We recognize that these comments are highly critical of the Commission's approach in this docket. That does not mean, however, that we are unaware of the challenges facing the Postal Service, or believe that the Commission cannot help the Postal Service meet them. But the Commission's proposals—in addition to being barred by the statute—misdiagnose the problems and will only exacerbate the Postal Service's financial difficulties. The Postal Service needs more incentive to reduce costs and increase efficiency,

[64] Typical Carrier Route mailings are entered at the DSCF on 3-Digit/SCF pallets. *Id*. at 14 – unclear what this refers to.

not less. The Commission should focus on how much money the Postal Service needs to meet its present and likely future obligations to its retirees, not how much money would be required in the (counterfactual) assumption that the Postal Service could somehow catch up with the absurd prefunding schedule that PAEA purported to impose, but Congress has not enforced since then. No amount of rate relief from the Commission can provide it with the revenue necessary to meet the latter obligations, which are wholly divorced from the market conditions facing the Postal Service. And ratepayers need continued protection from abuse of the Postal Service's monopoly power. The Commission's proposals do not meet any of these needs.

The Commission's best option going forward is to withdraw the proposed rules and reexamine both the problems facing the Postal Service and the Commission's options for helping the Postal Service develop solutions to those problems. Even if the Commission concludes that the Postal Service requires additional revenue, it must, at a minimum, more carefully analyze the additional revenue necessary and the potential effect on volumes that attempts to provide that revenue would cause.

A comprehensive rewrite of the system of ratemaking requires more deliberation and analysis than the Commission has engaged in to date, and a greater opportunity for comment than the Commission has allowed. While the Commission took almost 9 months to review the current system of ratemaking and develop its proposed revisions, it has provided little opportunity for public comment in this process. It engaged in its review after issuing an Advanced Notice of Proposed Rulemaking that offered only a cursory outline of the standards that the Commission intended to apply, then applied different standards than noticed in its review. At times in Order No. 4257, the Commission relied on information provided by the Postal Service in response to the ANOPR but, because the Commission did not allow reply comments, it lacked the benefit of other information that could have placed the information from the Postal Service in context or countered the Postal Service's narrative. The Commission then issued both its findings on the current system and its proposed revision at the same time, and provided only 90 days for the public to digest and respond to the over 500 pages of information contained in these orders, much of which could not have been predicted from the ANOPR.

The results of this process so far have been logically and factually flawed conclusions about the current system and proposed solutions that are illegal, unsupported by evidence, and dismissive of a century of regulatory economic theory. The Commission must do better. The mailing industry is willing to work with the Commission and the Postal Service to develop viable solutions, but it must be given a real opportunity to do so. At a minimum, if the Commission determines after the current round of comments that it must still make revisions to the system of ratemaking, it should issue a revised NOPR responding to the comments to date, proposing rules that properly balance the objectives of PAEA while remaining within the bounds of the Commission's authority. Better yet, the Commission should convene technical conferences and public hearings to allow the collaborative, deliberate development of potential alternatives before issuing new proposed rules. Such a process may moderate stakeholder positions in ways that the current process cannot.

Providing only two rounds of comments on a proposal that radically departs from the existing system, with everything at stake for the industry, forces stakeholders to protect their interests by taking more adversarial positions.

In the end, the Postal Service's problems are not intractable. Solutions exist. These proposed rules, however, are not among them.

Respectfully submitted,

Matthew D. Field
Ian D. Volner
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-8281
mfield@venable.com
idvolner@venable.com

Counsel for Association for Postal Commerce

David M. Levy
Eric S. Berman
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-4732
dlevy@venable.com
esberman@venable.com

Counsel for Alliance of Nonprofit Mailers and MPA–The Association of Magazine Media

Hamilton Davison
President & Executive Director
AMERICAN CATALOG MAILERS ASSOCIATION, INC.
PO Box 41211
Providence, RI 02940-1211
(800) 509-9514
hdavison@catalogmailers.org

David J. Steinhardt
President & CEO
IDEALLIANCE
1800 Diagonal Road, Suite 320
Alexandria, VA 22314-2862
(703) 837-1066
dsteinhardt@idealliance.org

March 1, 2018

Appendix A

LIMITATIONS ON THE COMMISSION'S AUTHORITY UNDER SECTION 3622(d)(3)

WHITE PAPER SUBMITTED TO THE POSTAL REGULATORY COMMISSION BY ALLIANCE OF NONPROFIT MAILERS, ASSOCIATION FOR POSTAL COMMERCE, ASSOCIATION OF MARKETING SERVICE PROVIDERS, DIRECT MARKETING ASSOCIATION, EMA, MPA—THE ASSOCIATION OF MAGAZINE MEDIA, NATIONAL ASSOCIATION OF ADVERTISING DISTRIBUTORS, INC., AND SATURATION MAILERS COALITION

October 28, 2014

VENABLE® LLP

575 SEVENTH STREET NW WASHINGTON, DC 20004
T 202.344.4000 F 202.344.8300 www.Venable.com

LIMITATIONS ON THE COMMISSION'S AUTHORITY UNDER SECTION 3622(D)(3)

PREPARED FOR THE POSTAL REGULATORY COMMISSION

39 U.S.C. § 3622(d)(3) directs the Postal Regulatory Commission ("PRC" or "Commission"), ten years after the enactment of the Postal Accountability and Enhancement Act ("PAEA"), Pub. L. 109-435, 120 Stat. 3198 (2006), to "review the system for regulating rates and classes for market-dominant products established under this section." This White Paper considers whether the Commission's authority under Section 3622(d)(3) includes the power to rescind or substantially modify the Consumer Price Index ("CPI") cap established under Section 3622(a) and (d). For the reasons explained here, the answer is no.

EXECUTIVE SUMMARY

In recent months, it has been suggested that the Commission could use the ten-year review to eliminate or substantially modify the CPI-based cap on class-average revenue per piece imposed by 39 U.S.C. §§ 3622(d)(1) and (2). The argument runs as follows: Section 3622(d)(3) provides that the Commission's ten-year review shall include a determination of whether the "system for regulating rates and classes for market-dominant products established under this section" is achieving the "objectives" of Section 3622(b), "taking into account the factors of" Section 3622(c). If the Commission finds that the "system" is not achieving the Section 3622(b) "objectives" in light of the Section 3622(c) "factors," the Commission "may, by regulation, make such modifications or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives." *Id.* § 3622(d)(3). The CPI cap is part of the regulatory system for market-dominant products. So, the theory goes, the Commission, on finding that the CPI cap is not achieving the "objectives" of Section 3622(b), may eliminate the

VENABLE LLP

cap and replace it with some other regulatory "system" or substantially relax the manner in which the cap now operates. This theory fails on two independent grounds:

(1)

The argument is an impermissible construction of the statutory language. Section 3622(d) defines the CPI cap as a binding and mandatory "requirement," not just a discretionary "objective" or "factor." *Id.* § 3622(d)(1). The Commission may not interpret as permissive a statutory provision that is so plainly mandatory. Further, inferring such authority from Section 3622(d)(3) would stretch the "review" of the regulatory scheme far beyond the bounds allowed by the language of Section 3622(d)(3) and Supreme Court precedent such as *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994).

Moreover**,** eliminating the CPI cap would contravene the *overall* structure and purpose of PAEA and, in particular, the relationship between Section 3622(d)(3) and Section 3622(a). The "system" that Section 3622(d)(3) directs the Commission to review and possibly modify after ten years is the same "system" that Section 3622(a) directed the Commission to create. The statute requires that both Commission actions be based on the same "objectives" and "factors" enumerated in Sections 3622(b) and (c). The Commission has repeatedly acknowledged that those "objectives" and "factors," and the "system" of regulation that Congress directed the Commission to build on them, are all subordinate to the "quantitative pricing standards" of PAEA, including the CPI cap. The role of the CPI cap in the statutory hierarchy is absolute, "central," and "indispensable"; the Commission's role in "establishing" the "system for regulating rates and classes" is secondary and interstitial. Docket No. R2010-4, *Rate Adjustment Due to Extraordinary* *or Exceptional Circumstances*, Order No. 547 (Sept. 30, 2010) at 10–13, 49–50 [hereinafter Order No. 547]; *accord* Docket No. RM2009-3, *Consideration of Workshare Discount Rate Design*, Order No. 536 (Sept. 14, 2010) at 16–17, 35–36 [hereinafter Order No. 536]; *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Cir. 2012), *on remand*, Order No. 1427 at 17–19. Nothing in the text, structure, or legislative history of PAEA suggests that the Commission's authority to review, modify, or replace the "system" of regulation under Section 3622(d)(3) is broader than the Commission's authority to "establish" the "system" of regulation under Section 3622(a).

(2)

The proposed reading of Section 3622(d)(3) would raise constitutional issues. A fundamental canon of statutory construction bars agencies from construing a statute in a way that even raises serious doubts about its constitutionality. Construing Section 3622(d)(3) to authorize the Commission to eliminate the CPI cap would do just that. In *Clinton v. State of New York*, 524 U.S. 417, 438–99 (1998), the Supreme Court held that the Presentment Clause of the Constitution, U.S. Const., Art. I, § 7, cl. 2, bars Congress from delegating to the executive branch the authority to amend or repeal statutes. In addition, wholesale repeal or modification of the CPI Cap would implicate the Constitutional limitations on the power of Congress to delegate its legislative function to administrative agencies under cases such as *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

* * *

In sum, PAEA established a system of rate regulation whereby the Postal Service cannot raise rates by more than CPI, as applied at the class level, absent extraordinary or exceptional circumstances. The Commission is not empowered to subvert the judgment of Congress by replacing this constraint with an alternative method of regulating rates.

ANALYSIS

I. PAEA ESTABLISHED THE CPI CAP AS A BINDING CONSTRAINT THAT THE COMMISSION MAY NOT REPEAL OR SUBSTANTIALLY MODIFY.

The text, structure, purpose, and legislative history of Section 3622 make clear that that the CPI cap mandated by Section 3622(a) and (d) is a fixed and binding constraint that the Commission has no authority to repeal or substantially loosen under Section 3622(d)(3).

A. The Binding Character of the Price Cap Is the Linchpin of the Statute.

As always, the first step in divining the meaning of a statute is "the language of the statute itself." *Caraco Pharm. Labs v. Novo Nordisk*, 132 S. Ct. 1670, 1680 (2012); *CSX Transp., Inc. v. Alabama Dept. of Rev.*, 131 S. Ct. 1101, 1107 (2011). The plain language of Section 3622 establishes the CPI cap as the primary requirement of any system of rate regulation developed by the Commission and prevents the Commission from eliminating that requirement during its 10-year review of the system. PAEA § 401, codified at 39 U.S.C. § 3622(d)(1)(A), prescribes the CPI cap in mandatory terms ("requirements" and "shall"):

> ***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

VENABLE LLP

> variation over the most recent available 12-month period preceding the date the Postal Service files notice of its intention to increase rates; . . . .

39 U.S.C. § 3622(d)(1)(A) (emphasis added).

The CPI cap limits the annual increase in average revenue per piece on any market-dominant class of mail to the rate of inflation. Section 3622(d) provides two exceptions to the CPI cap: exigent circumstances (§ 3622(d)(1)(E)) and the use of prior rate increase authority that has been banked (§ 3622(d)(2)(C)). Beyond these two exceptions, this CPI cap is absolute. Order No. 536 at 16, 35–36; *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Cir. 2012), *on remand*, Order No. 1427 (Aug. 9, 2012) at 17–19. As noted above, Section 3622(d), in contrast to Section 3622(b) ("Objectives") and Section 3622(c) ("Factors"), is entitled "Requirements."

Other provisions of Section 3622,—e.g., the rounding provision,[1]—flesh out how the price cap shall be implemented. The provisions that leave the PRC some discretion—e.g., Section 3622(d)(1)(C), which directs the Commission to develop procedures for reviewing non-compliance with the CPI rate cap—concern interstitial details and enforcement procedures.

The CPI cap is the linchpin of PAEA. In the Commission's own words, the role of the CPI cap in the statutory hierarchy is absolute, "central" and "indispensable." Order No. 547 at 10–13, 49–50; *accord* Order No. 536 at 16–17, 35–36. Through PAEA, Congress sought to create a profit

[1] 39 U.S.C. § 3622(d)(2)(B) ("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.").

VENABLE LLP

motive for the Postal Service and improve efficiencies in the postal networks by eliminating the break-even mandate.[2] To replace the break-even mandate as the main safeguard for users of market-dominant mail products, Congress required the adoption of a price cap linked to the rate of inflation. Order No. 547 at 10–12. "PAEA removed any reference to cost-of-service regulation, establishing the price cap as the *only regulatory model to be used under the new rate system*." *Id.* at 10 (emphasis added). "The broad flexibility" in pricing otherwise allowed the Postal Service by PAEA "underscores the importance of the price cap as a protection mechanism for ratepayers." *Id*. at 12. "The price cap . . . stands as the single most important safeguard for mailers." *Id.* at 13. The "role of the price cap is central to ratemaking, and the integrity of the price cap is indispensable if the incentive to reduce costs is to remain effective. Therefore, it would undermine the basic regulatory approach of the PAEA if the Postal Service could pierce the price cap routinely." *Id.* at 49–50.

The mandatory language used by Congress in establishing the CPI cap (the Commission "shall" establish a regulatory system, including the "requirement" of the CPI cap) and the central role of the CPI cap in the PAEA ratemaking scheme foreclose any claim that the statute makes the CPI cap merely optional. "The world 'shall' is ordinarily 'the language of command.'" *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (citations omitted); *see also Lopez v. Davis*, 531 U.S. 230, 231 (2001) ("Congress used 'shall' to impose discretionless obligations"). Although the courts sometimes treat "shall" as permissive when treating the word as mandatory would produce results

[2] *See* Gov't Accountability Office, GAO-07-684T, U.S. Postal Service: Postal Reform Law Provides Opportunities to Address Postal Challenges 1, 17–19 (2007), *available at* http://www.gao.gov/assets/120/116185.pdf.

VENABLE LLP

that are "inconsistent with the manifest intent of the legislature or repugnant to the context of the statute," *Kakeh v. United Planning Org., Inc.* 655 F. Supp. 2d 107, 124–25 (D.D.C. 2009), the plain meaning and purpose of the language mandating the CPI cap are aligned: the binding character of the cap is the linchpin of the statute.

B. Section 3622(d)(3) Directs the Commission to Review the Ratemaking System that It Established in 2007, not Repeal or Modify the CPI Cap Established by Congress.

By contrast, nothing in 39 U.S.C. § 3622(d)(3) suggests its directive to review and modify the "system for regulating rates and classes" previously adopted by the Commission under Section 3622(a) includes the power to repeal the *statutory price cap itself*. To the contrary, *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.* forecloses such a construction. In *MCI*, the Federal Communications Commission ("FCC") held that its statutory authority to "modify" rate-filing requirements entitled the agency to eliminate tariff-filing requirements for some telecommunications services. *Id.* at 224–25. The Supreme Court rejected this position, holding that the power to "modify" did not permit the agency to make major changes to a regime established by Congress under basic rules of statutory construction. *Id.* at 234. More broadly, the Supreme Court stated that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to "modify" rate-filing requirements." *Id.* at 231.[3]

[3] The dissenting justices in *MCI* would have allowed the agency to "modify" the Communications Act's tariff filing requirement because in their view, the provision, while important, was not "the

VENABLE LLP

MCI makes clear that substantive provisions "at the heart" of the statute may not be amended through modifications. Because the provisions of Section 3622 establishing the CPI cap are "at the heart" of price regulation of market dominant mail under PAEA, the Commission cannot effectively introduce "a whole new regime of regulation" that is "not the one that Congress established." *See MCI*, 512 U.S. at 234. A statutory provision calling for the review of a regulatory system cannot reasonably be interpreted as a basis for a complete overhaul of the fundamental principles of the system. Such an interpretation would take Section 3622(d)(3) far beyond "plausibility." *Accord Christensen v. Harris Cnty.*, 529 U.S. 576, 590 n.* (2000) (Scalia, J., concurring in part and concurring in judgment) (noting "the implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency)"). The Commission can, and indeed must, evaluate and modify the regulatory scheme set up in response to PAEA—but the modifications or alternative systems are bound by CPI cap established in Section 3622(d)(1)(A).

---

heart of the common-carrier section of the Communication Act." *Id.* at 237 (Stevens, Blackmun, and Souter, JJ., dissenting). As noted above, the PRC has acknowledged that the price cap provision is in fact the central feature of PAEA. Hence, Section 3622(d)(3) could not be interpreted to allow the modification of the CPI cap even under the reasoning of the dissent. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992) ("*Amtrak*"), distinguished by Justice Scalia, is also inapposite. The "contextual context" of the term "required" at issue in that case involved a determination of whether the agency action at issue was "necessary" or merely useful; under PAEA, by contrast, the PRC is "required" to review the regulatory system, but the contextual context makes clear that the PRC cannot modify or repeal the price cap.

VENABLE LLP

Moreover, as the Supreme Court has pointed out, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001). Nothing in the language of Section 3622(d)(3) specifically authorizes the PRC to modify the CPI cap; indeed, Section 3622(d)(3) does not even refer to the cap requirements. Congress may not be deemed to have authorized elimination of the price cap—"the single most important safeguard for mailers" in PAEA[4]—by omission or indirection. Section 3622(d)(3) may not be read as allowing the Commission to remove this fundamental protection during the 10 year review without express and explicit authorization in the statutory text.

Pursuant to the authority granted by 39 USC § 3622(d)(3), the Commission is free to modify its regulations or adopt alternative regulations to meet the objectives of Section 3622(b) if the PRC determines that the existing system of regulation is not doing so; however, the regulatory scheme must still meet the basic requirements contained in Section 3622(d)(1). Thus, any modified system for regulating rates would be subject to the CPI cap, absent congressional amendment. "[T]he power to issue regulations is not the power to change the law." *U. S. v. New England Coal & Coke Co.*, 318 F.2d 138, 143 (1st Cir. 1963).

C. The Relationship Between Section 3622(a) and Section 3622(d)(3) Confirms that the Commission's Authority to Revise the Ratemaking System Does Not Extend to the CPI Cap.

In construing the statute, the Commission may not interpret its provisions in isolation, but must consider each one in light of the overall "structure and purpose of the statute. The

[4] Order No. 547 at 13.

Commission itself has recognized that PAEA, like all statutes, must be interpreted as a coherent and symmetrical regulatory scheme and, if possible, all parts must be fitted into a harmonious whole." Order No. 547 at 25 (citing *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975); *Cody v. Cox*, 509 F.3d 606, 609 (D.C. Cir. 2007)), *remanded on other grounds*, *USPS v. PRC*, 640 F.3d 1263 (D.C. Cir. 2011); *accord K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). "The meaning of words should be determined by specific context in which they are used and within the broader context of the statute as a whole." Order No. 547 at 25 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000)). The overall structure of PAEA provides further confirmation that Section 3622(d)(3) does not authorize the Commission to rescind or substantially modify the CPI cap.

Section 3622(d)(3), which authorizes the Commission to modify its "system for regulating rates and classes for market-dominant products," mirrors Section 3622(a), which authorized the Commission to "establish" the "system for regulating rates and classes for market-dominant mail" in the first instance. A word or phrase that appears in two or more provisions of the same Section of a statute is presumed to have the same meaning each time. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

This conclusion is reinforced by the explicit references in Section 3622(d)(3) to the "objectives" of Section 3622(b) and the "factors" of Section 3622(c) as the criteria to govern the ten-year review. These "objectives" and "factors" are the *same* "objectives" and "factors" that

Section 3622(b) and (c) directed the Commission to consider in 2007 when initially establishing a "system for regulating rates and classes" for market-dominant mail under Section 3622(a). Hence, the Commission's authority to *modify* the "system for regulating rates and classes" under Section 3622(d)(3) must be regarded as coextensive with the Commission's initial authority to *establish* the "system" under Section 3622(a):

<table>
<tr><th>Section 3622(a)</th><th>Section 3622(d)(3)</th></tr>
<tr><td>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.</td><td rowspan="5">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.</td></tr>
<tr><th>Section 3622(b)</th></tr>
<tr><td>Objectives.— Such system shall be designed to achieve the following objectives, each of which shall be applied in conjunction with the others: [list of objectives omitted]</td></tr>
<tr><th>Section 3622(c)</th></tr>
<tr><td>Factors.— In establishing or revising such system, the Postal Regulatory Commission shall take into account— [list of factors omitted]</td></tr>
</table>

This parallelism precludes any claim that Section 3622(d)(3) authorizes the Commission to rescind or substantially modify the CPI cap. As the Commission has repeatedly acknowledged, the Commission's role in establishing a "system of regulation" under Section 3622(a) was merely to fill in the gaps between the "quantitative pricing standards" established by Congress in Sections

VENABLE LLP

3622(d)(1)(A), 3622(d)(2), 3622(e) and 3626. Nothing in the language, structure or history of PAEA suggests that it gave the Commission greater authority to override or repeal the CPI cap when *reviewing* or *modifying* the "system for regulating rates" under Section 3622(d)(3) than when initially *establishing* the same "system" under Section 3622(a). Accordingly, the Commission's authority to *modify* the "system" under Section 3622(d)(3) must likewise be regarded as subordinate to the CPI cap.

At the top of the statutory hierarchy of PAEA are the three "quantitative pricing standards" that are hard-wired into Title 39: the CPI cap imposed by Section 3622(d)(1)(A) and (2); the limit on worksharing discounts imposed by Section 3622(e); and the constraints imposed by Section 3626 on the rate relationships between preferred mail and regular mail. The Commission has recognized that the "out-of-bounds" lines established by these three "objective, quantitative pricing standards" are "mandatory":

> Under the system that the Commission has established, the Postal Service enjoys a general prerogative to set market dominant rates, subject to only a few, clear "out-of-bounds" lines drawn by the PAEA. These "out-of-bounds" lines consist of pricing restrictions in three areas—the cap on class prices (*see* section 3622(d)), the limit on workshare discounts (*see* section 3622(e)), and revenue ceilings for the various categories of preferred mail (*see* section 3626). Congress framed each of these requirements as objective, quantitative pricing standards, made their application mandatory, and placed each in a self-contained section of the PAEA.

Order No. 536 at 16. These self-contained "quantitative" provisions "directly and comprehensively address issues of flexibility, including when deviations from the standard are warranted, and the procedures to be followed in such situations." *Id.* at 34.

VENABLE LLP

The "factors" and "objectives" of sections 3622(b) and (c)—and therefore the Commission's authority to establish a "system for regulating rates" under Section 3622(a) or modify such a "system" under Section 3622(d)(3)—are subordinate to the CPI cap and the other quantitative pricing standards:

> Quantitative pricing standards are at the top of the statutory hierarchy. Next in the hierarchy are the qualitative "objectives" listed in section 3622(b), followed by the qualitative "factors" listed in section 3622(c). Under this hierarchy, violations of the three quantitative pricing requirements are "out of bounds." The Postal Service has broad flexibility to develop prices to achieve the qualitative objectives and factors of sections 3622(b) and (c) *so long as its prices are "in bounds" because they satisfy these quantitative requirements*.

Order No. 536 at 36 (emphasis added), *on further consideration*, Docket No. RM2010-13, *Consideration of Technical Methods to Be Applied in Workshare Rate Design*, Order No. 1320 (April 20, 2012), *aff'd*, *USPS v. PRC*, 717 F.3d 209 (D.C. Cir. 2013). "[U]nder accepted rules of statutory construction when a general, qualitative pricing standard . . . conflicts with a specific qualitative pricing standard, such as the limit on workshare discounts, the pricing standards that are specific and mandatory should prevail over those that are general and discretionary." Order No. 536 at 37 (citations omitted); *accord id*. at 16–17.[5]

[5] The objectives and factors of Sections 3622(b) and (c) are also subordinate to 39 U.S.C. §§ 403(c) and 3662(c), the statutory safeguards against undue discrimination. *USPS v. PRC*, 747 F.3d 906, 913 (D.C. Cir. 2014) ("*GameFly II*") (the "system for regulating rates and classes" established by the Commission under Section 3622(a), and the objectives and factors of Sections 3622(b) and (c), do not govern the Commission's exercise of its authority under Sections 403(c) and 3662(c)).

VENABLE LLP

The Commission reaffirmed the subordinate and limited role of Sections 3622(b) and (c) in the Annual Compliance Determination ("ACD") for Fiscal Year 2010. Rejecting the Public Representative's contention in Docket No. ACR2010 that the attributable cost provision of 39 U.S.C. § 3622(c) stood on equal footing with the CPI-based price cap of Section 3622(d), the Commission held that the price cap trumps the attributable cost floor:

> The Public Representative reasons that the statutory price cap and the attributable cost floor provision in section 3622(c)(2) are on equal footing. This is based on the contention that section 3622(c)(2) is a quantitative requirement, notwithstanding its location with the cluster of statutory factors the Commission identified, in Order No. 536, as qualitative . . . .
>
> 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 PAEA'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.

FY 2010 ACD (Mar. 29, 2011) at 18–19 (footnotes omitted).

On review of the 2010 ACD, the Court of Appeals agreed, finding that "the pricing" of Periodicals Mail "is subject to special statutory restrictions" inapplicable to the pricing of Standard Mail flats. *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Cir. 2012). On remand, the Commission reiterated that it faced greater statutory constraints in raising prices for Periodicals mail than Standard Mail flats because the former constituted a class, and hence was subject to the CPI cap:

VENABLE LLP

> Moreover, the fact that Periodicals has only two products (Within County and Outside County Periodicals), neither of which covered its attributable costs, limits the opportunity for the Postal Service to improve attributable cost coverage by means of price increases while remaining within the Periodicals class price cap.

Docket No. ACR2010-R, *Annual Compliance Report, 2010*, Order No. 1427 (Aug. 9, 2012) at 17. Because "96 percent of class revenues are provided by Outside County Periodicals, the Postal Services does not have the same flexibility to set prices substantially above the price cap as it does with respect to products within Standard Mail." *Id*. at 18 (citing FY2010 ACD at 94).

The Commission acknowledged this legal constraint again in its Annual Compliance Review for the Fiscal Year 2011, ACR2011. The Commission again declined to impose an above-CPI rate increase on Periodicals Mail despite finding that the class failed to cover its attributable costs. The Commission explained, *inter alia*, that "unlike Standard Mail, Periodicals as a class fails to cover costs, thus foreclosing a rebalancing pricing strategy." FY 2011 Annual Compliance Determination (Mar. 28, 2012) at 17 (emphasis added).

Finally, interpreting the Commission's general authority under Section 3622(d)(3) as a license to override or revoke the specific prescriptions of PAEA concerning the relationships between market-dominant price increases vs. inflation (Section 3622(d)(1)(A) and (B)), workshare discounts vs. cost avoidances (Section 3622(e)), and preferred rates vs. regular rates (Section 3626) would also violate the "fundamental rule of statutory construction" that, when two statutory provisions are arguably in conflict, "specific provisions trump general provisions." *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003). This canon of construction applies with particular force where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC*

VENABLE LLP

v. Amalgamated Bank, 132 S. Ct. 2065, 2070–72 (2012) (citations omitted); *accord Morton v. Mancari*, 417 U.S. 535, 550–51 (1974); *Mail Order Ass'n of Am. v. USPS*, 986 F.2d 509, 515 (D.C. Cir. 1993).

D. The Legislative History of PAEA also Indicates that the CPI Cap Is Mandatory.

The legislative history of PAEA does not support a contrary conclusion. As a general matter, the legislative history of a statute is entitled to much less weight than the text and structure of the statute, particularly when the meaning of the latter is clear. "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). As discussed above, the text and structure of Section 3622 make clear that the CPI cap is binding and not open to rescission by the Commission. The legislative history of PAEA is not to the contrary.

The legislative history of PAEA is sparse and scattered across several bills, including H.R. 22 and S. 622, which eventually combined to form H.R. 6407. None of the legislative history speaks to the purpose or proper interpretation of the review provision of Section 3622(d)(3), which appears to have been added to H.R. 6407 without hearings, Committee consideration, or floor debate. *See Whitman*, 531 U.S. at 468 (denying an agency the ability to fundamental revise a regulatory scheme base on "vague terms or ancillary provisions" because Congress does not "hide elephants in mouseholes"). By contrast, the only report regarding the CPI rate cap requirement stems from H.R. 22, and states that "[t]he legislation *would mandate* that the average rate for any market dominant product *could not* rise more than the annual increase in the Consumer Price Index

VENABLE LLP

(CPI), unless a larger increase would be necessary to ensure the viability of the Postal Service." H.R. Rep. No. 109-66, Part 1, at 86 (2005) (emphasis added). This intent is bolstered by the fact that the final version of PAEA in H.R. 6407 denoted Section 3622(d) "requirements" rather than "allowable provisions" as proposed in H.R. 22. The language and legislative history from earlier, *unenacted* bills shows that Congress contemplated giving the Commission more discretion regarding the rate cap, and was fully capable of drafting language to do so.

* * *

In sum, the text and structure of the statute demonstrate that the CPI cap is a non-discretionary requirement that the Commission may not remove through regulation. As the Postal Service's Office of Inspector General has acknowledged, eliminating the CPI cap would require an act of Congress.[6]

II. CONSTRUING SECTION 3622(d)(3) TO AUTHORIZE THE COMMISSION TO ELIMINATE THE CPI CAP WOULD VIOLATE THE CONSTITUTIONAL-DOUBT CANON OF INTERPRETATION.

Interpreting Section 3622(d)(3) to authorize rescission of the CPI cap would also raise constitutional issues. The constitutional-doubt canon prohibits agencies from construing statutes in such a way as to raise serious doubts about their constitutionality. *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *Lowe v. SEC*, 472 U.S. 181, 227 (1985); *Edward J.*

[6] *See* USPS OIG, Revisiting the CPI-Only Price Cap Formula, RARC-WP-13-007, at iv (Apr. 12, 2013) (noting that "[i]f Congress decides to continue using a price cap" the USPS would need to use "alternative approaches" to "improve its financial condition").

VENABLE LLP

DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). There is a serious doubt that construing Section 3622(d)(3) to authorize the Commission to rescind the CPI cap would pass muster under the Presentment Clause of the Constitution, U.S. Const. Art. 1, § 7, cl. 2, or the constitutional limits on the delegation of legislative authority.

Removal or substantial modification of the CPI cap would effectively repeal 39 U.S.C. §§ 3622(d)(1)(A), (D), (E) and 3622(d)(2), the provisions that established the creation of the CPI cap and continue to require its use as a constraint on market-dominant rates. The Presentment Clause, however, does not allow a bill to become law without first passing both houses of Congress and being "presented" to the President, who "shall sign it'" if he approves it, but "return it," *i.e.*, veto it, if he does not. U.S. Const., Art. 1, § 7, cl. 2. The Presentment Clause also bars Congress from delegating to the executive branch the authority to *amend* or *repeal* statutes. *Clinton*, 524 U.S. at 438–49.

In *Clinton*, the Supreme Court struck down as contrary to the Presentment Clause a provision of the Line Item Veto Act, 2 U.S.C. § 691 *et seq*.,[7] that authorized the President to veto individual line items of spending legislation. Allowing the President to exercise a line item veto, the Court held, would allow "truncated versions" of bills passed by Congress to become law, a result at odds with the "'finely wrought' procedure that the Framers designated." 524 U.S. at 440. "If the Line Item Veto Act were valid," the Court explained,

[7] Line Item Veto Act, Pub. L. 104-130, 110 Stat. 1200 (1996), *invalidated by Clinton v. State of New York*, 524 U.S. 417 (1998).

> it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as "Public Law 105–33 as modified by the President" may or may not be desirable, but it is surely not a document that may "become a law" pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.

Id. at 448–49.

Clinton may not be distinguished on the theory that rescission of the CPI cap would amount merely to a case-specific suspension or waiver of the cap, or a revision of a statutory table of examples. *Cf. Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *Republic of Iraq v. Beaty*, 556 U.S. 848, 861 (2009); *Terran v. Sec'y of HHS*, 195 F.3d 1302, 1307–08, 1312–14 (Fed. Cir. 1999); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124–26 (D.D.C. 2007). The suspensions, waivers, and revisions upheld in those cases were temporary, peripheral or limited adjustments to a larger statutory scheme. Rescission of the CPI cap, by contrast, would nullify the constraint that the Commission has acknowledged is the "central" and "indispensable" core of PAEA. Such rescission would moot and therefore repeal the congressionally mandated Exigency Provision. *See supra* p.5. Eliminating the CPI cap would go beyond pruning the leaves, twigs, or peripheral branches of PAEA; it would uproot the law at its very trunk and taproot.

Furthermore, the suspensions, waivers and revisions upheld in *Marshall Field*, *Republic of Iraq*, *Defenders of Wildlife*, and *Terran* were all found to "execut[e] the policy that Congress had embodied in the statute," *Clinton*, 524 U.S. at 444; *accord Republic of Iraq*, 556 U.S. at 861 (the statutory "proviso *expressly* allowed the President to render certain statutes inapplicable") (emphasis in original). Section 3622(d)(1)(E), which authorizes the Commission to approve above-CPI increases in certain "extraordinary" or "exceptional" circumstances, is an example of a constitutionally-permissible suspension or waiver provision of this kind. By contrast, nothing in the language, structure, or history of PAEA implies, let alone states expressly, that the Commission is allowed to discard the CPI cap under Section 3622(d)(3). Order No. 547 at 10–13, 49–50.

Wholesale repeal or modification of the heart of PAEA would additionally infringe upon the powers of Congress, as the OIG has recognized. *See supra* note 8 and accompanying text. The non-delegation doctrine recognizes that the Constitution gives Congress the power to legislate, and Congress may not delegate that power to administrative agencies through standardless delegations of authority. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371–79 (1989); *see also Panama Ref. Co.*, 293 U.S. at 430; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 529–31.

Allowing the Commission to eliminate or modify the congressionally-established CPI cap as part of its ten-year review, with no guidance or limits as to what alternative system can replace it, would entail just such a standardless delegation. Congress could not have intended to provide the Commission with unfettered discretion to repeal every substantive ratemaking provision of PAEA through a regulatory process—let alone effected this standardless delegation through an amendment that was added at the last moment to a substitute bill that was signed by the President without Committee consideration or debate. Such revision would run counter to the intelligible standards Congress set through its mandatory requirements in Section 3622.

By contrast, interpreting Section 3622(d)(3) as requiring the Commission to review its regulations and amend or provide for alternative regulatory schemes *within* the mandatory framework set by Congress provides an "intelligible principle" to narrow the agency's discretion and thus avoids the serious constitutional problem posed by the broader interpretation of Section

3622(d)(3) that administrative rescission of the CPI cap would require. "A construction of the statute that avoids [an] open-ended grant should certainly be favored." *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion); *see also Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974) (construing statute to avoid non-delegation question); *cf. Mistretta*, 488 U.S. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to . . . giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

The mandatory requirements and limitations of Section 3622, discussed *supra* Section I, form the basis for this guidance. The more reasonable and Constitutionally-sound analysis indicates that Section 3622(d)(3) requires the Commission to review the system to regulate rates that it set up through Congress's guidance, and revise only those aspects of the system that Congress left to the Commission's discretion as needed to meet the objectives set by Congress. The "heart" of the system, the CPI rate cap, may only be amended through Congressional action.

CONCLUSION

For these reasons, the Commission can and must declare that its 2017 Review under Section 3622(d) (3) will not result in any alteration to Sections 3622(d)(1) and (2) or Section 3622(e). While formal initiation of the review will not occur for several years, the Commission should resolve this issue now, so that when the review is commenced the Commission and all interested parties are focused on the matters that do lie within the Commission's discretion, thereby enabling the review process to produce results which advance the purposes of PAEA.

VENABLE LLP

Date: October 28, 2014

Alliance of Nonprofit Mailers
Association for Postal Commerce
Association of Marketing Service Providers
Direct Marketing Association
EMA
MPA-The Association of Magazine Media
National Association of Advertising Distributors, Inc.
Saturation Mailers Coalition

David M. Levy
Mathew Field
Ian D. Volner
Peter S. Frechette
Venable LLP
575 7th Street N.W.
Washington, DC 20004

EXHIBIT 5

Postal Regulatory Commission
Submitted 2/3/2020 3:44:53 PM
Filing ID: 112172
Accepted 2/3/2020

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products	)))	Docket No. RM2017-3

**COMMENTS OF THE ALLIANCE OF NONPROFIT MAILERS,
THE ASSOCIATION FOR POSTAL COMMERCE,
MPA - THE ASSOCIATION OF MAGAZINE MEDIA
THE AMERICAN CATALOG MAILERS ASSOCIATION,
THE DIRECT MARKETING ASSOCIATION OF WASHINGTON,
THE NONPROFIT ALLIANCE,
THE ENVELOPE MANUFACTURERS ASSOCIATION,
THE SATURATION MAILERS COALITION,
AND THE CONTINUITY SHIPPERS ASSOCIATION**

February 3, 2020

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF COMMENTS ... 3

II. THE COMMISSION'S PROPOSED REGULATORY CHANGES VIOLATE PAEA ... 9

- A. The Commission's Proposed Above-Inflation Price Increases Violate Section 3622(d)(3) By Undermining Key Statutory Objectives ... 12
- B. The New Proposed System Would Be Irreconcilable with Objective No. 1 ... 14
- C. The Commission Again Fails To Explain Its Proposal's Compliance With Objectives 2 and 8 ... 18

III. EVEN IF THE PROPOSALS COMPLIED WITH PAEA, THEY WOULD STILL HAVE DISASTROUS EFFECTS ... 22

- A. The Cumulative Impacts of the Proposed Supplemental Rate Authority Will Lead to Twin Impacts of Massive Price Hikes and Volume Declines ... 23
  - 1. The Commission's Proposal Would Authorize Dramatic Cumulative Price Increases ... 25
  - 2. These Cumulative Increases Will Significantly Accelerate Market Dominant Volume Decline ... 28
- B. The Density Rate Proposal Will Undermine, Not Achieve, the Commission's Objectives ... 39
  - 1. The proposal is theoretically flawed ... 40
  - 2. The Postal Service Should Not Be Compensated for Volume Declines Within its Control ... 41
  - 3. The Commission Fails to Account for the Large Cumulative Impact of the Proposed Price Increases ... 43
  - 4. The density authority is not rationally related to the impacts of declining density ... 44
- C. The Proposed Retirement-Based Authority Is Unnecessary and Misguided ... 50
  - 1. The proposal is a true-up designed to recover prior-period expenses ... 51
    - (a) The Commission Cannot Defend its Retroactive Ratemaking Through Claims of Changed Circumstances ... 54
  - 2. The proposal will contribute to volume losses caused by cumulative price increases impacts without making a

meaningful difference in the Postal Service's ability to honor its obligations to retirees 56

D. The Proposed Performance-Based Authority Is Unsound and Will Not Incent the Postal Service to be More Productive 60

1. The Commission's Performance-Based Rate Authority Proposal is Theoretically Unsound 61

(a) The Proposal Departs From Traditional Price Cap Regulation Without Justification 61

(b) The Commission's "Financial Health Cycle" Justification is Unsupportable 66

2. The Design of the Performance-Based Rate Authority Is Ill-Conceived 69

(a) The Proposal Rewards Increases in Productivity Far Below Historical Levels 70

3. Technical and Practical Flaws in the TFP Calculation Create Unacceptable Risks of Awarding Performance-Based Rate Authority without Real Productivity Improvements 76

E. The Commission Should Focus on Cost Control, Not on Punishing Noncompensatory Products 82

IV. THE POSTAL SERVICE'S MONOPOLY STATUS AND SOUND ECONOMICS REQUIRE THAT THE COMMISSION MAINTAIN A PRICE CAP 85

V. THE COMMISSION'S REVISED PROPOSAL TO ELIMINATE THE CPI-U PRICE CAP *AGAIN* VIOLATES SECTION 3622(D)(1)(A) 91

A. The Commission's Analysis of PAEA's Plain Text Is Erroneous 91

1. PAEA's "Structure" Does Not Permit the Elimination of the CPI Cap 93

2. The Commission's "Differing Context" Argument Is Specious 95

3. The Commission's Negative-Implication Argument Is Not Compelling 98

B. The Commission's Appeal to Statutory Ambiguity Cannot Save It: Its Interpretation is Unreasonable and is not Entitled to Deference 99

VI. CONCLUSION 104

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products	)))	Docket No. RM2017-3

COMMENTS OF THE ALLIANCE OF NONPROFIT MAILERS, THE ASSOCIATION FOR POSTAL COMMERCE, MPA - THE ASSOCIATION OF MAGAZINE MEDIA THE AMERICAN CATALOG MAILERS ASSOCIATION, THE DIRECT MARKETING ASSOCIATION OF WASHINGTON, THE NONPROFIT ALLIANCE, THE ENVELOPE MANUFACTURERS ASSOCIATION, AND THE SATURATION MAILERS COALITION

February 3, 2020

I. INTRODUCTION AND SUMMARY OF COMMENTS

We (collectively, "Joint Commenters") represent some of the Postal Service's largest, longest-tenured, and most loyal customers. We and our customers, subscribers, members, and donors are large-volume mailers of magazines, newspapers, catalogs, charity fundraising appeals, fulfillment pieces, newsletters, letters, financial statements, utility bills, and many other pieces of mail classed as market-dominant. We *want* the Postal Service to remain a viable medium for our communications. That is why we were active participants during Phase I (in response to Order No. 3673) and Phase II (in response to Order Nos. 4257 and 4258) of this docket. And that is why, in these comments, we explain that the Commission's revised proposals in Order No. 5337 should not be pursued. Our comments are supported by the expert declarations of Robert D. Willig, PhD.; Kevin Neels, PhD., and Nicholas Powers, PhD.; and Robert Fisher, and by the declarations of the following nonprofit organizations: Consumer Reports, Inc.; American Lung Association; Southern Poverty Law Center; National Wildlife Federation; Guideposts Foundation, Inc.; and Disabled American Veterans.

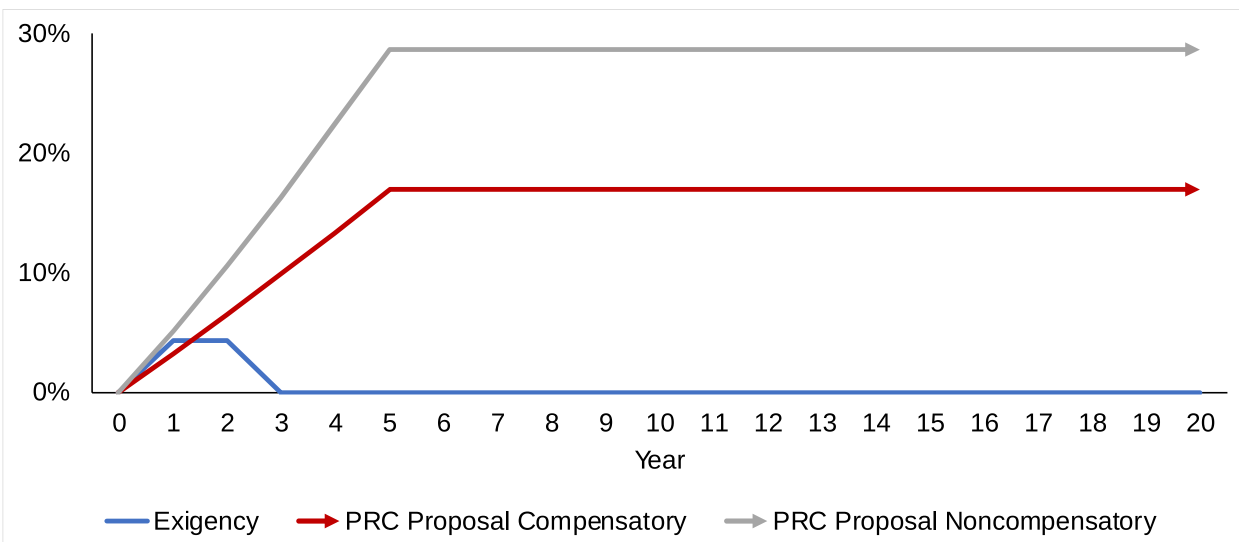
The Commission's proposals in Order No. 5337 are illegal: the Commission cannot enact them because the Postal Accountability and Enhancement Act (PAEA) does not permit it to grant above-inflation rate authority to the Postal Service. Congress baked a Consumer Price Index-Urban Consumers (CPI) cap into the statute to protect mailers and the American public and to incent the Postal Service to make wise, business-like operating decisions. Thus, PAEA identifies the CPI cap as a "requirement" of whatever market-dominant ratemaking system the Commission designs. Section 3622(d)(3), which obliges this docket, says nothing to the contrary. In fact, it does not refer to the CPI cap at all. The statute's plain language makes clear that the CPI cap is a Congressionally-mandated component of the system, and whatever modified version of the system might emerge from this review must keep it.

Even if the Commission *could* legally authorize the massive above-inflation price increases contemplated here, it should not *want* to. The proposals will not work. They will not strengthen the Postal Service's financial condition. They will not incentivize the Postal Service to behave more efficiently or become more productive. They will move the "system" farther away from achieving several important statutory objectives, such as maximizing incentives to reduce Postal Service costs (Objective 1), creating predictable and stable rates (Objective 2), and maintaining just and reasonable rates (Objective 8). What's more, the proposals will so badly exacerbate market-dominant volume losses that they will eventually deprive the Postal Service of the very revenue that the Commission hopes to provide (Objective 5). The Commission may hand-wave this prediction, but it does so at its peril: although the Commission has performed *no* analysis of the projected volume and revenue impact of its proposals (as reasoned decision-making requires), our comments are supported by both expert and mailer declarations written by people who have.

Order No. 5337 may have some superficial appeal over its predecessor. Whereas the Commission in Order No. 4258 proposed fixed above-CPI rate increases, it now proposes formula-based modifications that at least appear to be tethered to the Postal Service's underlying problems. Upon scrutiny, however, the revised proposals are revealed for what they are: attempts to "true-up" the prices market-dominant mailers have paid to the Postal Service since PAEA was enacted. Such retroactive ratemaking is unlawful and problematic. It is a thinly-veiled attempt to skirt the CPI cap *ex post facto*. It robs mailers of any predictability inherent in their purchasing decisions. It harms other members of the mail ecosystem—from the beneficiaries of charitable programs funded by mail, to rural Americans who rely on mail delivery, and even (ironically, given their support for above-inflation price authority) postal employees who may lose their jobs when customers flee. And it disrupts the regulatory bargain struck by PAEA, signaling that the Postal Service will be bailed out of perceived financial challenges without having to tighten its proverbial belt, relieving the operator of any motivation to control costs.

The Commission's plan, when viewed in its historical context, is startling. The last time that the Commission authorized above-CPI rate increases for market-dominant products occurred during the exigency rate case. *See* Order No. 2623 in Docket No. R2013-11R (July 29, 2015). The exigency increase was a *temporary* 4.3 percent rate increase that cost mailers less than $5 billion. The revised proposal, on the other hand, would authorize a *permanent* 17 percent phased-in above-inflation rate increase (or 29 percent for noncompensatory products) that will cost mailers about $8 billion *per year*. The present value of the pricing authority that the Commission is now proposing will cost mailers approximately *$220 billion*—almost *fifty times* more than the impact of exigency. The two are not remotely comparable, and the exigency's impact on mail volume is not a predictor of what will happen if the Commission's current proposals come to pass. Figure A depicts this discrepancy:

Figure A – Comparison of Rate Increases Under Exigency and Order No. 5337 Proposals

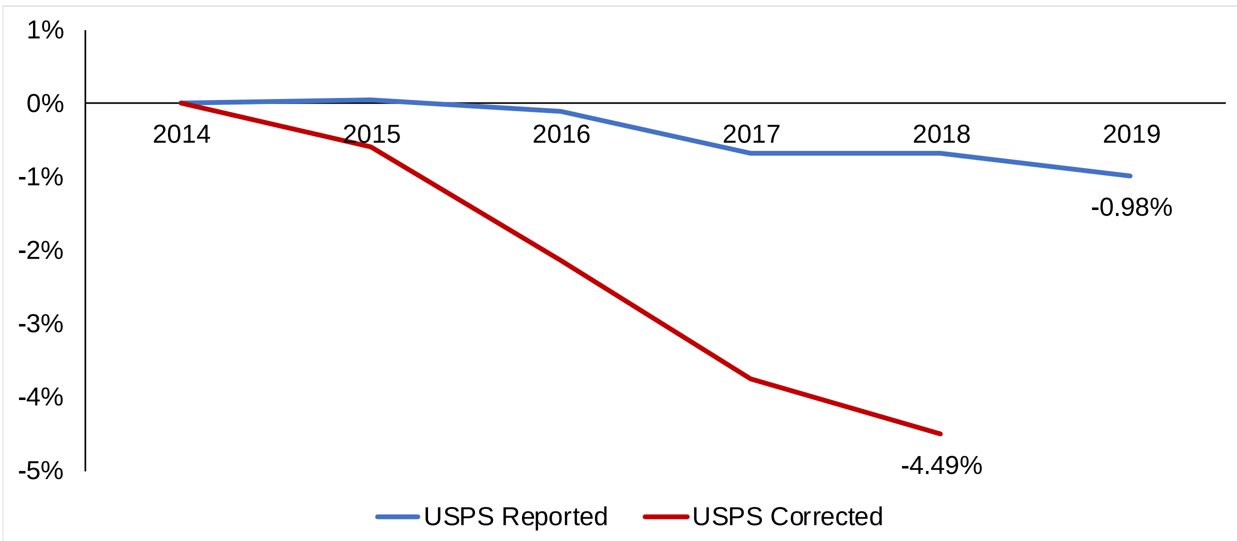


Source: ANMetalRM2017-3 Comment Wkpapers.xlsx, "Price Increase Comparison"

The density-based supplemental authority will invert the Postal Service's incentives to operate efficiently, rewarding the Service with higher prices for previous volume declines that the operator should be working to stem. Moreover, the proposal will dramatically over-compensate the Postal Service for reductions in volume and increases in the number of delivery points: in other words, it is not rationally related to the problem it is trying to fix. The retirement-based supplemental authority is another unlawful and unwise attempt to circumvent the CPI cap after-the-fact. It will hurt mailers, and it will not materially benefit the Postal Service or its retiring workforce, for whom more than $300 billion has already been put aside for retirement benefits. Congress clearly intended for the Postal Service's retirement prefunding obligation to exist in conjunction with the CPI cap—indeed, both measures were written into the same law—and thus any characterization of the retirement funding obligation causing the Postal Service unanticipated difficulties rings hollow. Both the density and retirement-based proposals are examples of retroactive ratemaking that will grant the Postal Service more pricing authority as volumes decline, triggering a death spiral of the Commission's doing.

The performance-based proposal turns incentive ratemaking on its ear. It is unjustified, backward-looking, and would reward the Postal Service with an additional one percent of pricing authority for achieving productivity levels *below* historical benchmarks. Perversely, mailers would be better off if the Postal Service's productivity *declined* (relieving mailers from having to face an additional one percent price hike) rather than increased. Even worse, the Postal Service's measure of productivity—total factor productivity ("TFP")—is inaccurate and overstates productivity growth by about one percent per year from FY2015 to FY2018, on average. Once corrected, Postal Service productivity has not just stagnated in recent years (which is problematic in its own right) but fallen dramatically. Thus, the Postal Service could capture this extra pricing authority *even if its actual productivity fell.*

Figure B – Cumulative Change in Postal Service Productivity



Source: ANMetalRM2017-3 Comment Wkpapers.xlsx, "Productivity"

All told, the Commission is proposing extraordinary changes to a rate system that both it and Congress have recognized was designed to shield market-dominant mailers and incentivize the Postal Service to cut costs. Now, the Commission has seemingly thrown up its hands—it has given up on holding the Postal Service's feet to the fire and has proposed modifications to the system that will harm mailers and give the Postal Service a free pass. This short-term "free pass" comes with a long-term price tag: eventually, without a sustainable customer base, the Postal Service will suffer from the Commission's proposals as well.

The proposed modifications are illegal. They constitute bad policy. And they represent a striking abandonment of the Commission's duty to engage in reasoned decision-making. For the reasons below and in our supporting declarations, the proposals must be rejected.

II. THE COMMISSION'S PROPOSED REGULATORY CHANGES VIOLATE PAEA

If implemented, the Commission's revised proposals would be counterproductive, inimical to sound economic theory, injurious to the Postal Service's customers (and, consequently, to the Postal Service's financial health), and an abandonment of the Commission's duty to engage in reasoned decisionmaking. Our comments are predominantly focused on these flaws. *See* §§ III-IV, *infra.*

We also note, though, that the Commission's Order No. 5337 proposals violate 39 U.S.C. § 3622 itself. The Commission seeks to grant the Postal Service pricing authority over market-dominant products equal to:

- Changes to the Consumer Price Index; ***plus***
- Additional rate authority tied to decreases in mail density; ***plus***
- Yet more rate authority to compensate the Postal Service for its retirement benefit payment obligations; ***plus***
- Another one percentage point of authority for each mail class for "meeting or exceeding" modest growth and service standard measures.

See Order No. 5337, Attachment A at 14-38 (published at 84 Fed. Reg. 67685 (Dec. 11, 2019)). Postal products that do not cover their attributable costs, like Marketing

Mail Flats, would be subject to a mandatory annual additional price hike of at least two percentage points above the class-wide percentage increase. Noncompensatory classes, *i.e.*, Periodicals, may be subject to an additional two percentage points of pricing authority also. *Id.*, Attachment A at 38-39 (proposed 39 C.F.R. § 3010.221 and 3010.222). Thus, the Postal Service could be granted annual new rate authority of up to five percent (for compensatory products) or seven percent (for noncompensatory products) above inflation, as depicted here:

		Average	Maximum
Density Rate Authority	[1]	1.23%	2.69%
Retirement Rate Authoirty	[2]	0.94%	1.11%
Performance-Based Rate Authority	[3]	1.00%	1.00%
Additional Rate Authority for Non-Compensatory Classes	[4]	2.00%	2.00%
Total Hypothetical Rate Authority (Compensatory Classes)	[5]	**3.17%**	**4.80%**
Total Hypothetical Rate Authority (Non-Compensatory Classes)	[6]	**5.17%**	**6.80%**

See Brattle Decl. at ¶ 35, Table 1. Over five years, compensatory classes could see cumulative average rate increases of roughly 17 percent in real terms and 29 percent in nominal terms, with maximum real and nominal increases of 26 percent and 39 percent, respectively. For noncompensatory classes, the cumulative average rate increases could be even more drastic: 29 percent in real terms and 41 percent in nominal terms. Those cumulative increases over noncompensatory classes could reach as high as 39 percent (real) and 53 percent (nominal):

Authority	Compensatory		Noncompensatory	
	Average	Maximum	Average	Maximum
Density	1.2%	2.7%	1.2%	2.7%
Amortization	0.9%	1.1%	0.9%	1.1%
Performance-Based	1.0%		1.0%	
Noncompensatory	N/A		2.0%	
Total Annual Increase (Above Inflation)	**3.2%**	**4.8%**	**5.2%**	**6.8%**
Total 5-Year Increase (Above Inflation)	**16.9%**	**26.4%**	**28.7%**	**39.0%**
Total 5-Year Increase – Nominal	**28.7%**	**39.0%**	**41.4%**	**52.5%**

Our previous comments submitted in this docket and in a 2014 white paper that we and other parties presented to the Commission both explain why the Commission may not do this: (1) the plain language of 39 U.S.C. § 3622 obligates the Commission to maintain the price cap, which Congress clearly identified as a mandatory "requirement" of the system for regulating market-dominant rates; (2) Congress structured the statutory scheme so that the Commission was instructed to review, and modify if necessary, the "system" that the Commission created via regulation—*not* the statutory provisions that Congress made superior to the system itself; (3) the Commission itself previously, and repeatedly, held that the CPI cap holds a central and primary place atop Congress' statutory scheme; and (4) Commission efforts to abrogate the price cap will effectively re-write the statute, raising constitutional concerns under the Presentment Clause and non-delegation doctrine. *See generally* ANM *et al.* Comments (Mar. 1, 2018) at 9-29 ("Phase II Comments"); ANM *et al.* Comments (Mar. 20, 2017) at 9-10, n.2 ("Phase I Comments"); ANM *et al.* White Paper (Oct. 28, 2014) (attached as Appendix A to Phase II Comments). Other commenters have raised similar arguments during this proceeding. *See, e.g.*, Docket No. RM2017-3, National Postal Policy Council, *et al.*

Comments (Mar. 1, 2018) at 19-41; Docket No. RM2017-3, Greeting Card Association Comments (Mar. 20, 2017) at 29-34.

Our previous submissions arguing that the Commission lacks the authority to breach the CPI-cap are extensive; we incorporate them by reference into these comments and will not repeat them wholesale. Although the Commission has not persuasively rebutted our earlier-presented legal arguments, we will later respond specifically to the principal contentions advanced by the Commission in Order No. 5337 as to why it still believes PAEA allows it to grant above-CPI pricing authority to the Postal Service. *See* Section V, *infra.*

The Commission also violates PAEA by ignoring Congress' mandate—in section 3622(d)(3)—that any modified or alternative system for regulating market-dominant rates must be designed "as necessary to achieve the objectives." Quite the opposite, the Commission's revised proposals move the ratemaking system farther away from several statutory objectives. Thus, the Commission's proposals would be held unlawful were they to be incorporated into a final rule and challenged in court. *See* 5 U.S.C. § 706(2)(C) (reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.").

A. The Commission's Proposed Above-Inflation Price Increases Violate Section 3622(d)(3) By Undermining Key Statutory Objectives

The Commission's authority under this ten-year review proceeding is constrained by 39 U.S.C. § 3622(d)(3), which requires that any modified or alternative market-dominant rate system be designed "as necessary to achieve the objectives."

For this reason, the Commission's revised proposals violate the statute. The cumulative impact of the proposed density-based, retirement-based, performance-based, and noncompensatory product-specific supplemental authority—resulting in nominal price increases averaging 30 to 40 percent over five years—completely undermines several statutory objectives that the current CPI cap achieves.

The Commission is now abandoning its previous recognition that the price cap balances the statutory objectives well and advances many of Congress' goals in promulgating them. In the exigency case, the Commission lauded the CPI-based cap as the "centerpiece" of postal reform that achieves Objectives 1 and 2 because it "ensures rate stability and predictability for the nation's mail users, and provides incentives for the Postal Service to reduce costs and operate efficiently." Order No. 547 in Docket No. R2010-4, *Order Denying Request for Exigent Rate Adjustments* (Sept. 30, 2010) at 1. The Commission also noted that the "price cap model simplifies the rate-setting process and provides greater accountability for the Postal Service." *Id.* at 11. This aligns with Objective 6: reducing the administrative burden and increasing the transparency of the ratemaking process. *See* 39 U.S.C. § 3622(b)(6).

The CPI cap system that Congress created not only achieves objectives designed to protect mailers, but pro-Postal Service objectives as well. Again, the Commission correctly recognized this:

> The changes effected by the price cap model benefitted ratepayers and other mail users. However, the Postal Service also gained significant advantages in the form of pricing and management flexibility. Senator Tom Carper, one of the primary sponsors of the PAEA in the Senate, stated that the PAEA "give[s] Postal management the tools and the flexibility needed to run the Postal

> Service more like a business at a time when there is fierce competition from . . . electronic 'communication. . . ." S. Hrg. 109-198 at 9. The PAEA grants the Postal Service broad latitude to alter rates as long as no market dominant class of mail's rates increased above CPI.

Order No. 547 at 12. The Commission also understood, as did Congress, that the price cap system was designed to allow the Postal Service to earn adequate revenues, including retained earnings. Quoting from the final House Committee report, the Commission explained that "[b]y maximizing gains and minimizing costs, the Postal Service could generate earnings that would be retained, and which could be distributed as incentives to management as well as to employees through collective bargaining." *Id.* at 70. The Commission went on: "Because the Postal Service does not have shareholders, all accumulated net income would be retained earnings." *Id.* Thus, the Commission has conceded that the price cap is designed to achieve Objectives 4 and 5.

The Commission's revised proposals in Order No. 5337 are not designed "as necessary to achieve the objectives." To the contrary, they represent a complete abdication of the Commission's statutory obligation to design a system that achieves the objectives.

B. The New Proposed System Would Be Irreconcilable with Objective No. 1

Objective 1 requires that the system "maximize the incentives to reduce costs and increase efficiency." 39 U.S.C. § 3622(b)(1). The CPI cap does just this, and the Commission knows it. Again, the Commission's own words ten years ago—when the Postal Service last sought an influx of revenue in response to declining volume—

reveal that it accepted the CPI cap's indispensable role in achieving Objective 1. "A price cap," wrote the Commission, "provided the Postal Service with the proper incentives to control costs." Order No. 547 at 11. The system of market-dominant rate regulation that Congress enacted "provide[s] clear incentives for postal management and the Postal Service as an institution." *Id.* at 12. Indeed, the PRC Chairman during PAEA's enactment, George Omas, testified that a price cap would "provide . . . meaningful incentives that will encourage the Postal Service to be more economical and more efficient." *Id.* (quoting *Postal Reform: Sustaining the Nine Million Jobs in the $900 Billion Mailing Industry Before the S. Comm. on Govt. Affairs*, 108th Cong. 53, 57 (S. Hrg. 108-527 at 13).

In Order No. 5337, the Commission sings an entirely different tune. While it "agrees with the commenters that the Postal Service must work to reduce costs," it also accepts that "the Postal Service's cost reduction efforts have been unsuccessful." Order No. 5337 at 156. During exigency, the Commission described PAEA as giving "Postal management the tools and the flexibility needed to run the Postal Service more like a business." Order No. 547 at 12. Today, the Commission laments that it "has limited tools that would directly affect costs." Order No. 5337 at 156-57. The Commission has not only failed to explain how its new proposals will achieve Objective 1; it appears to have given up hope on achieving that objective at all.

The remainder of the Commission's discussion reveals that its strategy to set the Postal Service straight has not changed from its Order No. 4258 proposals: refuse to hold the Postal Service accountable for its cost control failures, gift the Postal

Service the ability to charge its captive customers prices far in excess of inflation, and hope that the Service will use its newfound authority to operate more efficiently. When discussing its noncompensatory product proposal, the Commission makes this plain: "although the Commission expects the Postal Service to continue to work to reduce costs, the Commission proposes to require the minimum product-level increases to increase revenue." Order No. 5337 at 157. Although this language appears in the section of Order No. 5337 pertaining to noncompensatory products, it reflects a stance that pervades the Commission's general approach to fixing the Postal Service's problems. It has abandoned all pretense that it will require the Postal Service to tighten its belt and has decided to bail the Postal Service out of the operator's cost control failures by authorizing supplemental pricing authority.

Nowhere is this more apparent than in Marketing Mail Flats, a category that was nearly at breakeven in 2006 and is now at about 65 percent cost coverage. During the past two decades the reported costs of this category of mail have gone up 5.4 percent annually, while Factor Prices have risen 2.2 percent annually and inflation has been about two percent. The Postal Service has invested billions in flats automation, ostensibly to reduce the costs of handling flat mail, and during some of this time the Commission has "rewarded" the Postal Service with additional rate authority. These actions have done nothing but drive volume away while the reported costs for flat-shaped mail continue to rise inordinately. The strategy of above-average price increases to combat above-average cost growth is clearly not a recipe for success.

As has been the history following above-average price increases, it has only forced more mail volume out of the system.

The reasons why this proposed approach violates Objective 1 are obvious. If the Commission allows the Postal Service to simply recover for its cost-control shortfalls through excessive pricing, it will have been as if the statutorily-required price cap were all for naught. As a practical matter, the Commission's proposal resembles a cost of service regime with deferred revenue collection, and the type of retroactive ratemaking that generally proscribes regulators from requiring or authorizing the regulated entity to adjust current rates to make up for past errors in projections. *See Town of Norwood v. FERC*, 53 F.3d 377, 381-383 (D.C. Cir. 1995) ("if the company is not, in fact, collecting deferred costs, but instead attempting to make up for errors in earlier approximations of actual costs, [] it engage[s] in impermissible retroactive ratemaking.").[1] Moreover, the proposals may result in the Postal Service acquiring pricing authority up to five percent (for compensatory products) or seven percent (for noncompensatory products) above inflation annually. That supplemental authority is so high and detached from the CPI cap that it is "completely adverse to

[1] Indeed, courts have long held such retroactive true-ups illegal under the Interstate Commerce Act and related ratemaking statutes. *See, e.g.*, *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018) ("the rule against retroactive ratemaking 'prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods.'") (quoting *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992)); *see also Associated Gas Distributors v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (*per curiam*) (Williams, J., concurring) ("for purposes of this doctrine . . . a court must ask whether the costs are past"); *Consol. Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (quoting *Towns of Concord*, 955 F.2d at 71 n.2).

any system of economically efficient incentive regulation." *See* Willig Decl. at ¶ 7. Put differently, the Commission's proposals maintain a cap in name only, certainly not in function.

C. The Commission Again Fails To Explain Its Proposal's Compliance With Objectives 2 and 8

The Commission's revised proposals also violate Objectives 2 (predictable and stable rates) and 8 (just and reasonable rates). Taking the latter first: we explained at length in our March 2018 comments that the Commission's then-proposal would violate section 3622(b)(8)'s requirement that the system "maintain a just and reasonable schedule for rates" as well as 39 U.S.C. § 404(b) (authorizing the Governors to establish "reasonable and equitable rates of postage and fees"). *See* Phase II Comments at 62-71. Our critique of the Order No. 4258 proposal applies with even greater force to the Commission's new proposal. And, the Commission virtually ignores *any* mention of Objective 8 in Order No. 5337. Indeed, the Commission only mentions Objective 8 in reference to its Order No. 4258 noncompensatory product and class proposals. There is no discussion of why the Commission believes that its current proposals will achieve just and reasonable rates, nor any effort to respond to our prior arguments.

Objective 2 requires the system to have predictability and stability in rates. Just as it acknowledged the price cap's role in incentivizing efficiency and cost reductions (Objective 1), the Commission has similarly observed that the price cap is the feature of the system that "ensures rate stability and predictability for the nation's mail users." Order No. 547 at 1; *see also id.* at 11 ("the price cap model was intended to promote predictability and stability in setting rates"); 38 ("Section 3622(d)(1) of title 39 provides rate stability and predictability through a cap on annual rate increases for each market dominant mail class at the level of CPI-U."). Authorizing above-CPI price increases on market-dominant mail classes of the magnitude proposed in Order No. 5337 tramples on this important objective.

The Commission does not explain how its revised proposals will achieve Objective 2, and in fact does not address the issue in any serious detail. When explaining its proposal to grant the Postal Service supplemental retirement-based pricing authority, the Commission states in conclusory fashion that the five-year phase-in period "is designed to create a predictable and stable schedule for rate increases while minimizing the impact on mailers." Order No. 5337 at 95. But the Commission fails to explain *how* this retirement-based supplemental pricing authority will be predictable and minimize the impact on mailers. In fact, the Commission admits that its retirement-based "proposed formula does not attempt to predict future volume to determine the amount of retirement rate authority available in each year of the phase-in period. Instead, it adjusts annually to changes in both volume and the amount of the amortization payments." Order No. 5337 at 99.

The Commission's proposals will harm the Postal Service's customers—the very mailers Objective 2 was designed to protect. Nonprofit organizations, for example, are often high-volume mailers of marketing mail flats, first-class mail, and periodicals that "rely on stable, foreseeable postal rates in order to plan . . . fundraising operations for the following year." Clark Decl. (Southern Poverty Law

Center) at ¶ 24. The Commission's "backward-looking formula-based proposals make it impossible . . . to predict how large each year's postal price increases will be." Miao Decl. (National Wildlife Federation) at ¶ 13. This means that, as mailers try to develop their budget for the coming year, they will be "unable to clearly project our postal expenses." O'Sullivan Decl. (Guideposts) at ¶ 6. This lack of predictability "makes business planning in future years very difficult" and will force mailers to consider leaving the mail and moving "member communications to other mediums where we can better predict and control our spending." Miao Dec. at ¶ 13; *see also* Clark Decl. at ¶ 24 (proposals "make it impossible for the SPLC to project each year's postage expenses."). This, of course, is the antithesis of what Congress intended when it drafted Objective 2, as the Commission well knows. *See* Order No. 547 at 11 ("Predictability and stability, the Committee learned, allows mailers to better plan their mailing and could allow them to increase the amount of business they do with the Postal Service.").

In addition to violating Objective 2's predictability requirement, the Commission's proposals also do not achieve stability in rates. As we explained in our comments in response to Order No. 4258, predictability and stability are *each* requisites to compliance with Objective 2, and the Commission's proposal in that Order improperly conflated the two. *See* Phase II Comments at 57-62. The Commission does not do any better this time. In Order No. 5337, the Commission again avoids any explanation of how its proposals would lead to stability in rates.

Nor could it: allowing the Postal Service to raise rates multiple times the rate of inflation simply does not create rate stability.

When discussing the proposed CPI-plus two percentage point mandatory rate increase that the Postal Service would have to annually impose on noncompensatory products, the Commission claims that this "represents an appropriate mechanism for improving cost coverage while simultaneously maintaining stability and predictability in rates, as required by Objective 2. Both the Postal Service and the mailing community will have notice, through the Commission's announcement, of the products that are non-compensatory and thus subject to an additional 2-percentage point rate increase." Order No. 5337 at 157-58. The Commission pays similar lip service to rate stability when addressing the optional CPI-plus two percentage point authority for noncompensatory classes. *Id.* at 168 ("Both the Postal Service and the mailing community will be informed, through the Commission's announcement, which classes are non-compensatory and thus may be subject to a 2-percentage point rate increase in class-level rate authority.").

The Commission's belief that its proposals satisfy Objective 2 because mailers will have "notice" or be "informed" of the price increases reveals the same error that it committed in Order No. 4258: the Commission again appears to think that stability is achieved merely because rate increases—no matter how large—are announced in advance. This is not so. The Commission itself has recognized numerous times that rate stability is defined by the rate's *magnitude* and that rates that increase measurably faster than inflation violate the stability objective. *See* Phase II

Comments at 58-62. In the exigency case, for example, the Commission adopted Congress' admonition that it is of "primary importance" for predictability and stability that there be "the establishment of a regulatory system *that will provide for limits on the percentage changes in the Postal Service rates*. This system—frequently referred to as a rate or price cap—shall be designed to limit annual rate changes based on the level of inflation." Order No. 547 at 11 (emphasis added).

III. EVEN IF THE PROPOSALS COMPLIED WITH PAEA, THEY WOULD STILL HAVE DISASTROUS EFFECTS

It is obvious that the Commission's primary concern is that the Postal Service cannot raise sufficient revenue to cover its costs and meet its obligations. While no one wants the Postal Service to run out of money, we have previously explained why the Postal Service's financial situation is not nearly as dire as the Commission believes, and there is no realistic danger that the Postal Service will stop delivering the mail anytime in the foreseeable future. *See* Phase I Comments at 34-37 (explaining that the "Postal Service has sufficient liquidity to continue providing essential postal services for the foreseeable future."). While it may be true that the Postal Service would generally be better off if it were bringing in more revenue, it would also be in a better financial position if it had focused more vigilantly on cost cutting, and volume growth and retention over the past thirteen years.

The proposed changes to the system of ratemaking in Order No. 5337 are clearly intended solely to provide the Postal Service with more revenue. They would allow the Postal Service to raise rates well above inflation, which, if volumes remained stable, would increase postal revenues significantly. Therein, of course, lies the rub. As the Commission has acknowledged, volumes have been declining for years. And while the Commission's price elasticity estimates are ill-suited to predicting the volume loss that would be associated with price increases of the magnitude Order No. 5337 would allow, the Commission acknowledged in Order No. 4258 that higher prices will cause at least some loss of volume. *See* Order No. 4258 at 42-43. That is the problem: in proposing a radical revision of the ratemaking system, the Commission has offered *no* estimates of either volume declines or potential revenue increases, as reasoned decision-making requires of it.

Joint Commenters address the flaws in the Commission's proposals below. First, we explain how the Commission has failed to adequately consider the effect the cumulative price increases allowed by its proposals will have on volume. We then address each of the forms of supplemental authority in turn, demonstrating how each will fail to achieve its stated purpose while contributing to declines in volume, weakening incentives for cost control and efficiency, and failing to protect mailers from unreasonable price increases.

A. The Cumulative Impacts of the Proposed Supplemental Rate Authority Will Lead to Twin Impacts of Massive Price Hikes and Volume Declines

Joint Commenters disagree with the Commission's conclusion in Order No. 4257 that the current system of ratemaking is responsible for the problems the Postal Service is contending with today. *See, e.g.,* Phase II Comments at 55, n.31; Phase I comments at 47-59 (describing actions the Postal Service could take to improve its finances while complying with a CPI-limited price cap). Joint Commenters also disagree with the Commission about the degree of those problems and whether they require immediate and radical regulatory solutions or would be better addressed through legislative changes, Postal Service management actions, and moderate changes to the regulatory system that would incent proper management actions while retaining the CPI-based price cap. But Order No. 5337 makes clear that Joint Commenters and the Commission largely agree on the fundamental challenge facing the Postal Service: declining volumes and rising costs.

While the statutory prefunding obligations impose an unnecessary burden on the Postal Service's balance sheet, the Postal Service has suffered no consequences for failing to make these payments. As the Commission understands, these missed prefunding payments account for nearly all of the deficit the Postal Service accumulated during the PAEA era. *See* Order No. 4257 at 171 ("The accumulated deficit of $59.1 billion includes $54.8 billion in expenses related to prefunding the RHBF.") While a deficit of $4.3 billion accumulated over 10 years is not a cause for celebration, it is a problem different in kind and magnitude than the one the Commission believes it is trying to address.

Even with these obligations, it is easy to imagine how the Postal Service's finances would look if market dominant volume were not declining and the Postal Service was focused on improving the efficiency of its operations. In such a world, the Postal Service's revenues would be increasing every year as a result of CPI-limited price increases being applied to stable or increasing volume. These revenue gains would be enhanced by gains from the growth in competitive products (which, even in the real world, has mostly offset any contribution loss resulting from declining market-dominant volumes). If the Postal Service would only keep its costs increases in line with inflation, its long-term prospects would be significantly rosier than they are today.[2]

This simple thought experiment illustrates how the Postal Service's financial difficulties are primarily a result of above-inflation price increases, exacerbated to some degree by declining market dominant mail volumes. Any changes to the system of ratemaking in this docket must recognize that fact. Principally, the Commission must ensure that any changes will not reduce incentives for efficiency or accelerate volume loss and thereby exacerbate the very problems it is trying to solve. Unfortunately, by eviscerating the incentives of the price cap and authorizing rate increases that could in aggregate exceed CPI by well over six percent annually, the Commission's proposed rules will likely have just this effect.

1. The Commission's Proposal Would Authorize Dramatic Cumulative Price Increases

Indeed, the Commission seems not to acknowledge that it is authorizing cumulative annual price increases that could exceed six percent for some products.

The major difference between Order No. 4258 and Order No. 5337 lies in the Commission's abandonment of the additional two percent above CPI authority that Order No. 4258 would have authorized for all products. Perhaps recognizing that this authority was not tied to any specific revenue need of the Postal Service, the

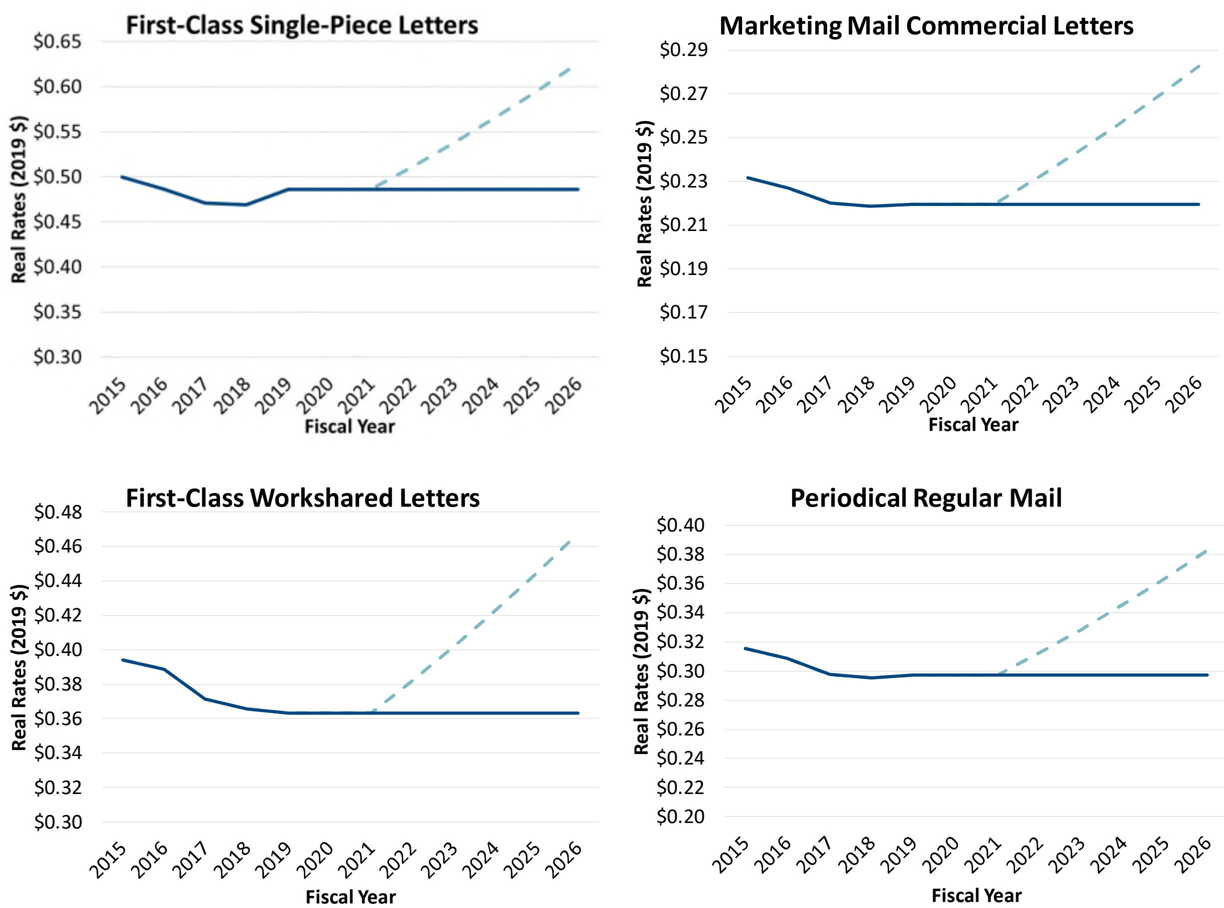
[2] Such an improvement would be consistent with the roll-forward analysis Joint Commenters presented in their Phase I comments, which showed how the Postal Service could continuing annual controllable operating income growth between FY 2015 and FY 2019. *See* Phase I Comments at 33-34; Library Reference ANM *et al.*-LR-RM2017-3/1, Rollfwd.xlsx.

Commission has replaced this authority with supplemental retirement authority and density rate authority. Each of these authorities could exceed one percent above CPI in a given year. Since the Commission has maintained the supplemental rate authority authorized in Order No. 4258 for noncompensatory products and functionally maintained the additional one percent of performance-based rate authority, the total annual rate increases authorized by Order No. 5337 will likely exceed those authorized by Order No. 4258.

As illustrated in the Declaration of Dr. Kevin Neels and Dr. Nicholas Powers ("Brattle Declaration") as depicted in the tables at pages 7 and 8, *supra*, the cumulative price increases for market-dominant products over the next five years could be massive. Because the available authority for the Postal Service can increase when volume declines, Order No. 5337 will likely authorize price increases even further above CPI. *See* Brattle Decl. at ¶ 46.

The Commission's attempted justification for each of these supplemental rate authorities—that they allegedly "address[] the underlying causes of the failure to achieve the objectives"—is unpersuasive. *See* Order No. 5337 at 11. As we explain below, these proposals do not "address" the problems the Commission seeks to remedy. And, from a mailer's perspective, the reasoning behind a price increase is irrelevant. Mailers will pay one postage rate; they will not have the option of choosing between the standard rate, the density rate, and the retirement rate. As Meredith Corporation, the largest magazine publisher in the U.S., states: "The PRC's method for calculating different types of above-CPI rate authority is not Meredith's main concern. Our concern is the total postage price that we will have to pay when all of the PRC's methodologies are implemented." Meredith Corp. Comments (Feb. 3, 2020) at 1; *see also* Brophy Decl. (Consumer Reports) at ¶ 13 ("It does not matter to CR or to our members and donors that the PRC is trying to fix so-called exogenous costs. What we see is that our prices will skyrocket and postal mail volumes will drop."). If the Postal Service exercises all its authority for Marketing Mail Flats and raises prices by more than six percent above CPI each year, mailers of that product will have to decide whether they can obtain a reasonable return on their mailing investment at that cumulative price level.

Make no mistake about it: the cumulative price increases mailers will be evaluating will be significant. The dramatic real price increases the Commission's proposals would authorize are vividly illustrated in the following charts Dr. Neels and Dr. Powers have prepared, which compare the authorized increases to a base case of CPI-U increases through 2026:



Brattle Decl. at ¶ 37, Figure 1. In these charts, the solid line represents the base case in which prices increase at CPI-U, and the dashed line indicates price increases in real terms under the Commission's proposals in Order No. 5337, relying on the indicative magnitudes of price increases presented by the Commission.

2. These Cumulative Increases Will Significantly Accelerate Market Dominant Volume Decline

Joint Commenters have repeatedly raised the issue of induced volume decline in this docket. *See* Phase I comments (Cohen Decl. at 5-8; Faust Decl. at ¶ 12); Phase II Comments at 65-70 (discussing how Periodicals and nonprofit mailers will decrease volume in response to price increases). The Commission's Order No. 4258 wrongly projected revenue impacts of above-CPI rate increases based on the assumption that volumes would remain steady even though PRC admitted that "recent volume trends and the effects of price elasticity" made that unlikely. Phase II Comments at 80 (quoting Order No. 4258 at 42). Order No. 5337 does not remedy these defects. In fact, it compounds them by authorizing price increases that could exceed even those suggested in Order No. 4258. Despite granting increased pricing authority, the Commission fails to make any projections whatsoever regarding volume impacts of the price increases the order would authorize. Accordingly, the Commission should evaluate the volume impacts of its pricing proposals at a cumulative level, not based on whether the individual supplemental authorities will address a specified problem. The Commission has not done so in Order No. 5337.

Joint Commenters, on the other hand, have commissioned such an analysis. Dr. Neels and Dr. Powers assess the likely impact of price increases of the magnitude the Commission's proposals would authorize. Brattle Decl. at ¶¶ 34-53. They note that using the Postal Service's own estimates of price elasticity, rate increases of the magnitude described in the previous section "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.

There are good reasons to believe that this estimate likely understates the volume loss that would occur as a result of the Commission's proposals. Brattle Decl. at ¶¶ 44, 46. Because the existing Postal Service price elasticity models are based on 16 years of data during a period in which price increases, on average, have simply tracked inflation (*i.e.,* when real costs for mailers have not risen), they were not developed from observations of how mailers respond to large and sustained above-CPI price increases. *See* Brattle Decl. at ¶ 42.

The Commission may point to the exigency rate case, but that was not remotely comparable to what the Commission is proposing today. The above-CPI rate increases authorized in that docket were different in kind and magnitude from those proposed here, and they were time-limited from the outset and set to expire as soon as the Postal Service recovered its losses. *See* Order No. 3186 in Docket No. R2013-11, *Order On Removal Of The Exigent Surcharge* (Mar. 29, 2016) at 2-3. The approved exigent authority was $4.634 billion. This exigent increase was not baked into the rate base, meaning that there would be no cumulative rate impact over time.[3] It is possible that the annual increases proposed in Order No. 5337 for all products will exceed the 4.3 percent increase authorized in the exigency case, and certain that they will for non-compensatory products.

The long-term rate impact of the Order No. 5337 proposals dwarfs that of the exigency increase. The total five-year increase above inflation is approximately 17 percent. Brattle Decl. at ¶ 36. In sum, the Commission is proposing to award the Postal Service with total supplemental price authority that can increase market-dominant mail and services revenue by $7.7 billion.[4] Because there is no expectation

---

[3] The 4.3 percent exigent increase took effect in January 2014 and was rolled back on April 10, 2016.

[4] Our calculation applies the proposed cumulative increase to the USPS FY2019 Total Market Dominant Mail and Services Revenue. *See* Docket No. ACR2019, Library Reference USPS-FY19-1, Public_FY19CRAReportRev.1.10.2020.xlsx, "Cost2", cell D33.

of a rollback in these rates, the present value of these increases in perpetuity is a whopping $220.6 billion—well more than an order of magnitude higher than the value of the exigency-based rate hike. It seems obvious that price increases of such differing magnitude would have disparate impacts on mailer behavior.

In fact, mailers themselves tell us so. According to Consumer Reports, "[i]f the PRC permits the Postal Service to raise prices on market-dominant mail in this way, we estimate needing to cut our acquisition Marketing Mail volume by about 9.5M pieces in the same time period—a cumulative loss of 18.35 percent in our prospecting volume alone, which creates a downstream effect." Brophy Decl. ¶ 11. The American Lung Association's board of directors and management would "divert resources away from direct mail," reducing ALA's "ability to raise significant funding using the mail to combat lung disease." Finstad Decl. ¶ 9. The "mere possibility of the proposed postage rate hikes has already had an impact on Guideposts," and if the Commission's proposals were actually implemented the organization "would be forced to reduce direct mail volumes." O'Sullivan Decl. ¶¶ 6-7. The Southern Poverty Law Center "would be forced to reduce the amount of mail for its fundraising appeals, publications, investigative reports, and other important communications." Clark Decl. ¶ 25. And Disabled American Veterans will be forced "into the untenable position of having to further reduce the volume of mail sent each year." Burgoon Decl. ¶ 10.

The Postal Service elasticity estimates likely, therefore, understate elasticity under the scenarios the Commission's proposal would allow. Dr. Neels and Dr.

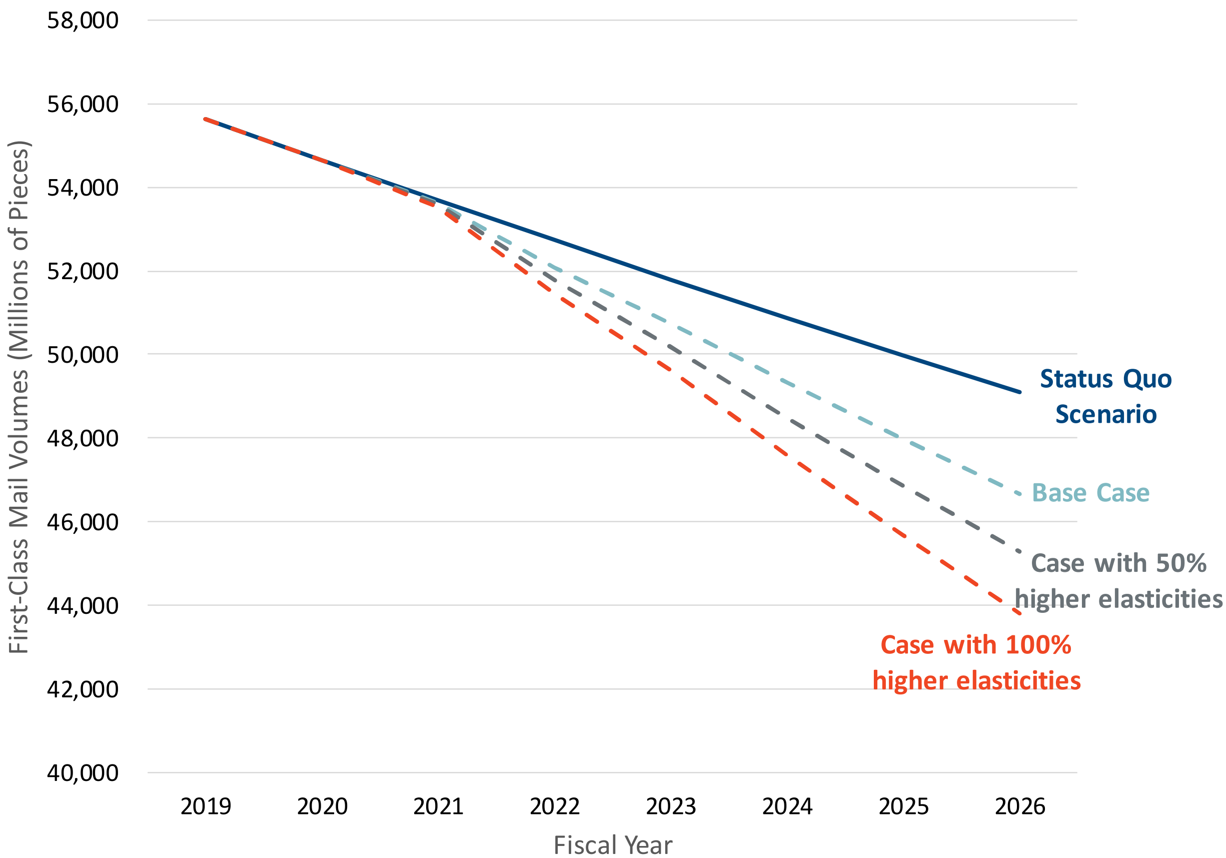
Powers explain that "as prices move outside the range over which the data are calibrated, the estimated elasticity parameters are necessarily less reliable." Brattle Decl. at ¶ 43. Generally speaking, larger price increases will make demand increasingly price-elastic because "they present erstwhile consumers of the good or service in question with increasingly large incentives to search for and find acceptable substitutes." *Id.* at ¶ 44. In the postal context, this dynamic means that mailers with the ability to do so may be more likely to leave the mail entirely in favor of digital alternatives. The growth and importance of digital technology itself may also increase the price sensitivity of mailers. Brattle Decl. at ¶ 45. In light of these factors, and when faced with the prospect of rate increases of this size, mailers may not wait to see what the Postal Service does with its increased rate authority (*i.e.*, whether it uses all of its authority in each year). Instead, they may alter their business models to take advantage of other modes of communication and may not return to the Postal Service even if the prospective price increases fail to materialize. Brattle Decl. at ¶ 46; *see also* O'Sullivan Decl. ¶ 6 ("once we make this conversion, we will not be able to return to our previous mail volume levels.").

Accordingly, Dr. Neels and Dr. Powers caution that "far greater responses to rate increases are very plausible," and "[t]he mere possibility of sustained and unprecedently large rate increases may trigger sudden and potentially significant volume losses." Brattle Decl. at ¶ 53. Additionally, at some point a "tipping point" could be reached where "a large exodus of mail volume in a given year triggers a large density authority related rate increase in a subsequent year, setting the Postal

Service on a vicious cycle where a dwindling number of mailers pay ever-increasing rates to cover the costs of the increasingly oversized and under-utilized Postal Service network." *Id.*

Nevertheless, likely effects of the Commission's proposals on mail volume can be assessed quantitatively. Using data and parameters from the Postal Service's demand equations, cost and revenue data, Postal Service data on delivery points, and historical data provided to the Commission, Dr. Neels and Dr. Powers quantify the impact of these proposals in a variety of scenarios. Brattle Decl. at ¶ 47 In the "status quo" scenario, they assume the current price cap is maintained and price increases are limited to inflation. Brattle Decl. at ¶ 48. In the "base case" scenario, they assess the effects of the Order No. 5337 proposal using existing Postal Service elasticity estimates. *Id.* In other scenarios, consistent with the preceding discussion, they estimate the volume impacts of the Order No. 5337 proposal if demand turns out to be more elastic than these estimates would suggest. *Id.* Their results, reproduced in the charts below for First-Class Mail and Marketing Mail, illustrate how the Commission's proposals will accelerate volume decline versus the status quo scenario:

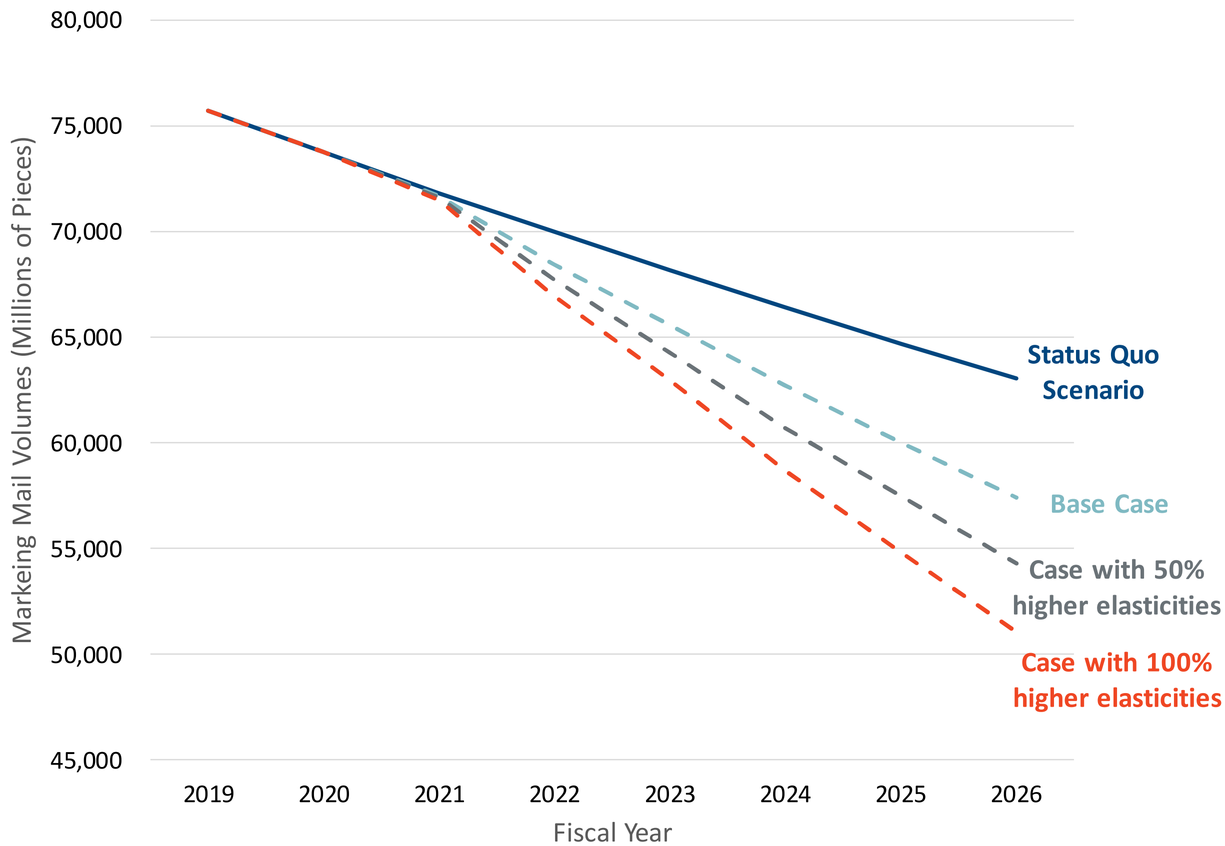
Figure 1: First-Class Volume Under Different Scenarios, FY19-FY26



Notes and Sources:

This chart plots First-Class mail volumes that can be expected to result from the analysis of the various scenarios, as described above.

Figure 2: Marketing Mail Volumes Under Different Scenarios, FY19-FY26



Notes and Sources:

This chart plots Marketing Mail volumes that can be expected to result from the analysis of the various scenarios, as described above.

Brattle Decl. at ¶ 50, Figures 3 and 4. Table 2 of the Brattle Declaration displays these changes numerically, indicating volumes could decline between 51 to 111 percent more for First-Class Mail versus the expectation under the status quo, 62 to 131 percent more Marketing Mail, and 18 to 37 percent more for Periodicals:

		Status Quo	Base Case	50% Higher Elasticities	100% Higher Elasticities
		[A]	[B]	[C]	[D]
First-Class Mail					
Absolute Change (Millions of pieces)	[1]	(4,590.8)	(6,961.0)	(8,303.6)	(9,754.9)
Relative Increase in Volume Loss	[2]		52%	81%	112%
USPS Marketing Mail					
Absolute Change (Millions of pieces)	[3]	(8,807.5)	(14,271.0)	(17,279.7)	(20,461.6)
Relative Increase in Volume Loss	[4]		62%	96%	132%
Periodicals					
Absolute Change (Millions of pieces)	[5]	(954.5)	(1,078.6)	(1,145.7)	(1,216.4)
Relative Increase in Volume Loss	[6]		13%	20%	27%

Brattle Decl. at ¶ 51, Table 2.

As discussed above, the Commission has not publicly estimated the volume impacts of its proposal, much less grappled with the entirely foreseeable outcome that volume will decline faster under its proposals than it would under the CPI-limited price cap. The Commission's only retort to such arguments seems to be to reiterate that the Postal Service is not obligated to use the full rate authority it has been granted and should exercise its discretion not to increase prices to a level that would cause counterproductive volume losses. *See, e.g.*, Order No. 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").

There are multiple problems with relying on the Postal Service's "business judgment" to protect mailers (and the Postal Service from itself). First, there is a well-established record of the Postal Service eventually using virtually all of the rate authority it has been granted. Brattle Decl. at ¶ 40. Second, the Postal Service has publicly advocated for increased rate authority, in this docket and in other settings. *See, e.g.*, Docket No. RM2017-3, Comments of the United States Postal Service (March 20, 2017) at 175-228 (arguing for replacement of the current system with a system that grants the Postal Service to set prices at any level subject only to monitoring by the Commission as to compliance with the objectives).[5] It is unlikely, after undertaking such efforts, that it would not take advantage of such rate authority. Third, the Commission's proposals are clearly premised on the Postal Service taking advantage of its full authority. The Postal Service must use its supplemental authorities in the first price change after they become available, or it loses access to that authority in future rate changes.[6] Further, there would be no point in granting authority tied to the amount of revenue the Commission believes the Postal Service is losing from supposedly exogenous factors if the Commission did not believe the Postal Service would use that authority to cover these obligations.

---

[5] *See also* Docket No. RM2017-3, Initial Comments of the United States Postal Service in Response to Order No. 4258 (March 1, 2018) at 40-48; *The Financial Condition of the Postal Service: Hearing before the House Comm. on Oversight and Reform, United States House of Representatives* 116th Cong. 14-15 (Apr. 30, 2019) (Statement of Megan J. Brennan, Postmaster General and Chief Executive Office, United States Postal Service); USPS FY2019 10-K at 42 ("We continue to assert that the price cap should be eliminated, and that the PRC should engage in after-the-fact, light-touch review of the Market-Dominant prices we set to ensure that those prices are just and reasonable.").

[6] This feature further undermines the responsibility for managing its customer portfolio that was a central feature of PAEA, granting the Postal Service authority over the prices it charges customers as long as it stayed within the overall inflation capped maximum price.

But perhaps most importantly, the Postal Service will be motivated to use all of this supplemental pricing authority. As Dr. Neels and Dr. Powers explain, "the Postal Service's estimates of price elasticity, which are generally less than 1 in absolute value, imply that by raising rates, it can increase market dominant contribution and its overall profits. Indeed, it is because of the likelihood that the Postal Service would abuse unlimited freedom to raise rates that PAEA subjected the Postal Service to regulatory oversight by the Commission." Brattle Decl. at ¶ 40.

Ultimately, not only do the Commission's proposals do nothing to address the root causes of the Postal Service's financial problems—volume loss and costs that are rising faster than inflation—but they will have the opposite of their intended effect, driving volume from the mail and creating the risk of a death spiral for the Postal Service. As Joint Commenters explained in their Phase II Comments, the CPI-based price cap requirement of PAEA was motivated by a desire to avoid precisely this outcome. See Phase II Comments at 81-82 (citing Cong. Rec. S11674 (Dec. 8, 2006) (Sen. Collins) (supporting a price cap to avoid "a potential 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"); *accord* Cong. Rec. H65613 (July 26, 2005) (Chairman Davis comments on H.R. 22)).

The fact remains that the Postal Service cannot solve its financial problems simply by raising prices, and the Commission cannot guarantee the Postal Service sufficient revenue to cover its obligations. As Joint Commenters explained in their Phase II comments, "[W]hen a regulated industry is in financial trouble . . . there is nothing a regulator can do to guarantee a 'fair rate of return.'" Phase II Comments at 80 (quoting WILLIAM J. BAUMOL AND ALAN S. BLINDER, MICROECONOMICS: PRINCIPLES AND POLICY at 442 (7th ed. 1998)). The Postal Service, like any business, is subject to the laws of supply and demand. If it raises its prices, it will depress demand for its services.

As the analysis above shows, the price increases authorized by Order No. 5337 would almost guarantee significant volume loss, thus exacerbating one of the primary problems the redesigned system of ratemaking should be seeking to remedy. They will also allow the Postal Service to increase prices well above inflation, thus eliminating the incentives to reduce costs that are imposed by the current price cap. Finally, as a basic matter, allowing these price increases fails to protect captive mailers from the Postal Service's monopoly power. While the price increases will accelerate volume declines, mailers will still enter billions of pieces of mail. PAEA requires that the rates for these mailers be just and reasonable, and rate increases averaging 40 percent over five years on products that already cover their attributable costs facially violate that requirement. *See* 39 U.S.C. § 3662(b)(8).

B. The Density Rate Proposal Will Undermine, Not Achieve, the Commission's Objectives

The Commission's proposed volume density supplemental authority suffers from several theoretical flaws that will almost certainly result in its failure to improve the financial circumstances of the Postal Service. This supplemental authority subverts the incentives typically provided for in price cap regulation by retroactively compensating the Postal Service for volume loss. Through this backwards-looking approach, it undermines the regulatory bargain by placing all the risk of volume loss on postal customers. By failing to distinguish between volume loss resulting from exogenous factors such as technological change and that resulting from factors within the Postal Service's control, such as quality of service, it reduces incentives for the Postal Service to maximize efficiency, embark on growth initiatives, and ensure its customers are receiving quality service. The no-strings-attached rate authority provides a perverse incentive, awarding the Postal Service additional rate authority for volume declines it potentially could have prevented.

Additionally, the density authority is not rationally related to the expenses it is intended to recover. The Commission has made no attempt to tie the additional rate authority it would award to the financial impact either a decline in volumes or an increase in delivery points has on the Postal Service.

1. The Proposal is Theoretically Flawed

As Dr. Willig explains in his declaration, declining volumes are a real problem for a regulated entity with high fixed costs, and it is reasonable in certain circumstances for a system of regulation to account for exogenous volume declines. *See* Willig Decl. at ¶ 20. The modifications the Commission has proposed in Order No. 5337, however, are not a reasonable response to the problem of declining volumes. In fact, they violate basic tenets of price cap and industrial organization theory.

As Dr. Willig explains, any adjustment to the price cap to account for declining volume should be prospective, with an element of risk sharing between the Postal Service and its customers. Willig Decl. at ¶ 20. By contrast, "adjustments to allowed prices that are based on actual, measured volume loss every year are decidedly contrary to the fundamental concept of price caps and would confer dysfunctional incentives on the regulated entity." *Id.* Instead, any adjustment should be "established based on the predicted future decline in mail density." *Id.* at ¶ 21. If, like the Commission's proposal, the adjustment represents an attempt to make up for past losses, the adjustment "would thoroughly undermine the efficiency incentives of the price cap mechanism because the regulated firm could look forward to true-up compensation as a replacement for its needed efforts to control cost increases and volume losses." *Id.*

Not only does a forward-looking approach appropriately share risk of volume declines between mailers and the Postal Service, but it creates "an incentive for the Postal Service to limit density declines to the extent it can because it would directly benefit." *Id.* at ¶ 24. By contrast, the Commission's proposal "in effect rewards the Postal Service for density declines by providing additional annual pricing authority retroactively without providing any built-in incentive for the Postal Service to limit density declines (to the extent it can do so, even indirectly)." *Id.*

2. The Postal Service Should Not Be Compensated for Volume Declines Within its Control

Additionally, as Dr. Timothy J. Brennan explained on behalf of the Public Representative in Phase I of this proceeding, any adjustment to the price cap designed to account for declining volumes "should be based on events outside the control of USPS, such as the growth of the Internet and the consequent use of electronic communication instead of USPS services. In particular, if demand falls because USPS reduces the quality of service, it should not be rewarded through higher rates."[7] The Commission appears to recognize this principle in Order No. 5337, stating that it is providing the Postal Service with additional rate authority to compensate it for "increases in per-unit cost that are driven by measured declines in year-over-year density, which are outside of the Postal Service's control." Order No. 5337 at 77. But the Commission's proposal is not consistent with this reasoning.

As Dr. Neels and Dr. Powers explain, the density authority does not differentiate between density declines resulting from exogenous volume decreases (*i.e.*, technology-driven decreases in mail volumes) and those that result from rate increases or other factors within Postal Service control. Brattle Decl. at ¶ 30. This design flaw is exacerbated by the self-reinforcing nature of the density authority, through which mail volume losses that result from sub-optimal marketing efforts (or other controllable factors) will be *rewarded* with additional rate authority in the future. Brattle Decl. at ¶ 33.

This design flaw is further exacerbated by the fact that there are *numerous* factors associated with mail volume declines that are clearly within the Postal Service's control. These include things like weak marketing efforts and a failure to price services according to mailer demand. Then, there is poor customer service: beyond the Postal Service's shabby treatment of its mailer base (as reported to Joint Commenters by many of our members), instances like the Postal Service's surprise publication of proposed changes to Marketing Mail content standards springs to

---

[7] Docket No. RM2017-3, Declaration of Timothy J. Brennan for the Public Representative (Mar. 20, 2017) at 14 ("Brennan Declaration").

mind. *See* USPS Marketing Mail Content Standard, 83 Fed. Reg. 42624 (Aug. 23, 2018). That proposal would have harmed a large number of our members, required us to fight the effort (we won), and failed to inspire any loyalty from market-dominant mailers to the Postal Service. There is also, of course, the Postal Service's inability to contain cost and expense growth, as well as its failed investment in the Flat Sequencing System ("FSS"). We have addressed this issue *ad nauseum*. *See, e.g.,* Docket No. R2019-1, MPA Comments (Oct. 30, 2018) (reiterating that the Commission should not consider above-CPI price increases for Periodicals until the Postal Service ends the failed FSS experiment). But when the Postal Service's own Inspector General reports that flats mail processed on the FSS costs three times as much per mail piece as those processed on the AFSM, and that flats volume "will continue to decline as customers move to less expensive ways to achieve their communication goals," that is something within the Postal Service's control. *See* USPS OIG Report No. AR-18-008 (July 26, 2018). It is certainly not an exogenous factor for which the Postal Service should be rewarded with extra pricing authority.

3. The Commission Fails to Account for the Large Cumulative Impact of the Proposed Price Increases

The impact of the cumulative price increases described in section III.A. must also be accounted for when assessing the implications of this proposal. Dr. Neels and Dr. Powers explain that these increases "can be expected to accelerate future volume declines," which, all things being equal, "will accelerate decreases in density." Brattle Decl. at ¶ 31. They further note that the institutional cost ratio multiplier that partly determines the amount of density authority is likely to increase because attributable costs can be expected to decrease more quickly than institutional costs. *Id*. For this reason, the full effects of the density adder will exceed the backward-looking estimates provided by the Commission in Table IV-3. *Id.* at ¶ 31.

Dr. Neels and Dr. Powers conclude that "[t]he year-over-year effect of sustained price increases means that the density authority embeds a positive feedback loop in the regulatory structure of the Postal Service. The presence of this feedback loop means that the Commission's Table IV-3 is not a reliable indicator of the future impact of its proposed density authority." *Id.* at ¶ 32.

4. The Density Authority Is Not Rationally Related to The Impacts of Declining Density

The Commission's density authority proposal is arbitrary and capricious because the Commission fails to make any credible effort to quantify the impact of the change in density on postal finances and the size of the adjustment required to offset it. The arbitrariness of the Commission's implementation can be seen in its dramatic contrast with the estimates that would be produced by applying previously approved and longstanding Commission methods to calculate the financial impact of density reductions.

Established PRC methods for calculating the financial impact of changes in volume and delivery points show that the proposed adjustment factor substantially overstates the negative impact of these factors on postal finances. Specifically, in its Order, the Commission shows (based upon an analysis of changes in density from FY 2011 to FY 2018) that if its proposal had been implemented historically, the Postal Service would have received 8.96 percent density-based rate authority from FY 2013 to FY 2019, translating into approximately $6.3 billion in FY 2019 in revenue.[8] This is an order of magnitude above the actual negative impact (about $600 million) of these factors on postal finances using established methods.

First, using the Commission's method to quantify the impact of volume changes on postal finances from Docket No. R2013-11[9]—multiplying the per-piece contribution ("profit") by mail class by the change in volume in the mail class and summing—the impact of mail volume changes on postal finances was minimal. *See* Figure C.

Figure C – Contribution Loss (FY 2011 – FY 2018)

Mail Class	Volume			Contribution	
	FY 2011	FY 2018	Change	Unit	Change
First-Class Mail	73.1	57.3	(15.8)	$0.229	($3.6)
USPS Marketing Mail	84.7	77.3	(7.4)	$0.064	($0.5)
Periodicals	7.1	5.0	(2.1)	($0.123)	$0.3
Package Services	0.7	0.6	(0.0)	$0.035	($0.0)
Priority Mail Express	0.04	0.03	(0.01)	$15.474	($0.2)
Priority Mail	0.8	1.1	0.3	$1.973	$0.6
First-Class Package Service	0.6	1.3	0.6	$0.924	$0.6
Ground	0.4	3.1	2.7	$1.028	$2.8
Total					**($0.1)**
Source: ANMetalRM2017-3 Comment Wkpapers.xlsx, "Vol-Related Contribution Change" Note: Volumes and Contribution Changes are in billions					

[8] The $6.3 billion is calculated by multiplying the 8.96 percent of density-based rate authority against total revenues of $69.9 billion from Docket No. ACR2019, USPS-FY19-1. This is consistent with the Commission's concession that the entire burden of density declines should not be borne by market dominant products in its use of both Market Dominant and Total Volume in calculating density authority. Even if the 8.96 percent of density-based rate authority were applied just to Market Dominant revenue, the resulting $3.9 billion is still multiple times higher than the actual negative impact of these factors.

[9] *See* Order No. 1926 in Docket No. R2013-11, *Order Granting Exigent Price Increase* (Dec. 24, 2013) at 106.

The primary reason for this result is that volume gains were concentrated in mail classes (*i.e.*, classes consisting primarily of packages) with high per-piece contribution and the beneficial effect of these volume gains largely offset the negative effect of larger volume declines in mail classes with much lower per-piece contribution.

Second, the established approach for estimating the impact of increasing number of delivery points on Postal Service costs is to increase institutional carrier costs to reflect the higher non-volume workload. This approach was last used in Docket No. R2013-11.[10] Using this approach in FY 2014, the Postal Service last estimated that the annual cost increase due to increased delivery points was about $76 million[11] or about $530 million over seven years. Furthermore, this estimate is biased upward because it doesn't reflect the fact that new delivery points are generally lower-cost delivery points.[12] Indeed, the Postal Service's move towards cluster boxes neutralizes much of the impact of delivery point growth. Brattle Decl.

---

10 See the non-volume workload factors calculated in Docket No. R2013-11, USPS-R2010-4R/8, Input_12.xls, "Non-vol Wkld", cells D42:D46, and the result of the non-volume workload adjustment in FY2014BR.CompSumRpt.BR-Final.xls, "Component Summary", cell G300.

11 *See* Docket No. R2013-11, USPS-R2010-4R/8, FY2014BR.CompSumRpt.BR-Final.xls, "Component Summary", cell G300.

12 *See* UNITED STATES POSTAL SERVICE, POSTAL OPERATIONS MANUAL (POM), https://about.usps.com/postal-bulletin/2018/pb22492/html/updt_002.htm ("[Low-cost] Centralized delivery is the preferred mode of delivery for all new residential and commercial developments. [Higher-cost] Curbside, sidewalk delivery, and door modes are generally not available for new delivery points, with very rare exceptions, as determined by the Postal Service in its sole discretion, on a case-by-case basis."). GAO has found that centralized/cluster box delivery is the lowest cost delivery mode. https://www.gao.gov/products/GAO-14-444.

at ¶ 29. In a recent update to its Postal Operations Manual, the Postal Service states that "centralized delivery is the preferred mode for new or extended business or residential delivery points, with very rare exceptions, as determined by the Postal Service in its sole discretion."[13] Accordingly, new delivery points will simply be less costly to serve, as dozens or even hundreds of mailboxes can be co-located. Brattle Decl. at ¶ 29.

Additionally, Dr. Neels and Dr. Powers explain that mail density, which the Commission defines as a function of both mail volumes and delivery points (Order No. 5337 at 64), is most relevant to delivery costs. Brattle Decl. at ¶ 27. Delivery points, for example, are not a recognized cost driver of several other large cost segments and components, such as mail processing and transportation. *Id.* The Commission's proposal does not account for these other cost drivers or quantify the impact of declining density on the Postal Service's ability to recover these costs. And it does not explain why growth in delivery points should be a prime determinant of the additional authority the proposal would grant when, as shown above, this growth has little impact on the Postal Service's cost structure.

As Dr. Neels and Dr. Powers relate, a simple calculation can be used to demonstrate why the Postal Service's problems are not driven by growth in delivery points. Brattle Decl. at ¶ 28. Relying on existing Postal Service costing methodology and an average growth of delivery points of 0.9 percent per annum, they estimate

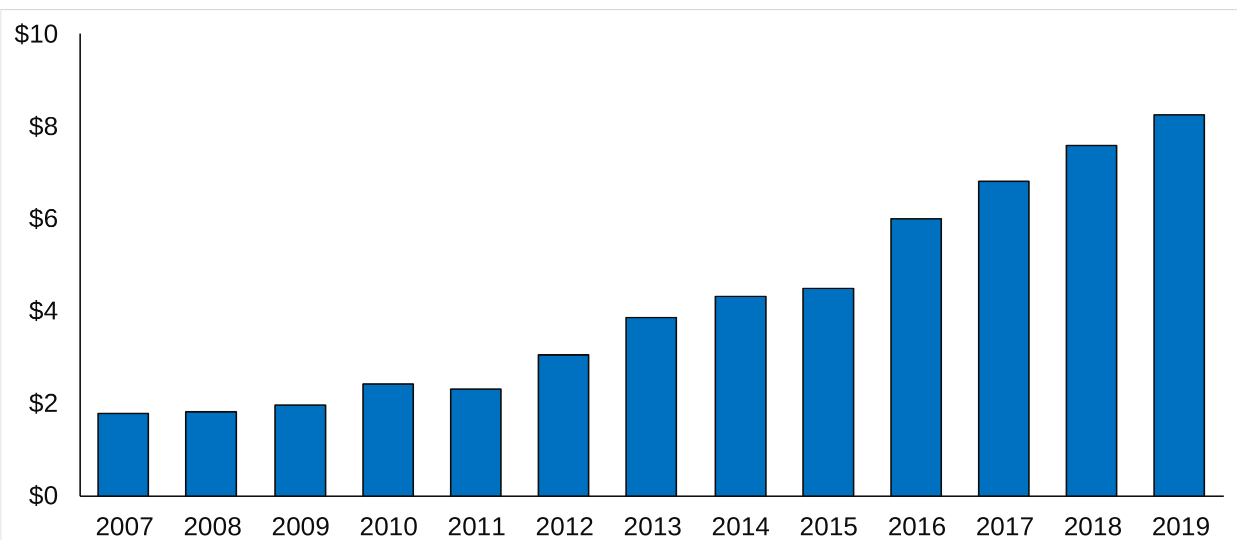
---

[13] See, *e.g.*, https://about.usps.com/postal-bulletin/2018/pb22492/html/updt_002.htm. and https://about.usps.com/publications/pub265a/pub265a_006.htm.

that "prices would need to increase by 0.23% annually on average in order to offset the increased delivery costs (including affiliated costs)." *Id.* However, under the Commission's formula, the same increase in delivery points (holding volume constant) would result in additional rate authority of 0.38 percent. *Id.* In other words, the Commission' proposal would grant the Postal Service 65 percent more rate authority than even the Postal Service's costing suggests it needs.

Finally, the density adjustment does not recognize the increasing contribution to fixed costs provided by ongoing growth in competitive products. Since FY 2013, the Postal Service has increased competitive product prices by 45.7 percent. These price increases, combined with volume growth, have resulted in the contribution of competitive products increasing from $3.9 billion in FY 2013 to $8.2 billion in FY 2019.

Figure D – Competitive Products Contribution (Billions)



Source: ANMetalRM2017-3 Comment Wkpapers.xlsx, "CP Contribution"

No effort was made by the Commission to adjust the price cap for these substantial tailwinds provided by above-inflation competitive product prices increases. While the growth in competitive product volumes have recently moderated, the tailwinds will likely continue (a fact that must not be ignored). In particular, the Postal Service projects (1) competitive product revenue to increase by $800 million in its recently-filed FY 2020 Performance Plan[14]; and (2) forecasts modest long-term growth in competitive product volumes in its FY 2020-2024 Strategic Plan[15]. Furthermore, the Commission has found Postal Service package delivery prices have consistently outpaced inflation despite the competitive nature of the package delivery industry.[16]

Accordingly, not only is the density adder theoretically flawed, but it is not rationally related to Postal Service cost drivers, does not reflect the actual impact of declining density, and fails to properly recognize the impact of contribution from competitive products. The proposal is arbitrary and capricious and should be withdrawn.

---

14 UNITED STATES POSTAL SERVICE, FISCAL YEAR 2019 ANNUAL REPORT TO CONGRESS, at 30.

15 UNITED STATES POSTAL SERVICE, THE U.S. POSTAL SERVICE FIVE-YEAR STRATEGIC PLAN, FY2020-FY2024, at 17.

16 Order No. 4963 in Docket No. RM2017-1, *Order Adopting Final Rules Relating To The Institutional Cost Contribution Requirement For Competitive Products* (Jan. 3, 2019), at 10-12, 169-170; *see also* Order No. 5308 in Docket No. CP2020-5, *Order Approving Price Adjustments For Competitive Products* (Nov. 15, 2019) at 3, Table I-1.

C. The Proposed Retirement-Based Authority Is Unnecessary and Misguided

As the Commission found in Order No. 4257, the Postal Service's "accumulated deficit of $59.1 billion includes $54.8 billion in expenses related to prefunding the RHBF." Order No. 4257 at 171. In other words, one could argue the prefunding obligations are responsible for nearly all of the paper losses the Postal Service has suffered in the PAEA era. *See* Order No. 5337 at 90 ("Although these congressionally mandated payments are outside of the Postal Service's direct control, they continue to be one of the primary drivers of net loss."). In a change from Order No. 4258, Order No. 5337 attempts to address this expense by tying some of the above-CPI authority provided to the retiree health benefit and other retirement benefit prepayments PAEA imposes on the Postal Service. Rather than provide a blanket two percentage points of above-CPI rate authority, "[t]he Commission proposes to provide additional price cap authority . . . for the statutorily mandated amortization payments for unfunded retirement liabilities, including RHB, FERS, and CSRS, as computed by OPM for each fiscal year." Order No. 5337 at 95. The Postal Service would be required to make partial payments against its outstanding liabilities after the first year of receiving revenues under this provision, and if it fails to make these payments, it will forfeit the balance of additional authority. After a five-year phase-in period, the Postal Service would be required to pay all the revenue collected under this provision toward amortization obligations.

While the Commission may believe this proposal is at least better targeted to the underlying problem it identified than the blanket authority proposed in Order

No. 4258, the Commission still should not pursue it. It is both theoretically deficient and unnecessary. First, it singles out and attempts to true up a single expense that the Postal Service was always intended to recover in its rates, an action that is contrary to incentive ratemaking theory and amounts to impermissible retroactive ratemaking.[17] Second, it attempts to solve a theoretical problem that is nonexistent in practice. Resuming prefunding payments would not place the Postal Service or its retiree programs in meaningfully better financial shape than they are now. Finally, the proposal will contribute to further volume losses, potentially leaving the Postal Service in a worse financial position than it currently faces.

1. The Proposal is a True-Up Designed to Recover Prior-Period Expenses

As Dr. Willig explains, regulatory systems that react to increases in the regulated entity's costs by providing that entity with greater rate authority reduce incentives to operate efficiently and, unlike price caps, do not do a good job of replicating competitive forces that protect customers from excessive pricing. *See* Willig Decl. at ¶¶ 8-11. Incentive regulation, such as the price cap required by PAEA, on the other hand, divorces the price the regulated entity can charge from its costs. *Id.* at ¶ 9 n.4, ¶ 11. Under this type of regulation, the prices the regulated entity can charge "do not rise with increases in the costs incurred by the firm, nor with increases in the firm's capital stock, nor with diminutions in the consumer demand for the

[17] *See, e.g.*, *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018) ("the rule against retroactive ratemaking 'prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods.'") (quoting *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992)).

firm's outputs." *Id.* at ¶ 11. As a result, a price cap system "both protects consumers from excessive pricing where effective competition is absent, while still presenting the firm with strong incentives to behave competitively since it will be rewarded at its bottom line for its productivity, cost control and market appeal." *Id.*

A key feature of an effective price cap system is that it does not allow "backward looking true-ups." *Id.* at ¶ 12. Instead, the system "intentionally leaves some risks to each side arising from exogenous cost or demand changes that are lower or higher than was anticipated." *Id.* In fact, "[i]t is crucial the regulated entity and consumers should *prospectively* share in the risk of cost increases that are higher, ex post, than expected." *Id.* at ¶ 13 (emphasis added). While the price cap may be reevaluated after a period of time, this evaluation is not designed to true-up for past cost changes—those risks were already shared when the cap was initially established. Instead, the goal is to look at the going-forward value of exogenous anticipated trends in factors "such as improvements in the industry's technology, or changes in the anticipated rates of inflation in the industry's input prices and wages, or alterations in the firm's mandated outputs, or thinning of the volume of demands where there are scale economies." *Id.*

The Commission's retirement authority proposal violates all of these tenets of incentive regulation. It is a transparent attempt to retroactively correct the price cap to recover costs that the Postal Service failed to recoup since 2006. Instead of respecting the bargain that Congress, the Commission, and the Postal Service entered through PAEA and its CPI-U price cap, the Commission proposal retroactively shifts all the risk of underperformance to mailers. As Dr. Willig notes, "if the Postal Service's retirement benefit funding obligations were built into the level of allowed prices previously, then it would be highly problematic to allow the Postal Service pricing authority that effectively lets the Postal Service collect this cost a second time." Willig Decl. at ¶ 24, n.16.

There can be no question that Congress and the Commission intended for the Postal Service to recover the costs of its prefunding obligations while remaining within the CPI-U price cap. In the same law in which Congress mandated the use of a CPI-based price cap, it required the Postal Service to make prefunding payments ranging from $5.4 billion to $5.8 billion annually to pay down USPS unfunded retirement obligations, followed by these smaller—approximately $3.2 billion—annual amortization payments.[18] By establishing these prefunding requirements and a price cap, Congress plainly intended the Postal Service and mailers to share the risk that exogenous factors impacting the Postal Service's revenues (or cost reductions) would impact its ability to recover these costs. Importantly, if Postal Service revenues had increased (or costs decreased sufficiently), the Postal Service would have received the benefit of that bargain in the form of retained earnings, which under this price cap system are not shared with mailers. But now that the

[18] *See* 39 U.S.C. § 8909a. Additionally, these larger initial payments were largely incorporated into the Postal Service's rate base in Docket No. R2006-1. The Commission stated therein that enactment of PAEA was "expected to result in both favorable and adverse financial consequences for the Postal Service during the periods under scrutiny. . . On brief, the Postal Service projects a consequent negative impact on test year income of $662 million." Docket No. R2006-1, *Opinion and Recommended Decision* (Apr. 27, 2007) at 19.

opposite result has obtained, forcing mailers to cover these losses would renege on this deal. In a classic sense, this misaligns the risks and rewards. It is certainly doubtful that the Postal Service and Commission would be so eager to true up this account if the Postal Service had in fact achieved retained earnings. In retrospect, it appears the risk of loss was all on the mailers.

(a) The Commission Cannot Defend its Retroactive Ratemaking Through Claims of Changed Circumstances

Perhaps recognizing that the Postal Service's prefunding expenses are no different than any other expenses the Postal Service was expected to recover in its rates under PAEA, the Commission claims this supplemental authority is appropriate because "the Postal Service's financial situation began to unexpectedly decline in ways not anticipated by the PAEA" after the prefunding obligations were established. Order No. 5337 at 90. But the Commission does not identify what these supposedly unanticipated declines were. The Great Recession was arguably unanticipated, but economic slowdowns are certainly to be expected and the Postal Service recovered all the losses it suffered as a result of that event through the exigent surcharge.[19] Electronic diversion was not unanticipated. The Congressional Record contains multiple references to electronic diversion in debates leading to the passage of PAEA; PAEA was in fact designed to give the Postal Service the tools to combat this diversion by incentivizing more efficient operations and providing more pricing

---

19 *See* Order No. 3186 at 2-3 (approving removal of exigent surcharge from Postal Service rates after explaining that the order approving the surcharge required that it "would be removed once the loss associated with the Great Recession was recovered" (citing Order No. 1926 at 1-3, 193)).

flexibility.[20] The degree of growth in e-commerce and the package business may not have been entirely anticipated, but that growth has, substantially benefitted the Postal Service and improved its ability to cover costs.

What may have been unanticipated was the Postal Service's inability to improve its efficiency in response to the incentives provided by the price cap and its inability to limit its cost increases to less than the rate of inflation. Notably, in justifying its proposal, the Commission provides the example of a required payment calculated by OPM of $3 billion in a year in which the Postal Service's total revenues are $60 billion. Order No. 5337 at 92. The Commission explains that in this scenario, "revenue would need to increase [by] 5 percent" to meet the payment obligation, which, "[p]hased in over 5 years," means "the annual increase needed would be approximately 1 percent." *Id.* However, the Commission is incorrect that this obligation can only be met by a 5 percent increase in revenue. It could just as easily be met by a 5 percent decrease in cost—1 percent per year—which would have the same impact on the cash available to the Postal Service to make the payment.

PAEA and the CPI-based price cap were designed to force the Postal Service to increase efficiency. In establishing the retirement benefit prefunding requirements, Congress anticipated that the Postal Service would generate the cash necessary to

---

20 *See, e.g.*, 152 CONG. REC. 23,306 (daily ed. Dec. 8, 2006) (Statement of Rep. Shays on HR6407) ("due to the increasing use of electronic forms of communication, such as e-mail, first-class mail volume is declining."); Order No. 4257 at 12 (quoting Sen. Carper's statement that a price cap "give[s] Postal management the tools and the flexibility needed to run the Postal Service more like a business at a time when there is fierce competition from . . . electronic 'communication . . .") (internal citation omitted).

meet these payments through this type of activity. Certainly, 1 percent per annum reductions in costs were well within the realm of anticipated outcomes of PAEA, yet the Postal Service has not been able to meet even these modest targets. But there is no reason that a renewed commitment to reducing costs (or increasing volumes) could not be just as effective in providing "the Postal Service the ability to begin funding its retirement benefit obligations in the future" as the additional rate authority the Commission has proposed. *Id.* at 103. Such cost reductions would also limit the impact of cumulative price increases on demand.

2. The Proposal Will Contribute to Volume Losses Caused by Cumulative Price Increase Impacts Without Making a Meaningful Difference in The Postal Service's Ability to Honor Its Obligations to Retirees

As discussed above, the Commission's proposals must be evaluated not only in terms of their individual reasonableness, but in terms of their cumulative impacts. In the hypothetical example presented by the Commission, the Postal Service would receive between 0.827 percent and 1.111 percent of additional pricing authority from the supplemental retirement provision in the first five years after the proposed rule takes effect. Order No. 5337 at 100, Table IV-6. This example is not a forecast, and the actual authority provided could be higher or lower. In particular, the Commission notes that "[i]f volume declines, the full amortization payment will represent a greater proportion of total revenue, and the proposed formula will provide additional retirement rate authority." Order No. 5337 at 92.

Moreover, the cumulative supplemental pricing authority will be greater than the sum of its parts. The retirement-based authority (which is potentially self-compounding) will be combined with the density authority (which is self-compounding), the performance-based authority, and in some cases the noncompensatory products authority to provide additional pricing authority that far exceeds CPI. Price increases of this magnitude will have a detrimental impact on mailers, significantly increasing their postage costs. While the Commission acknowledges these "concerns about the potential financial impact of the supplemental authority on mailers," its proposal does not meaningfully respond to them. Order No. 5337 at 94.

Rather, the Commission states that "retirement prefunding payments have remained relatively stable and followed a predetermined schedule, and as such, protect Market Dominant mailers by ensuring that rates can be consistently forecast and do not include sudden or extreme fluctuations." *Id.* (citing Order No. 4257 at 52). This response is a complete non-sequitur. Mailers are concerned about the impact the *absolute value* of the rates will have on their business. The additional retirement rate authority—especially when combined with the additional supplemental rate authorities—will cause rates to rise much faster than inflation. The proposal violates Objective 2, destabilizing rates, and fails to account for Factor 3 by ignoring the effect of the authorized rate increases on business mailers. Whether the prefunding payments are similar each year or not, the Commission's proposal will increase the rates mailers will pay. The Commission must account for the impact these increases will have on business mailers. It has utterly failed to do so.

The Commission also ignores the impact this proposal is likely to have on mail volume and how that impact could undermine its stated goal in providing the retirement authority. The Commission claims that its "proposed rules provide the Postal Service a method to begin to meet these [retirement] obligations." Order No. 5337 at 91; *see also id.* at 102-03 (claiming its proposal "is giving the Postal Service the ability to begin funding its retirement benefit obligations in the future"). But the Commission has made no attempt whatsoever to quantify the impact of its proposal. It can only assess whether it will help the Postal Service meet its prefunding requirements if it evaluates the amount of additional revenue the proposal can be expected to raise, taking into account the volume declines that will result from the increases authorized by all of the supplemental authorities. The Commission has not performed this analysis—or at least it has not made it public.[21] Perhaps this is why the Commission indicates the proposal will only "begin" to help the Postal Service make these payments.

Or, perhaps the Commission recognizes that attempting to provide the Postal Service with sufficient pricing authority in an attempt to cover unnecessary prefunding expenses would be a fool's errand. Perhaps the Commission implicitly

---

[21] *See* section III.A, *supra*, for Dr. Neels' and Dr. Powers' assessment of the potential volume impacts of this cumulative authority. Note that while their analysis of the density authority was updated recursively to account for the effects on volume of above-inflation increases in each year, the same calculation was not performed for the retirement rate authority. Thus, their estimates may understate the volume decline these cumulative rate increases would cause.

recognizes that just because a cost is "uncontrollable"[22] or "outside the price cap," that does not mean it can be recovered by simply adding pricing authority on top of the price cap. While one could ensure recovery of these costs through a government subsidy, *mailers* will only subsidize this cost to the extent postage prices remain at a level that meets their business needs. If the retirement authority, combined with other available authority, causes the price of a mailpiece to rise above this level, mailers will not pay it, and the Postal Service will not receive the revenue it needs to recover this cost. As explained previously, the Postal Service is still subject to the laws of supply and demand, and the Commission cannot guarantee the Postal Service will be able to recover its costs no matter how much pricing authority it grants it.

In light of these practical limitations, the Commission should ask itself what the Postal Service can realistically expect to gain from the supplemental retirement authority. The proposed authority will have little impact on whether the Postal Service will actually be able to make promised payments to its retirees. That is because the Postal Service already has the ability to fund its retirement obligations.

As Joint Commenters explained in their prior comments, even as the Postal Service has stopped prefunding its obligations, its retiree benefit programs remain better funded than the vast majority of public and private sector retirement programs. *See* Phase II Comments at 76 (Figures 8 and 9); *see also* Phase I Comments at 40-44 (demonstrating that the prefunding obligations are no measure of the Postal

---

[22] While the Postal Service excludes amortization payments from "controllable expenses," it readily admits that this unique presentation is not GAAP-compliant. See United States Postal Service, 2019 Report on Form 10-K, at 18.

Service's actual ability to honor its obligations to retirees). The Commission does not address these arguments in Order No. 5337. It proceeds as if the failure to make these prefunding payments is equivalent to a default on actual payments owed retirees. That is simply not the case—if it were, nearly every private and public enterprise in the United States would be at risk of defaulting on its obligations to retirees. In reality, the Postal Service simply does not need additional funding to meet the obligations it has toward its retirees, whether the prefunding obligations are recorded against its balance sheet or not.

The Commission's choice, therefore, is not between providing additional rate authority or causing the Postal Service to default on its obligations to its retirees. The Postal Service is in position to meet its retiree obligations without any additional funding. The choice, rather, is between providing additional authority that will do little to improve the Postal Service's financial position while adding to the cumulative rate increases that would be imposed on mailers, or abandoning the proposal to provide useless rate authority to limit rate increases, protect mailers, and avoid further erosion of volume. If the Commission has any concern for limiting the cumulative impact of rate increases on mailer finances and Postal Service volume, it must abandon the retirement rate authority proposal.

D. The Proposed Performance-Based Authority Is Unsound and Will Not Incent the Postal Service to be More Productive

The Commission has proposed to provide the Postal Service with an additional one percent of pricing authority above CPI if the Postal Service's TFP "for the measured fiscal year [exceeds TFP for] the previous fiscal year." Order No. 5337 at

150. To receive this authority, the Postal Service's service standards, including applicable business rules, must meet or exceed the service standards in place during the prior fiscal year, but the authority does not depend on any service performance metrics. *Id*. While the Commission perfunctorily casts this authority as a means to maximize incentives for the Postal Service to reduce costs and increase efficiency, the true impetus behind this authority is to provide the Postal Service with additional revenue that it can invest in capital improvements to restart the so-called "financial health cycle." *Id.* at 105-106. Whatever the reasoning behind the proposal, it should be withdrawn. In addition to being theoretically unsound, there are serious technical problems with the proposal as designed that could lead to false positive results and distort incentives to improve productivity.

1. The Commission's Performance-Based Rate Authority Proposal is Theoretically Unsound

(a) The Proposal Departs From Traditional Price Cap Regulation Without Justification

As Dr. Willig explains, "[i]n standard price cap theory, as in effectively competitive markets, productivity improvements provide their own reward: after a percentage of the incremental revenue is shared with consumers, the remainder falls to the bottom line in the form of higher retained earnings." Willig Decl. at ¶ 27. This reward alone "provides a strong incentive for the regulated entity to achieve improvements in productivity." *Id.* As a result, the extra 1 percent of pricing authority the Commission proposes to provide for productivity improvements "is largely redundant and unnecessary." *Id.*

Additionally, a price cap system should pass a portion of the productivity benefits a regulated firm achieves on to its customers. *See* Willig Decl. at ¶ 14. Under this approach, the price cap will incorporate an "X" factor, where "X is a predetermined percentage reflecting a productivity growth target, which would remain in effect for an extended period of time, such as 4-5 years." *Id.* Dr. Willig explains the economic logic behind such a mechanism:

> When a regulated entity's productivity growth performance is lower than the productivity target, the entity automatically incurs a penalty similar to what a firm in an unregulated competitive market suffers if its productivity growth is lower than its competitors. And the converse is also true: if the entity's productivity growth performance is higher than the target, the entity receives a reward akin to the benefits of having higher productivity growth than one's competitors.

Willig Decl. at ¶ 15. The CPI-based price cap employed in the current system has no such mechanism. As such, it is already more generous to the Postal Service than a typical price cap system. The Commission's proposal in Order No. 5337 would make postal customers even worse off. As Dr. Willig explains, "[i]f, for example, the Postal Service were to increase productivity by a miniscule amount, like 0.1 percent, consumers would have to pay 1 percent higher prices. Mailers would, paradoxically, be better off if the Postal Service's productivity *declined* by 0.1 percent." Willig Decl. at ¶ 27.

Dr. Neels and Dr. Powers provide numerical examples to show how far this proposal departs from traditional price cap regulation. Brattle Decl. at ¶ 59. They consider the hypothetical case of a product or service produced by a regulated entity at a cost of $10.00 per unit and sold to consumers at a price of $11.00, then evaluate how different productivity gains would be distributed under various price cap systems and the Commission's Order No. 5337 proposal. In sum:

- A private enterprise under price cap regulation with a 1 percent per year productivity adder that reduces cost by 1.5 percent would achieve 15 cents of cost savings. The 1 percent X-factor would force it to reduce its price by 11 cents, leaving it with additional pretax profits of 4 cents per unit (which would be reduced to 2.76 cents per unit after paying a 21 percent corporate tax rate on the profit). However, if this same entity were to reduce its costs by 2.0 percent, it would achieve 20 cents of costs savings but still only have to reduce its rates by 11 cents due to the X-factor. It would net 6.21 cents after taxes. Thus, the incremental rewards for this entity from more aggressive pursuit of productivity gains are substantial.
- A private enterprise under price cap regulation with *no* productivity adder that reduces cost by 1.5 percent would achieve 15 cents of cost savings. With no productivity adder, it would not have to reduce its rates, and that 15 cents of savings would directly translate into 15 cents of pretax profits. Taxes would reduce this profit to 10.35 cents per unit.
- The original PAEA system involves a public entity (the Postal Service) under price cap regulation with no productivity adder. If the Postal Service under this system reduces its cost by 1.5 percent, it will again translate into 15 cents of costs savings and profit, just as in the prior

example. But because it does not pay taxes, the Postal Service will enjoy after-tax profits of 15 cents, not the 10.35 cents a private enterprise would realize.

– Order No. 5337 proposal. If the Postal Service reduces cost by 1.5 percent, this reduction translates again into cost savings of 15 cents per unit. As a reward for achieving this gain, the Postal Service is allowed to increase its price by 1 percent, generating additional pretax profits of 11 cents per unit, leaving it with additional pretax profits of 26 cents per unit. Because it does not pay taxes, it also enjoys additional after tax profits of 26 cents per unit.

These examples make an important point: the existing PAEA system richly rewards the Postal Service for productivity gains. Compared to systems regulating private entities or containing productivity adders, the PAEA system allows the Postal Service to realize greater profits (*i.e.* retained earnings) with less cost reduction effort. As Dr. Neels and Dr. Powers opine, "[t]here is little reason to believe that the existing system is insufficiently generous." Brattle Decl. at ¶ 60.

The performance-based rate authority is also theoretically flawed because it seeks to correct prior performance failures rather than incentivize future behavior. In essence, it is a backward looking true-up that should be proscribed under a healthy system of incentive ratemaking. Willig Decl. at ¶ 30. The proposed adjustment would give the Postal Service money in part to fund capital investments that were (allegedly) foregone by the Postal Service. *Id.* A more reasonable design would tie any authority to anticipated future needs. The Commission, however, has declined to even estimate such future needs. *See* Order No. 5337 at 122 (indicating that the 1 percentage point of authority was derived from "the amount of capital spending and the value of assets pre-PAEA compared to post-PAEA and the amount of borrowing authority exhausted during the PAEA era" as well as "its expert judgment"); Phase II Comments at 45-47.

Similarly, the performance-based rate authority is inappropriately provided based solely on the past performance of the Postal Service. Dr. Willig explains that any productivity adjustment to the price cap "should be set at a level based on the Postal Service's expected ability to improve productivity over the next 4-5 years." Willig Decl. at ¶ 31. In other words, "[t]he productivity adder should be based on the CPI minus X, where X is a preestablished percentage inclusive of a productivity growth anticipation." *Id.* Doing so would provide the Postal Service with the "full dollar for dollar impact on its bottom line from diminutions in cost and increases in productivity." *Id.* As Dr. Willig concludes:

> Rather than allowing the Postal Service to charge more for outcomes that already happened, (which would in fact convert the system to cost of service with deferred revenue collection), and contrary to economic efficiency to charge more according to outcomes that resulted in cost savings, setting the regulatory policy up according to the concepts of price caps with pricing authority governed with a "price index minus X" formulation incentivizes the Postal Service to be more productive to an economically efficient degree.

Willig Decl. at ¶ 31.

Dr. Neels and Dr. Powers further emphasize that the generous rewards the proposed system would provide could encourage gaming of the system by providing the Postal Service with an incentive to manage its productivity improvement efforts over time "to assure its ability to reap the reward in all years." Brattle Decl. at ¶ 61 (citing Willig Decl. at ¶ 27).

(b) The Commission's "Financial Health Cycle" Justification is Unsupportable

Notably, the Commission does not justify the proposed performance-based authority exclusively, or even primarily, on the grounds that it will provide the Postal Service with incentives to reduce costs and increase efficiency. Instead, it expressly states that the purpose of the proposed performance-based rate authority is to "promote greater capital investment and allow the Postal Service to reenter the financial health cycle by providing the Postal Service with additional revenue if it achieves the specific operational efficiency and service standard benchmarks." Order No. 5337 at 105. According to the Commission, "[t]he financial health cycle requires the generation of 'adequate revenues to ensure net income, which provide retained earnings.'" *Id.* (citing Order No. 4258 at 46). It then clarifies that "the proposed performance-based rate authority serves as an incentive for the Postal Service to gain that additional revenue by first meeting the specific efficiency and service benchmarks." *Id.* at 117.

Joint Commenters provided extensive critiques of the factual basis for this reasoning in their prior comments. *See* Phase II Comments at 41-48; ANM *et al.* Reply Comments (Mar. 30, 2018) at 39-43 (Phase II Reply Comments). These critiques remain valid: Order No. 5337 does not remedy these defects; the Commission still has not presented evidence indicating the Postal Service's failure to restrain cost increases has resulted from an inability to make capital investments. The only foregone investment the Commission has identified is the immediate upgrading of its transportation fleet (Phase II Comments at 45-46, Order No. 4258 at 50 n.69), and the Postal Service is currently proceeding with that upgrade. Order No. 5337 provides no additional information regarding foregone, required, or planned capital improvements or their impacts on volume and efficiency. The Postal Service continued making capital investments throughout the PAEA era, and it anticipates obligating $6.3 billion in capital investments in FY 2020. *See* UNITED STATES POSTAL SERVICE, FISCAL YEAR 2020 BUDGET CONGRESSIONAL SUBMISSION at II-14, (March 11, 2019) (reporting actual capital investments of $1.573 billion in FY 2018 and estimated new obligations of $1.849 billion in FY 2019 and $6.302 billion in FY 2020).[23] The Commission's proposal to restart the financial health cycle through the performance-based rate authority lacks a factual basis in the record and therefore remains arbitrary and capricious.

But the "financial health cycle" theory suffers from more than a lack of a factual foundation. It is illogical from the start. As Dr. Willig explains, "[t]here seems to be no reason to conclude that the proposed productivity adder would incentivize the Postal Service to improve productivity as appropriately as the built-in incentives under a 'price index minus X' approach." Willig Decl. at ¶ 30. This is because "[t]he achievement of productivity improvements under a 'price index minus X' approach

---

[23] Available at
https://www.prc.gov/docs/108/108499/USPS%20FY2020%20Congressional%20Submission.pdf

will itself generate gains in net revenue appropriately scaled to compensate the entity for the needed capital investment." *Id.* Because the Commission's proposal does not similarly provide an "economically efficient connection between productivity gains, their financial benefits, and the cost of the investments needed to accomplish them," there is no reason to believe the Postal Service will respond to the incentives as the Commission hopes. *Id.* The Commission's proposal does not even require any after-the-fact oversight to determine whether the additional revenue produced is put toward productivity-enhancing capital investments. Dr. Neels and Dr. Powers echo Dr. Willig's critique, noting that if the Postal Service has failed to respond to the incentives of the existing price cap, through which cost savings fall directly to the Postal Service's bottom line, it is not clear why the Postal Service needs an additional reward in order to motivate it to reduce costs. Brattle Decl. at ¶ 56. The Postal Service will not be motivated to reduce its costs in the future when the price cap incentives are attenuated and the Commission "rewards" the Postal Service with more money for meager productivity improvements.

Moreover, as Dr. Neels and Dr. Powers explain, the "financial health cycle" posited by the Commission implies that once the Postal Service has retained sufficient earnings to make the needed capital investments, productivity gains will subsequently become easier to finance, and thus to achieve. Brattle Decl. at ¶ 62. The logical conclusion of the Commission's theory is thus that once it has reentered the financial health cycle, the Postal Service's ability to generate retained earnings, and thus to make subsequent productivity-enhancing investments, will be significantly improved. *Id.* This reasoning suggests that any additional rate authority awarded with this objective need only be temporary. *Id.* at ¶ 64. However, rather than grant the increased rate authority temporarily, the Commission has proposed to increase it on annual basis, seemingly in perpetuity. *Id.* at ¶ 65. Further, the explanation offered by the Commission for why costs have not fallen more—namely, that the Postal Service has not been able to generate the needed investment funds—would not be addressed by this proposal. Consistent with the critique provided by Dr. Willig above, extra revenues would be awarded only *after* productivity gains have been achieved. *Id.* at ¶ 66. Rather than allow the Postal Service to reenter the financial health cycle, it "would only reward the Postal Service once it had managed to get there on its own." *Id.* at ¶ 66.

In light of these critiques, the design of the performance-based rate authority suggests that its real purpose is just to grant additional rate authority. Although nominally a reward for achievements, the threshold is set so low that it is, in effect, simply an authorization to impose additional rate increases. *Id.* The "performance-based" incentive is a misnomer.

2. The Design of the Performance-Based Rate Authority Is Ill-Conceived

Even if there were a theoretical basis for providing the Postal Service with extra pricing authority to encourage productivity gains, one would not design a system with the features the Commission has proposed. The Commission's proposal could reward the Postal Service for productivity growth far below historic levels. It does not adjust the authority provided to the size of the gains in productivity. And it relies on a metric designed for a different purpose that can produce false positives when measuring year-over-year changes in productivity. As such, the proposal will violate Objective 1. The Commission should withdraw this proposal and rely on the inherent incentives of a standard price cap to encourage the Postal Service to reduce costs and improve efficiency.

(a) The Proposal Rewards Increases in Productivity Far Below Historical Levels

When viewed in historical perspective, the Commission's proposal provides extra rate authority for significant decreases from historical levels in the Postal Service's rate of productivity growth. The requirement that TFP growth merely be positive allows the Postal Service to receive extra rate authority for changes in TFP that are 0.7 percentage points *below* the long-standing annual average rate of increase. Effectively, the Commission is providing extra rate authority that can be received despite a dramatic and substantial reduction in the rate of growth in TFP. The Commission provides no explanation of its reasoning for doing so, nor could it: this is not the reasoned decisionmaking that the APA requires.

While the proposal provides a retroactive bonus to the Postal Service for increasing productivity by a small amount, it provides no additional incentive for being any more productive than the bare minimum. The Postal Service would receive the same additional rate authority for improving productivity growth substantially (1 percent per year), for maintaining productivity growth at historical levels (0.7

percent per year),[24] or for dramatically decreasing productivity growth to a very low level (0.1 percent per year). Far from maximizing the Postal Service's incentive to increase productivity growth above past levels, the proposal does not even provide an incentive to maintain productivity growth at past levels.

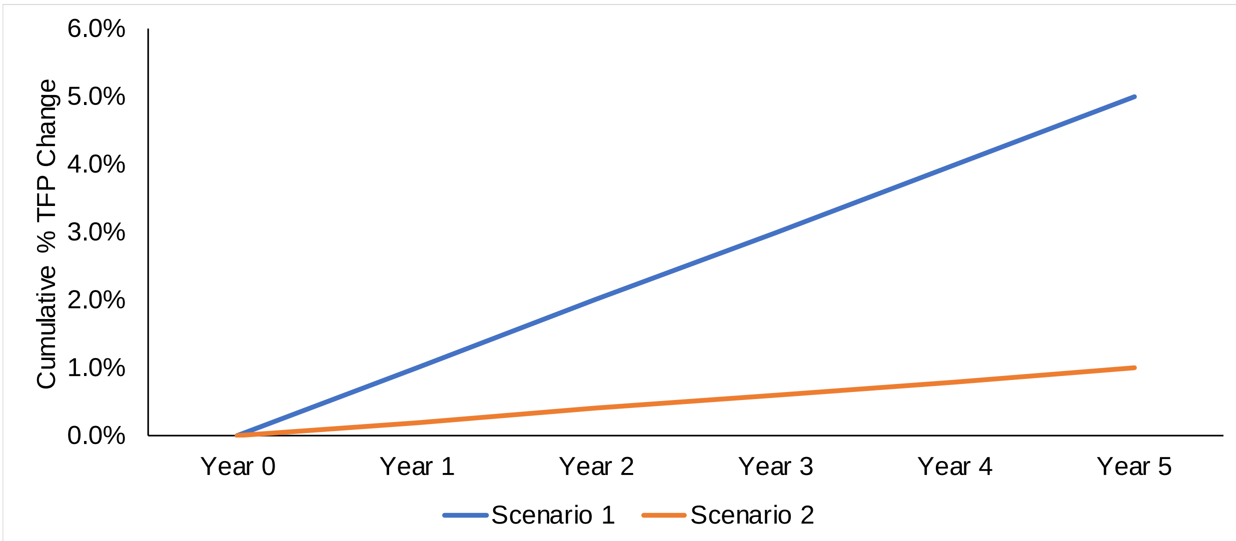
Under this proposal, TFP growth will likely fall to a low positive level. Significant management attention is required to bring about the kinds of organizational change that cause productivity growth. However, without a need to bring about that change, it is likely not to occur. The Commission's performance-based rate authority provides the Postal Service with substantially more money every year (1 percent) for near-zero productivity improvements than have been generated in the past from management efforts to improve productivity (0.7 percent on average). The Commission's proposal therefore invites the Postal Service to work to achieve a minimal level productivity growth each year, but only a minimal level.

As a result of the typical behavioral responses to incentives, the Commission's proposal could give rise to a variety of perverse results that are consistent with achieving minimal productivity growth each year and inconsistent with Objective 1. As Dr. Willig explains, "[i]t is highly dysfunctional and problematic for a regulated entity, or any firm for that matter, to be presented with a disincentive to maximize productivity improvements each year." *See* Willig Decl. at ¶ 28. For example, as Figure E shows, the two scenarios would both result in a cumulative additional

[24] Average annual growth in TFP was 0.72% before PAEA (1990-2006) and 0.75% in the initial years after PAEA through 2015.

performance-based rate authority of 5 percentage points after five years despite Scenario 2 having much slower growth in TFP.

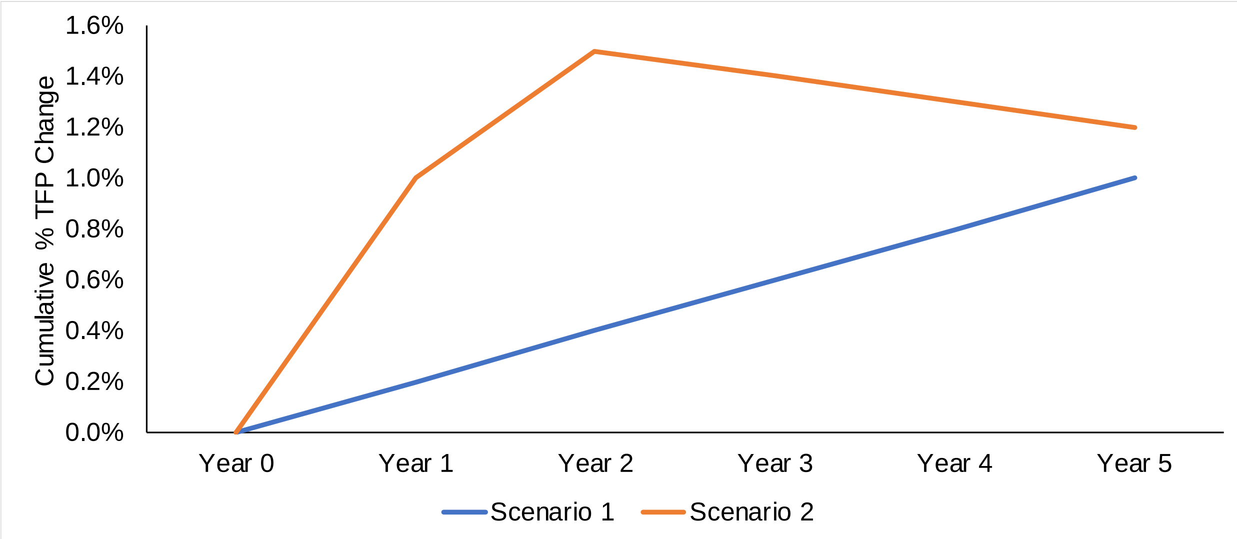
Figure E – Sample TFP Scenarios



Source: ANMetalRM2017-3 Comment Wkpapers.xlsx, "TFP Examples"

Even more problematic, because the prior year's TFP sets the productivity bar for receiving the performance-based rate authority in the subsequent year, there is a perverse incentive to increase productivity only marginally to ensure the performance-based rate authority is achieved every year. As Figure F shows, Scenario 1 grows at a consistent 0.2 percent per year, resulting in a cumulative additional performance-based rate authority of 5 percent; however, Scenario 2 sees significant growth in the first two years, with small declines in years three through five, resulting in a cumulative additional performance-based rate authority of 2 percent, despite ending Year 5 with a higher overall TFP.

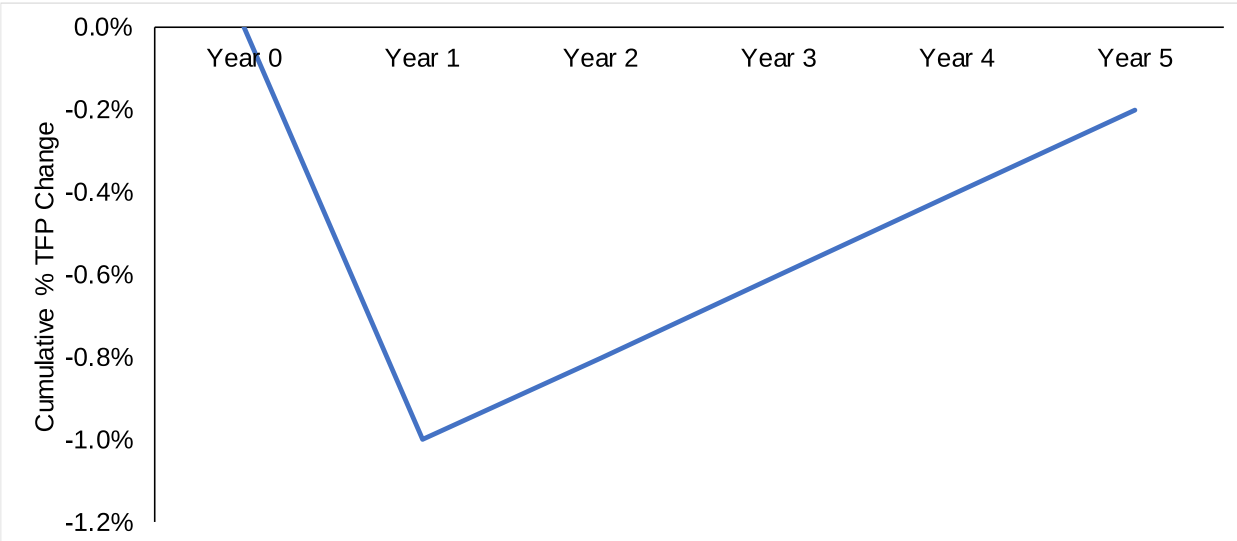
Figure F – Sample TFP Scenarios



Source: ANMetalRM2017-3 Comment Wkpapers.xlsx, "TFP Examples"

As Dr. Willig notes, "the Postal Service could game the system by seeking trivial positive productivity gains (or even negative ones) in Year 1 so that productivity improvements in Year 2 and subsequent years are easier to achieve." *See* Willig Decl. ¶ 28. Figure G shows that the Postal Service would receive 4 percentage points of additional performance-based rate authority after five years, despite the overall TFP being lower in Year 5 than in Year 1.

<u>Figure G – Sample TFP Scenario</u>

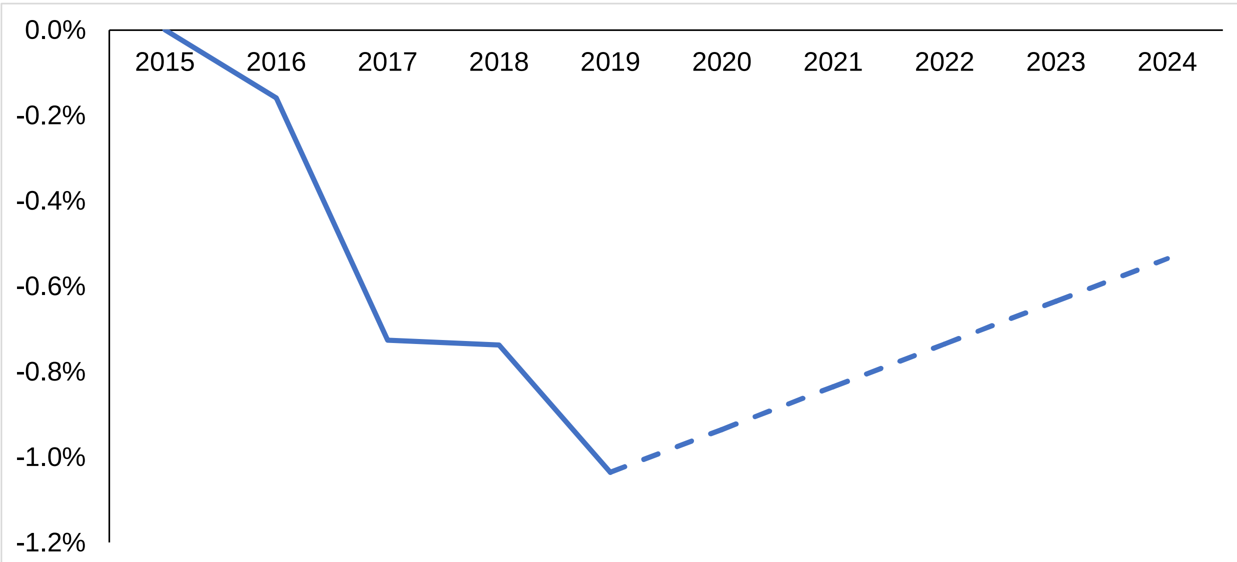


Source: ANMetalRM2017-3 Comment Wkpapers.xlsx, "TFP Examples"

This last scenario is not far-fetched; in fact it resembles current reality. As discussed above, Postal Service productivity is 0.63 percent below where it was in FY 2013. So, as Figure H below illustrates, the Postal Service could receive the performance-based rate authority every year despite its TFP remaining below where it was in FY 2015. Even if TFP would grow at 0.1 percent per year for five years, productivity would still be below FY 2015 levels at the end of FY 2024. This would clearly be an inappropriate outcome.

Figure H – Cumulative Percent Change in TFP

(Actual FY 2015 – FY 2019, Projected FY 2020 – FY 2024)



Source: ANMetalRM2017-3 Comment Wkpapers.xlsx, "TFP Examples"

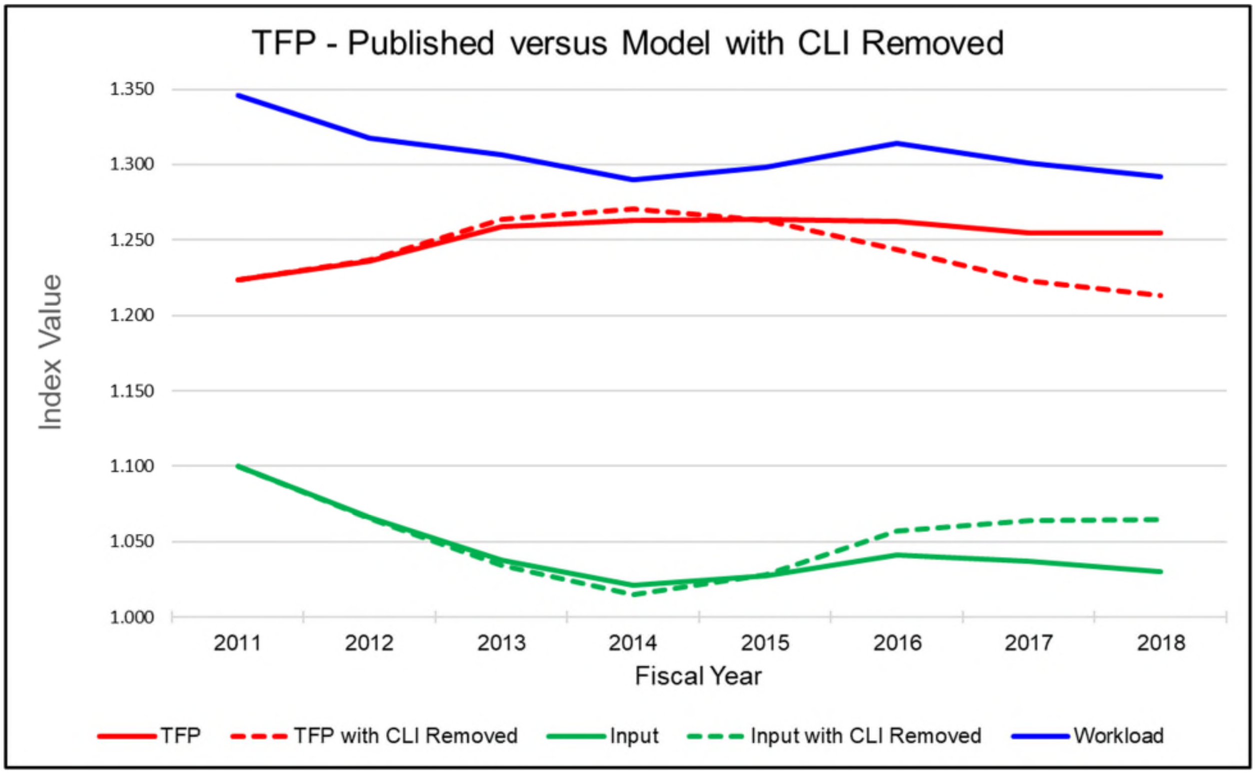
In a similar vein, Dr. Neels and Dr. Powers explain that the proposal could provide incentives for the Postal Service to waste funds on uneconomic investments. Brattle Decl. at ¶ 67. Where the Postal Service is at risk of narrowly missing its productivity target—the low bar of any year over year increase in TFP—it could "could fund an investment that made no economic sense on its own, but that nonetheless could provide a small near-term payoff sufficient to push the Postal Service over the necessary threshold." *Id.* Because it will receive 1 percent of additional authority regardless of the increase in productivity or amount of capital investment, this rate increase could "more than make up for the losses on the otherwise ill-considered investment." *Id.*

3. Technical and Practical Flaws in the TFP Calculation Create Unacceptable Risks of Awarding Performance-Based Rate Authority without Real Productivity Improvements

The Commission's performance-based supplemental authority proposal is also unreasonable because it carries a high risk of rewarding the Postal Service for illusory gains in productivity. The attached Declaration of Robert Fisher ("Fisher Declaration") details deficiencies in the use of TFP as the basis for performance-based rate authority. Mr. Fisher identifies three summary concerns tying the authority to changes in TFP: First, the inclusion of inappropriate factors and issues with the component values used to calculate TFP can cause "false positive" results in which TFP is shown to increase, but productivity has not. Fisher Decl. at 2. Second, the TFP methodology is not transparent and cannot be independently validated—the Postal Service makes adjustments to the methodology that are not published and can result in values different than those obtained using the published formula. *Id.* Third, TFP includes inputs that are beyond the control of the Postal Service, and therefore measures factors that are not conceptually appropriate as a basis for rewarding productivity gains. *Id.* Mr. Fisher's report explains each of these deficiencies in detail; we will briefly summarize them and discuss their implications here. His analysis demonstrates that TFP could overstate the Postal Service's productivity growth by over *one percent* per year. *Id.* at 8, Figure 5; *id.* at 30 (explaining that Figure 5 demonstrates that published TFP results of 1 percent growth could actually reflect negative productivity growth when CLI is removed). Not only does this disparity result in an unacceptable risk of false positive awards of performance-based authority, but it shows that Postal Service productivity is declining significantly faster than reported.

First, Mr. Fisher identifies several inputs to TFP that are not valid productivity inputs or contain other methodological errors. These inputs can cause false positive results. For example, the Composition of Labor Input ("CLI") is not a valid productivity input. Fisher Decl. at 4. CLI is a factor applied to workhours to adjust for employee experience level, which TFP assumes to be a key determinant in labor productivity performance. *Id.* But as Mr. Fisher relates, for most Postal Service positions, there is no reason to assume that an employee with one year of experience would be any more or less productive than one with 15 years experience in a non-professional position. *Id.* Similarly, CLI measures the change in number of employees, grouped by five year increments, which relates only to recent employee demographic shifts, not changes in productivity. *Id.* Additionally, non-career employees are not considered in the CLI factors, but when they are moved to career status, their workhours are then indexed as more productive even though there has been no change in the work they actually perform. *Id.*

The inclusion of the CLI factor in TFP significantly distorts the Labor input (which represents 75 percent of total dollar inputs used in TFP, Fisher Decl. at 3) and, as a result, the TFP result. Fisher Decl. at 4. Mr. Fisher details this distortion in Figure 5 of his declaration, in which he compares published TFP values to the TFP values that would obtain if the CLI factor was removed. Fisher Decl. at 8, Fig. 5. As Mr. Fisher shows, the differences in the measure are significant—TFP is overstated by about one percent per year. Moreover, inclusion of CLI in TFP resulted in a false positive in 2015. That is, the year over year change in the published TFP factor was 0.06 percent from 2014 to 2015, indicating an increase in productivity. Yet when CLI is removed, the same period shows a *decrease* in TFP of 0.59 percent. *Id.* The difference between published TFP and the TFP model with CLI removed is viewable in the difference in the solid and dashed red lines below:



Fisher Decl. at 8, Figure 6. This graph demonstrates that when CLI is removed, productivity is declining at a much faster rate than the Postal Service reports.

Because the Commission's revised proposal would provide the Postal Service with one percent above CPI rate authority for any year over year increase in TFP, the consequences of false positive results are extremely high. If this proposal had been in place in 2015, the Postal Service would have been awarded additional rate authority even though its productivity, properly measured, declined. This is a debilitating flaw in the Commission's proposal. If the Postal Service can be rewarded with rate authority without actually improving productivity, the performance-based rate authority has no rational basis. It certainly will not "maximize" incentives to increase efficiency and reduce costs if the Postal Service can earn the authority without increasing efficiency at all.

Mr. Fisher discusses several other flaws with the TFP inputs that could lead to false positives. For instance, he explains that TFP Labor dollars are overstated by over a billion dollars in 2018. Fisher Decl. at 14. Moreover, actual national labor costs are not measured for change against the previous year in TFP. *Id.* at 19. Due to the methodology and cost weighting used in the TFP formulas, adding labor costs to the calculation counterintuitively results in *higher* TFP productivity— an unreasonable result that could cause the Postal Service to earn performance-based authority in the absence of any productivity increases. *Id.* at 18-19. Additionally, multiple inputs in the Material Price Index cannot be independently validated because they contain differences with published Bureau of Labor Statistics metrics. *Id.* at 21. Again, these flaws could lead to false positive results. *Id.*

As a related matter, it is impossible to independently verify the Postal Service's TFP calculations. Several inputs rely on non-public data. *See, e.g.*, Fisher Decl. at 26; Brattle Decl. at ¶ 68. The TFP tables supporting the calculation provide values only, not formulas that can be used to replicate results. Fisher Decl. at 28. Perhaps most troubling, adjustments are made to the structure and factors of TFP with no public input or acknowledgement, and values change in tables form one year to the next with no explanation. *Id.*; *see also* Brattle Decl. at ¶ 70 (citing NORTHWEST POSTAL CONSULTING, ADEQUACY OF THE POSTAL SERVICE'S TFP MODEL at 43 (Mar. 27, 2017). These characteristics of TFP make it impossible for the public to verify the Postal Service's TFP results and meaningfully comment on whether they accurately describe changes in productivity. Worse, they create the potential for gaming the performance-based authority through methodological adjustments. It is unreasonable to provide the Postal Service, a public entity, with additional rate authority without giving the public the tools necessary to independently verify that an award of the authority is appropriate. Dr. Neels and Dr. Powers opine that "[t]he fact that an obscure and undocumented technical change of this nature would, under the Commission's proposal, potentially affect the rates paid by millions of market dominant mailers . . . is a significant problem." Brattle Decl. at ¶ 70.

Finally, TFP measures some factors that the Postal Service and Commission may consider outside of management control. *See* Fisher Decl. at 13, 31. While there may be debate over which costs should be considered controllable, as a matter of principle, it does not make sense to award performance-based authority for changes in costs that are outside of management control. The purpose of the performance-based authority, however misguided it is, is to incentivize Postal Service management to take actions to reduce costs and increase efficiency. The reward must, therefore, be tied exclusively to factors within management control.[25]

Joint Commenters acknowledge the challenge of accurately measuring productivity and recognize that criticisms of the specific inputs to TFP may be viewed as nitpicking.[26] Any metric used by the Commission would likely have some data or methodological flaws that one party or another could highlight, though a metric based on the criteria Mr. Fisher describes would at least be transparent, replicable, and focuses on controllable costs. *See* Fisher Decl. at 31. That is not a reason, however, to continue to use TFP as a basis for performance-based rate authority. It is instead an argument for withdrawing the performance-based rate authority proposal altogether. As discussed above, one of the benefits of a price cap system of regulation is that productivity gains automatically accrue to the regulated entity's bottom line. *See* Brattle Decl. at ¶ 71. Under such a system, productivity growth does not need to be measured at all: it will manifest in retained earnings. Rather than attempt to retroactively measure gains in productivity and reward the Postal Service with

---

25 Providing additional capital to the Postal Service for management to invest in productivity-enhancing projects does not resolve this concern. As Mr. Fisher explains, the TFP Input Index would not be substantively changed if the Capital Index were excluded. Fisher Decl. at 25. TFP is therefore not a good measure of productive capital investment. Furthermore, Mr. Fisher opines that if the Capital Index—one of three main components of TFP—"can be removed with no substantive change to the TFP result, it calls into question the underlying theory of the measurement." *Id.*

26 Though the Commission should also recognize that the use of TFP as the basis for performance-based authority has been criticized by its own econometrician in this docket. *See* Brattle Decl. at ¶ 68 (citing Docket No. RM2017-3, Declaration of Lyudimila Y. Bzhilyanskaya for the Public Representative (March 20, 2017)).

additional rate authority for such gains, the Commission should rely on the incentives of the price cap and the inherent self-interest of the Postal Service to drive productivity gains. *See id.* (recommending an "X factor" reduction in price increase authority as an alternative to the performance-based authority proposal).

E. The Commission Should Focus on Cost Control, Not on Punishing Noncompensatory Products

Order No. 5337 carries over the Commission's proposal to impose above-CPI rate increases on products and classes that do not cover their attributable costs. The only difference between the proposals in Order No. 4258 and Order No. 5337 is that the Commission no longer proposes to mandate above-CPI increases for Periodicals. Order No. 5337 at 168. This change, while welcome, does not remedy the primary underlying defect of the Commission's proposal: by authorizing above-CPI increases on these products, the Commission ignores the fact that the Postal Service's inefficient management is the root cause of these products' non-compensatory status. Additionally, the proposal fails to further Objective 1 of the PAEA by reducing incentives for the Postal service to eliminate inefficiencies and reduce the costs of processing and delivering these products; the proposal violates Objective 4 by limiting the Postal Service's pricing flexibility, hampering its ability to recognize the multiplier effect this type of mail can create; and the proposal ignores Factors 3 (impact of increases on mailers), 8 (value of the different kinds of mail entered into the system), and 11 (the educational, cultural, scientific, and informational value to the recipient of the mail matter). Moreover, mailers cannot rely on the Postal Service's largesse: they must assume that the Postal Service will use its full pricing authority when planning campaigns and making strategic decisions about resource allocation. In that context, the ability of the Postal Service to use its full authority is equivalent to a requirement that it do so.

Joint Commenters presented extensive evidence in their Phase II comments regarding the Postal Service's failure to control costs associated with processing Flats and Periodicals Mail. *See* Phase II Comments at 84-107. As Joint Commenters explained, "[t]he failure of Periodicals Mail and Marketing Mail Flats to cover attributable costs is a cost-control problem, not a revenue problem." *Id.* at 85. The Commission has no rejoinder for this argument. It agrees "that the Postal Service must work to reduce costs," but it laments that "the Postal Service's cost reduction efforts have been unsuccessful." Order No. 5337 at 156. The Commission further claims that it lacks the ability to force cost reductions and that its actions "requiring more transparency, requiring additional reporting, and directing the Postal Service to reduce costs, have not eliminated the problem of underwater products." *Id.* at 157.

The Commission's solution to this problem is to simply throw up its arms. Rather than enforce—or even tighten—the price cap to force the Postal Service to reduce its costs going forward, it "proposes to require minimum product-level price increases to increase revenue." *Id.* Doing so undermines any incentives the current system contains for the Postal Service to reduce its costs and essentially ensures that the status quo will remain in effect. Flats and Periodicals costs will continue to rise unabated, and mailers will be forced to subsidize the Postal Service's inefficiency.

This strategy is misguided, and other options exist. In addition to reinforcing its commitment to the price cap, the Commission could tackle inefficient pricing that drives mail to more costly categories. *See* Phase II Comments at 94 (explaining how reductions in passthroughs for Carrier Route Basic Flats caused "inefficient mail preparation by mailers and needlessly high costs for Periodicals Mail"). Such practices have limited the growth of co-mailing, among other ill effects. *See id.* at 95. Statements in the most recent Annual Compliance Report ("ACR") support the value of adjusting these incentives.

In the Fiscal Year 2019 ACR, the Postal Service attributes increases in per-piece costs for processing Marketing Mail Flats primarily to volume declines in this product category. Docket No. ACR2019, Fiscal Year 2019 ACR, (Dec. 27, 2019), at 18 (FY 2019 ACR). In turn, it attributes volume declines in part to "[c]o-mailing, which shifts pieces towards High Density." *Id.* The result is that Marketing Mail Flats covered only 67.7 percent of their attributable costs in FY 2019. *Id.* However, the cost-coverage for High Density and Saturation Flats and Parcels was 137.84 percent in Fiscal Year 2019, meaning that this volume moved from a non-compensatory category to a compensatory category. *See id.* at 13 (Table 2). The Postal Service notes that High Density Flats volume increased nearly 10 percent in FY 2019, "following increases of approximately 20 percent in both FY 2017 and FY 2018." *Id.* at 18. In other words, as co-mailing has increased, Postal Service operations have become more efficient.

The Commission should be focused on designing a system of regulation that encourages this type of activity rather than focusing on squeezing revenue out of the remaining volume in Marketing Mail Flats. No doubt in no small part due to the above-inflation rate increases leveled on it in recent years, Marketing Mail Flats volume has already declined from 10 billion pieces in FY 2008 to 3.8 billion pieces in FY 2019. FY 2019 ACR at 18. Before requiring the Postal Service to raise prices on this remaining volume by over 6 percent more than CPI each year in the future, the Commission must ask itself why it is willing to drive all this mail out of the system, and whether doing so is necessary to ensure the financial health of the Postal Service.

IV. THE POSTAL SERVICE'S MONOPOLY STATUS AND SOUND ECONOMICS REQUIRE THAT THE COMMISSION MAINTAIN A PRICE CAP

Joint Commenters have explained why the Commission's approach to evaluating whether the current system of regulation is achieving the objectives of PAEA was flawed and led to unsupportable conclusions in Order No. 4257. Joint Commenters have explained that the Commission lacks the authority to abrogate the CPI-based price cap PAEA applies to each class of mail. Joint Commenters have further explained why, even if the Commission could allow above-CPI increases in rates, the specific proposals in Order No. 5337 are unlikely to either achieve the objectives of PAEA or solve the specific problems the Commission has targeted these proposals toward.

One point requires further emphasis in light of the Commission's attempts to effectively eliminate the CPI-based price cap and the Postal Service's statements, in this docket and elsewhere, that it should be subject to hardly any restrictions on its pricing at all.[27] That is that the Postal Service remains the monopoly provider of market dominant mail services and must continue to be regulated as such. Because the Postal Service retains both statutory and de facto monopolies over the delivery of printed matter, it does not face sufficient competition in these markets to discipline price increases. While there are of course some limits to how high the Postal Service could raise its prices without losing business in some categories of market dominant mail—indeed, the rate increases authorized by Order No. 5337 would likely exceed those limits—captive mailers still require protection from the exercise of the Postal Service's market power. *See* Brattle Decl. at ¶ 47 ("Indeed, it is because of the likelihood that the Postal Service would abuse unlimited freedom to raise rates that PAEA subjected the Postal Service to regulatory oversight by the Commission.").

In other words, even if the Commission is intent on replacing its current system of regulation, the new system must still protect mailers from excessive price increases and ensure just and reasonable rates. It should attempt to replicate the features of a competitive market that restrain price increases and incentivize firms to reduce costs, increase efficiency, and grow their customer base. The system should also minimize administrative costs and account for the information asymmetry that inherently exists between regulator and regulated entity. As Dr. Willig explains in

[27] *See* Order No. 4258 at 59 (relating Postal Service claims that it has inherent incentives to pursue cost reductions and efficiency gains and that any efficiency gains it has made were not driven by the price cap); USPS FY2019 10-K at 42 ("We continue to assert that the price cap should be eliminated, and that the PRC should engage in after-the-fact, light-touch review of the Market-Dominant prices we set to ensure that those prices are just and reasonable.").

the attached declaration, a system of regulation incorporating a strong price cap protected against efforts to retroactively adjust for past changes to costs or volumes is the best approach to achieving these goals.

Dr. Willig succinctly summarizes the virtues of price cap regulation:

> The primary virtues of price cap regulation include: a) its direct control of overall prices instead of a related variable such as earnings that does not directly affect consumer welfare, b) the freedom it allows the regulated firm to choose its own relative prices subject to the constraint of the cap, and c) its function as a regulatory mechanism that can be shown analytically to comport with the competitive market model in offering consumers all the price protection that effective competition can provide, while presenting the regulated firm with incentives to operate with static and dynamic efficiency in its costs, price structure, and its choices of the characteristics of its products and services.

Willig Decl. at ¶ 8.[28] Price caps are preferred to cost-plus or rate of return regulation, both of which tie prices to the firm's changes in costs. *Id.* at ¶ 9. While "such regulation is motivated by the understandable aspiration to keep prices and the revenues they generate in line with costs, as real effective competition would accomplish . . . cost-plus regulation inadvertently but nonetheless powerfully presents the firm with incentives to allow its costs to rise, because not only will correspondingly permitted increased prices cover the excess costs, but they will provide extra profits from the 'plus.'" *Id.* Additionally, with rate of return regulation, "the firm is motivated to increase its capital base well beyond the level of efficiency

[28] *Citing* Baumol, W.J. and R.D. Willig, "Price Caps: A Rational Means to Protect Telecommunications Consumers and Competition," *Review of Business*, Spring 1989 at p. 3.

for product quality and savings of variable costs," leading to higher prices and inefficient capital expenditures. *Id.*

Perhaps most importantly for the Postal Service, firms under cost-plus or rate of return regulation are not incentivized to grow volume without incurring excessive costs. This is because doing so raises the firm's profits (rate of return), which can compel the regulator to reduce the price the firm can charge. *Id.* at ¶ 10. Conversely, where declining demand raises average costs due to sale economies, the firm lacks "incentives to avoid diminishing the appeal of its products and services because loss of demand would generate regulatory permission to compensate with higher prices." *Id.*

A price cap system, by contrast, decouples the regulated price from a firm's costs, capital stock, and consumer demand. *Id.* at ¶ 11. In doing so, it "both protects consumers from excessive pricing where effective competition is absent, while still presenting the firm with strong incentives to behave competitively since it will be rewarded at its bottom line for its productivity, cost control and market appeal." *Id.* Thus, where competition cannot be relied on to constrain prices, a price cap system of regulation is preferable to a cost-plus or rate-of-return system.

Dr. Willig identifies key features of an effective price cap system. These include limiting price changes to CPI or some other index measuring economy-wide inflation while accounting for the "anticipated difference between changes in costs in the industry that are exogenous as compared to the CPI." *Id.* at ¶ 12. When these adjustments are renegotiated, the regulator can take into account "anticipated trends such as improvements in the industry's technology, or changes in the anticipated rates of inflation in the industry's input prices and wages, or alterations in the firm's mandated outputs, or thinning of the volume of demands where there are scale economies." *Id.* These adjustments, however, must be *forward-looking*. "[B]ackward looking true-ups are to be strongly discouraged in an optimal system on incentive grounds." *Id.* Adjustments to the index do not assure recovery of costs or compensate for past forecasting failures; rather, they "intentionally leave[] some risks to each side arising from exogenous cost or demand changes that are lower or higher than was anticipated." *Id.* Indeed, "[i]t is crucial that the regulated entity and consumers should prospectively share in the risk of cost increases that are higher, ex post, than expected; and conversely, they should also share in possible benefits of cost-reducing and demand increasing static and dynamic efficiencies that are higher than expected." *Id.* at ¶ 13.

Dr. Willig further explains that "to stimulate productivity growth and innovation, it is vital that the regulated entities are permitted to retain a portion of the benefits resulting from any such improvements that they generate." *Id.* at ¶ 14. Further, the price cap system should incorporate a productivity growth target through which a portion of the benefits of productivity growth are passed on to consumers. *Id.* Like other features of a well-designed price cap system, the division of productivity gains between the regulated entity and its customers should be established in advance, remain in effect for a defined period, and not be subject to retroactive true-ups or amendments. *Id.*

Dr. Neels and Dr. Powers echo these principles, and further emphasize that holding to the regulatory bargain is especially important in the case of a public entity like the Postal Service. Brattle Decl. at ¶¶ 16-24. Without shareholders, and aware of the prospect that the government may step in to fund operations if its financial situation deteriorates significantly, the Postal Service may need reinforcement of the message that the regulator will not allow it to recoup past losses.

As discussed above, Dr. Willig has concluded that the proposals in Order No. 5337 are at odds with these basic principles of a well-designed system of price cap regulation. Additionally, Dr. Willig notes that "if the value of the cap is set too high, and if competition is not an adequate constraint on price, consumers are likely to be harmed by prices exceeding competitive levels." *Id.* at ¶ 13, n.7. By tying the Postal Service's prices to actual costs, extent of capital investment, and declining demand, and doing so through retrospective assessments of those factors, the Commission's proposals in Order No. 5337 do not implement best practices for regulating a monopoly service provider. Instead, they incorporate features of cost-plus or rate-of-return regulation without providing mailers any assurance that prices will decline if Postal Service costs decline. Furthermore, by allowing price increases that could exceed CPI by over 6 percent annually, the Commission's nominal price cap would be set at a level far above what would be expected in a competitive market.[29]

[29] Indeed, if one assumes the economy as a whole is generally competitive, CPI-based increases can be assumed to reflect the actions of a competitive market. While the postal industry might experience some variation from that norm, the Commission's proposals would authorize price increases that triple recently experienced changes in CPI.

If the Commission is intent on changing the current system of regulation, it should redesign the system in line with the principles identified by Dr. Willig. A well-designed price cap system will serve the interests of the Commission, the Postal Service, and the mailing industry, achieve the objectives of PAEA, and provide the Postal Service with the proper incentives and greatest opportunity to align its operations with market realities and achieve financial stability.

V. THE COMMISSION'S REVISED PROPOSAL TO ELIMINATE THE CPI-U PRICE CAP *AGAIN* VIOLATES SECTION 3622(D)(1)(A)

A. The Commission's Analysis of PAEA's Plain Text Is Erroneous

When it enacted PAEA, Congress instructed the Commission, by regulation, to establish "a modern system for regulating rates and classes for market-dominant products." 39 U.S.C. § 3622(a). This is precisely the same "system" that must be designed to achieve the statutory objectives found in 3622(b), accounting for the factors found in 3622(c). And it is the same "system" that "shall" include a CPI cap on annual market-dominant price changes. Congress identified this CPI cap as a "requirement" of the "system" not once (*see* 39 U.S.C. § 3622(d)(1)(A)), but twice. *Id.* at 3622(d)(1)(D).

On these foundational points, we and the Commission agree. The Commission's analysis goes awry when it concludes that "the CPI-U price cap is plainly a part of the system that is subject to review under paragraph (d)(3) and, if necessary to achieve the statutory objectives, subject to potential change or replacement." Order No. 5337 at 36. Nothing in the statute makes such a conclusion reasonable, let alone "plain." Indeed, Congress' words necessitate a contrary conclusion: the "system" that the Commission is reviewing (and may modify if necessary) in this docket is the same "system" that Congress instructed it to establish "by regulation" in 3622(a). Nowhere does the legislature instruct, or even permit, the Commission to modify or abandon any aspect of the "system" that Congress itself mandates. Unless Congress changes the law, the Commission cannot, for example, propose a revised system of ratemaking that eliminates the 3622(b) objectives. Nor could it propose modifications that eliminate the exigency authority provision in 3622(d)(1)(E). Nor may it amend the system to abrogate the CPI cap. That the statutorily-required price cap is not subject to modification or abrogation because it is not part of the system that the Commission created "by regulation" is clear from the language of the statute. *See USPS V. PRC*, 785 F.3d 740, 743 (D.C. Cir. 2015) ("Under the Act, the Commission is charged with 'regulating rates and classes for market-dominant products,' . . . *which includes promulgating regulations implementing the inflation-based price cap."*) (emphasis added). When the language of the statute is clear, as it is here, "that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

In Order No. 5337, the Commission looks to PAEA's structure, the alleged contextual differences between sections 3622(a) and 3622(d)(3), and the negative implications of words Congress elected *not* to include in the statute to support its belief that the plain text of PAEA permits it to grant the Postal Service above-inflation pricing authority. We address each here.

1. PAEA's "Structure" Does Not Permit the Elimination of the CPI Cap

First, the Commission states that "[t]he structure of subsection (d) of section 3622 confirms the Commission's interpretation." Order No. 5337 at 36. The Commission's analysis is as follows:

> Subsection (d), titled "Requirements" is subdivided into three paragraphs: (d)(1) "In General;" (d)(2) "Limitations;" and (d)(3) "Review." Paragraph (d)(2) modifies the preceding text appearing in paragraph (d)(1). This structure reinforces the conclusion that the general provisions of paragraph (d)(1) and the limitations of paragraph (d)(2) are part of the system to be reviewed (and, if necessary to achieve the statutory objectives, changed or replaced) pursuant to paragraph (d)(3).

Id. The Commission reiterates this argument later, claiming that "paragraph (d)(3) structurally follows paragraphs (d)(1) and (d)(2), which strongly suggests that the provisions of paragraphs (d)(1) and (d)(2) are subject to modification by paragraph (d)(3)." *Id.* at 39.

We are unaware of any authority, the Commission cites none, supporting this novel proposition that last-in-sequence sections of a statute swallow up the ones preceding them. That is certainly not how 39 U.S.C. § 3622(d) works. Section 3622(d) contains three distinct paragraphs, and *each* is a requirement of the market-dominant ratemaking system. Paragraph (d)(1) sets forth the general requirements that must be included in the system, including the CPI cap. Paragraph (d)(2) further defines the contours of the system: it states that the (d)(1) price cap applies to mail classes, it permits the Postal Service to round prices upward to the nearest whole number, and it delineates how the Postal Service can utilize unused rate authority. Paragraph (d)(3) instructs the Commission to review the system after ten years; the same system that includes a CPI cap, applies that cap to mail classes, and subjects rounding and banked rate authority to the cap. Nothing in the law's structure states that paragraph (d)(3) eliminates the CPI cap from paragraph (d)(1).

One wonders how the statutory structure can "reinforce the conclusion" or "strongly suggest" that paragraph (d)(3) supplants (d)(1)'s price cap when Congress drafted section 3622(d)(3) without any reference to the CPI cap at all. Congress clearly knew how to explicitly refer to the CPI cap when writing this portion of the statute: paragraph (d)(2) does so several times. In contrast, paragraph (d)(3) is *entirely silent* with respect to the (d)(1) price cap. There is simply nothing in (d)(3)'s text indicating that the price cap is subject to whatever "modification" or "alternative system" the Commission creates as part of its ten-year review. If Congress intended to allow the Commission to promulgate regulations abrogating the CPI cap during the ten-year review, it could have instructed the Commission to "review the system for regulating rates and classes for market-dominant products established under this section, *including the annual limitation under paragraph (1)*." As we stated in previous comments during this proceeding, "[t]hese extra words presumably were not omitted just to save on printing costs." *See* Phase II Comments at 23 n.8. It strains credulity to believe that Congress would allow the Commission to eliminate what the Commission itself has called PAEA's "centerpiece"—the CPI cap—during this review without once mentioning the cap in paragraph (d)(3) of the statute. *See* Order No. 547 at 1. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001).

The Commission's theory that section 3622(d)'s paragraph sequencing "strongly suggests" that paragraph (d)(3) permits it to abolish (d)(1)'s price cap is especially misplaced. When reviewing the plain language of a statute, one does not guess at what statute's structure "strongly suggests." The Commission's assertion about what the law suggests, hints at, or insinuates does not change what Congress actually wrote. "Repeals by implication are very much disfavored." *Fogg v. Gonzales*, 492 F.3d 447, 453 (D.C. Cir. 2007) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189-189 (1978); *see also id.* ("we cannot infer from the addition of § 2000e–2(m) the implicit repeal of § 2000e–2(a)"); *see also TVA v. Hill*, 437 U.S. at 189 (calling it a "cardinal rule" that "repeals by implication are not favored."). For all of these reasons, the Commission's structural argument is unsound and cannot withstand judicial scrutiny.

2. The Commission's "Differing Context" Argument Is Specious

The Commission asserts that the "differing statutory context under which [it] acts—subsection (a) versus paragraph (d)(3)—determines the extent of the Commission's rulemaking authority." Order No. 5337 at 37 (citing Order No. 4258 at 17-18). In our previous comments, we explained why differences in the wording of sections 3622(a) and 3622(d)(3) do not authorize the Commission to disregard the price cap. *See* Phase II Comments at 16-19. The Commission doubles down on this argument in Order No. 5337, however. It refers multiple times to the allegedly "different purposes" of subsection (a) and paragraph (d)(3), imagines disparate roles for the statutory objectives, and envisions malleable definitions of the word "system" depending on its location within the statute. *See* Order No. 5337 at 37-39. The Commission's interpretations cannot be squared with the statutory text.

The Commission asserts that PAEA "makes it clear that the statutory objectives and factors play different roles to effectuate the different purposes of subsection (a) and paragraph (d)(3)." *Id.* at 37. Nowhere does PAEA do this. The Commission then goes on to say that "subsections (b) and (c) explain the role of the objectives and factors during the course of any rulemaking undertaken pursuant to subsection (a)." *Id.* This is also not true. Section 3622(b) identifies the objectives that the system must be designed to achieve, and 3622(c) identifies the factors the Commission must take into account when creating or revising the system. Congress did not limit the role of the objectives and factors to 3622(a) rulemakings. It deemed them to be important elements of the "system" in all contexts, including rate reviews. *See Carlson v. PRC*, 938 F.3d 337, 343 (D.C. Cir. 2019) ("Based on the text and structure of the PAEA, we conclude that the PAEA requires consideration of all relevant statutory objectives and factors as part of the regulatory process . . . "). There is simply nothing in the statute that relegates the objectives and factors to a mere "background role" under subsection (a) and promotes them to a "primary role" during the ten-year review required by paragraph (d)(3). Order No. 5337 at 37. The statutory objectives are *always* important: the system—whether originally created pursuant to section 3622(a) or modified under 3622(d)(3)—must *always* be designed to achieve them. The assignment of relatively different values to the objectives based on "context" is an invention of the Commission's making that lacks any support in the statute.

More fundamentally, the Commission's discussion of the objectives and factors' roles under section 3622 is a red herring. Even if one presumes that Congress gave the objectives a relatively larger importance during the ten-year review proceeding, that *still* does not mean that Congress authorized the Commission to ignore the CPI cap in the event the Commission modifies the system. The Commission creates an artificial binary choice here when it writes that "[t]he purpose of paragraph (d)(3) is to ensure that the objectives appearing in subsection (b)—not the provisions of paragraphs (d)(1) and (d)(2)—are being met." *Id.* at 40. It is true that Congress authorized the Commission during this proceeding to modify the system "as necessary to achieve the objectives." 39 U.S.C. § 3622(d)(3). No one suggests otherwise. But the Commission invents a false dilemma by deducing that, if the ten-year review process is designed to achieve the objectives, it necessarily is at odds with the statutory requirements of 3622(d)(1) and (d)(2). This is a logical fallacy. The paragraph (d)(1) CPI cap is a Congressionally-mandated requirement of whatever system is created or modified. That paragraph (d)(3) instructs the Commission to make sure any revised or alternative system achieves the objectives does not alter the price cap's preeminence in any way.[30]

[30] In our previous comments, we explained that a canon of statutory interpretation holds that the same word or phrase—in this case "system"—is presumed to have a consistent meaning throughout the statutory text. The

3. The Commission's Negative-Implication Argument Is Not Compelling

The Commission also draws on the absence of specific limiting language in section 3622(d)(3) to infer that its ability to modify the system is unbounded. First, it observes that "nothing in paragraph (d)(3) states that the Commission's review of the system, and the range of action that can be taken in response to that review, is to be limited by the provisions appearing in paragraphs (d)(1) and (d)(2)." Order No. 5337 at 38. Next, the Commission proclaims that "[i]f Congress had intended to restrict the scope of review or action authorized under paragraph (d)(3), it could have done so easily." *Id.*

The first observation is true, but it proves nothing. Sections 3622(d)(1) and (d)(2) set forth the required parameters of the system. Those parameters do not magically disappear into the ether because Congress decided not to repeat them in paragraph (d)(3). Indeed, it would have been superfluous for Congress to have done so. Congress is not expected to identify a requirement of a regulatory system and then explicitly reaffirm that requirement's existence in an adjacent paragraph in the same section of the statute. The requirement remains a requirement until Congress says otherwise. It is paradoxical that the Commission lauds its "holistic interpretation" of the statute when it reads paragraph (d)(3) in such isolation here. Order No. 5337 at 35.

Commission's attempt to overcome this presumption by claiming that it "relents when a word used has several commonly understood meanings" appears hollow when the Commission itself cited to a singular dictionary definition of the word "system" only pages earlier. *Compare* Order No. 5337 at 35, n.71 *with id.* at 39.

As to the second point, the Commission has it backwards: Congress *did* restrict the scope of review or action under paragraph (d)(3)—those restrictions are found in (d)(1) and (d)(2). Again, there is no reason for Congress to repeat these restrictions in the immediately next paragraph. The only reason why Congress would have felt compelled to mention the (d)(1) or (d)(2) requirements in (d)(3) would be to exempt them as statutory "requirements" for purposes of the ten-year review. In fact, Congress knew how to do this in the very same section of the statute: section 3622(d)(1)(E)—the exigency provision—begins "notwithstanding any limitation set under subparagraphs (A) and (C) . . ." Congress knew precisely how to carve out the CPI price cap when it wanted to. Its failure to do so in paragraph (d)(3) must be regarded as its intention to keep the price cap a requirement of whatever system emerges from the ten-year review. *See generally* Phase II Comments at 24.

B. The Commission's Appeal to Statutory Ambiguity Cannot Save It: Its Interpretation is Unreasonable and is not Entitled to Deference

The Commission posits an alternative argument that PAEA is "at most ambiguous" on the question of whether section 3622(d)(3) permits it to modify the CPI price cap. "To the extent that paragraph (d)(3) may be ambiguous," claims the Commission, its "interpretation is reasonable and thus would be entitled to *Chevron* deference." Order No. 5337 at 44.

Of course, a reviewing court will not accept the Commission's assertion that PAEA is ambiguous merely because the Commission says so. "The first question, whether there is such an ambiguity, is for the court, and we owe the agency no deference on the existence of ambiguity." *American Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005). As we explain above and expounded on in our prior submissions, the statutory language is unambiguous: "The system of regulating rates and classes for market-dominant products *shall* . . . include an annual limitation . . . equal to the change in the [CPI]." 39 U.S.C. § 3622(d)(1)(A). Paragraph (d)(3) says absolutely nothing that could conceivably override this requirement—In fact it does not reference the CPI cap at all.

Even if the statute were ambiguous, the Commission's interpretation of paragraph (d)(3) would not be entitled to deference. Courts "recognize that the existence of ambiguity is not enough per se to warrant deference to the agency's interpretation. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity. 'Mere ambiguity in a statute is not evidence of congressional delegation of authority.'" *Am. Bar Ass'n*, 430 F.3d at 469 (citing *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001)). "The deference mandated in *Chevron* 'comes into play, or course, only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency.'" *Id.* (citing *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998)) (emphasis in original).

To find the Commission's statutory interpretation deference-worthy in this case, a court would first have to find that the plain language of paragraph (d)(3)—which makes no reference to abrogating the CPI cap whatsoever—ambiguous. Then, the court would have to deduce that Congress implicitly delegated to the Commission the authority to abolish one of the fundamental statutory requirements of the system, which would require a level of deference far beyond that required under *Chevron*. To make this leap, a court "would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast of any indication that Congress even suspected its presence." *Am. Bar Ass'n*, 430 F.3d at 469.

Furthermore, if a court were to review whether the Commission's interpretation of PAEA is reasonable, it would not do so in a vacuum. "This rule reflects the idea that a statute should not be read in an atmosphere of sterility, but in the context of what actually happens when humans fulfill its purpose." *See* 2A Sutherland Statutory Construction § 45:12 (7th ed.). To interpret PAEA as the Commission does would mean that the Postal Service's captive customers—including charities who use the mail to fulfill their missions and publishers who use the mail to distribute educational, cultural, scientific, and informational material—would be crushed beneath the weight of unprecedented price increases *even though PAEA's drafters intended for a price cap to protect mailers.* It would also result in a rapid acceleration of volume loss from the mail to the Postal Service's detriment, which is precisely the dilemma the Commission is trying to avoid. Such results simply do not square with a reasonable interpretation of the statute. *See Bechtel Const., Inc. v. United Broth. Of Carpenters & Joiners of America*, 812 F.2d 1220, 1225 (9th Cir. 1987) (court should avoid construction establishing illogical, unjust, or capricious statutory scheme).

* * *

The Commission offers three justifications for its claim that its expansive interpretation of paragraph 3622(d)(3) entitling it to rupture the CPI cap merits judicial deference.

(1) First, the Commission simply falls back on its plain text analysis. It argues that "if paragraph (d)(3) is determined to be ambiguous, the foregoing plain language analysis would be equally applicable to explain how the Commission's reasonable interpretation is consistent with the text, context, structure, and purpose of the PAEA." Order No. 5337 at 45.

This argument gets the Commission nowhere. If a reviewing court finds that the Commission's analysis of PAEA's plain text is correct, then that ends the matter. There would be no need for the court to resort to a reasonableness analysis if the plain meaning of the statute is as apparent as the Commission says because "it is not allowable to interpret what has no need of interpretation." *Ruggles v. Illinois*, 108 U.S. 526, 534 (1883). On the other hand, if the Commission's plain language analysis lacks merit—as we believe it does—then that analysis will not be given deference by a reviewing court in any event.

(2) Second, the Commission states that "to the extent that any ambiguity exists with regard to paragraph (d)(3), it is also permissible for the Commission to use Senator Collins' floor statement as an interpretive aid and reasonable for the Commission to conclude that paragraph (d)(3) would allow the Commission to make

additional rate adjustment authority available to the Postal Service." Order No. 5337 at 45-47.

The Commission's continued reliance on Senator Collins' single floor statement remains unpersuasive. This is especially so because—regardless of what Senator Collins said on the Senate floor—the statute that Congress actually enacted *does not* state that the CPI cap in paragraph (d)(1)(A) shall be subject to modification or elimination during the ten-year review. As we explained in our previous comments, Senator Collins' floor statement cannot override the plain text of the statute. *See* Phase II Comments at 25-27; *see also Carlson*, 938 F.3d at 350 ("legislative history cannot provide the express statement necessary to eliminate the reasoned decisionmaking required by the APA.").

(3) Third, the Commission attempts to defend its abandonment of its earlier interpretations of the CPI cap as resting atop PAEA's statutory hierarchy and as being the "indispensable" "centerpiece" of the market-dominant rate regulation scheme. The Commission justifies walking away from its previous statements extolling the sanctity of the PAEA price cap by noting that those statements were made in different contexts than as part of the ten-year review mandated by paragraph (d)(3).

For the reasons stated above (*see* § II(A)(2), *supra*) and explained in our previous comments (*see* Phase II Comments at 27-29), there is nothing in PAEA's language—whether under paragraph (a)'s general review authority, or paragraph (d)(1)(E)'s exigency provision, or (d)(3)'s ten-year review—that permits the

Commission to assign different levels of importance to the price cap. Moreover, nothing in the statute's legislative history even suggests this. Section 3622(d)(1)(A) makes the CPI cap a requirement of the system in *any* context. Congress did not make the price cap a malleable entity that is somehow "mandatory" under section (a), "central" during exigency cases, but disposable during the ten-year review.

Thus, the Commission cannot repudiate its longstanding interpretation by distinguishing its authority under paragraph (d)(3) as somehow unique. "An agency cannot typically abandon an earlier position simply by subsequently terming the case in which it was applied 'sui generis,' but is instead 'obligated to supply a reasoned analysis for the change." *Trunkline LNG v. FERC*, 921 F.2d 313, 320 (D.C. Cir. 1990) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983)); *see also U.S. v. Paddack*, 825 F.2d 504, 512 (D.C. Cir. 1987) ("We do not normally defer to a vacillating agency position.").

VI. CONCLUSION

Joint Commenters want a healthy, vibrant Postal Service to exist. In large part, it currently does. The Postal Service is meeting its universal service obligation. Its retirees' benefits are well-funded. Market-dominant mailers, like our members, want to stay in the mail. The sky could perhaps be a bit bluer, but it is hardly falling.

It is thus critical that any proposed changes to the market dominant system of ratemaking – particularly changes as radical as those proposed here – account for the fact that the Postal Service's continued health depends on its customers. Any modified system must galvanize the Postal Service to do what Congress intended when it enacted PAEA: act like a reasonable business, make sensible management decisions, and price market dominant products flexibly but also *justly, reasonably*, *stably*, and *predictably*. These are not mere suggestions. They are Congressionally-mandated objectives.

After it reviews and considers the voluminous public comments that will be submitted in response to Order No. 5337, the Commission should withdraw the Order. Its proposals are illegal. Even if they were legal, they'd be unworkable. As a matter of good public policy and common sense, it cannot be that the solution to declining volumes and uncontrolled costs is to design a system that will drive volumes further down while substantially reducing the incentivize for cost-cutting. The Commission should not gamble the outlook of our postal system on the unproven and suspect hypothesis that large, stand-alone price surcharges will lead to a stable, bright future. These new proposed rules are not what mailers want, not what the Postal Service needs, and not what the Commission can legally or rationally implement.

Respectfully submitted,

Eric S. Berman
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-4661
esberman@venable.com

Counsel for Alliance of Nonprofit Mailers and MPA–The Association of Magazine Media

Matthew D. Field
Ian D. Volner
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 344-8281
mfield@venable.com
idvolner@venable.com

Counsel for Association for Postal Commerce

Hamilton Davison
President & Executive Director
American Catalog Mailers Association, Inc.
PO Box 41211
Providence, RI 02940-1211
(800) 509-9514
hdavison@catalogmailers.org

Donna Tschiffely
Executive Director
Direct Marketing Association of Washington
11709 Bowman Green Drive
Reston, VA 20190
703-689-DMAW (3629)
donna@DMAW.org

Shannon McCracken
Chief Executive Officer
The Nonprofit Alliance
1319 F St NW, Suite 402
Washington, DC 20004
smccracken@tnpa.org

Maynard H. Benjamin
President and CEO
Envelope Manufacturers Association
700 S. Washington Street, Suite 260
Alexandria, VA 22314-1565
703-739-2200
mhbenjamin@envelope.org

Donna Hanbery
Executive Director
Saturation Mailers Coalition
33 South 6th Street, Suite 4160
Minneapolis, MN 55402
612-340-9350
hanbery@hnclaw.com

Jody Berenblatt
Executive Director
Continuity Shippers Association
180 Thompson St
New York, NY 10012-4910
(212) 677-3284
JodyBerenblatt@gmail.com

February 3, 2020