

ORAL ARGUMENT SCHEDULED MARCH 15, 2011

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

UNITED STATES POSTAL SERVICE,	)	
<i>Petitioner,</i>	)	
	)	
NATIONAL POSTAL MAIL HANDLERS	)	
UNION,	)	
<i>Intervening Petitioner,</i>	)	
	)	
<i>v.</i>	)	No. 10-1343
	)	
POSTAL REGULATORY COMMISSION,	)	
<i>Respondent,</i>	)	
	)	
AFFORDABLE MAIL ALLIANCE <i>et al.</i> ,	)	
<i>Intervening Respondents.</i>	)	

**BRIEF OF INTERVENING RESPONDENTS  
AFFORDABLE MAIL ALLIANCE *ET AL.***

(Names of sponsoring parties and counsel  
appear inside front cover.)

January 14, 2011

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**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

On December 21, 2010, this Court issued an order allowing the National Postal Mail Handlers Union to intervene in support of the USPS, and the following mailers and mailer trade associations to intervene in support of the PRC:

Affordable Mail Alliance  
Alliance of Nonprofit Mailers  
American Business Media  
Association for Postal Commerce  
Direct Marketing Association, Inc.  
Magazine Publishers of America, Inc.  
Major Mailers Association  
National Newspaper Association  
National Postal Policy Council  
Newspaper Association of America  
Saturation Mailers Coalition  
Time Warner Inc.  
Valassis Direct Mail, Inc.

The Certificate as to Parties, Rulings and Related Cases on pages i-ii of the initial brief of the USPS is otherwise correct and complete.

**Circuit Rule 26.1 Disclosure Statement**

Affordable Mail Alliance, Alliance of Nonprofit Mailers, American Business Media, Association for Postal Commerce, Direct Marketing Association, Inc., Magazine Publishers of America, Inc., Major Mailers

Association, National Newspaper Association, National Postal Policy Council and Saturation Mailers Coalition are membership organization of mailers, mail service providers, or trade associations of mailers and mail service providers having a common interest in postal rates. Each of these intervenors seeks to promote the interests of its members, *inter alia*, by participating in litigation concerning the rates of postage paid by mailers. Each of these intervenors is a trade association within the meaning of Circuit Rule 26.1(b), so no listing of members is required. None of these intervenors is publicly traded, and none has a corporate parent. No publicly traded entity has an ownership interest in these trade associations.

Time Warner Inc. is a publicly held corporation organized under the laws of the State of Delaware and having its principal place of business in the State of New York. Its shares are publicly traded on the New York Stock Exchange. Time Warner Inc. does not have a parent company. No publicly held company has a 10% or greater ownership interest in Time Warner Inc.

Valassis Direct Mail, Inc. is a wholly owned subsidiary of Valassis Communications, Inc., a company organized under the laws of Delaware and having its principal place of business in Michigan. No publicly-held company has a 10% or greater ownership interest in Valassis Communications, Inc.

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\* Authorities upon which we chiefly rely are marked with asterisks.

## GLOSSARY OF TERMS

JA	Joint Appendix filed November 23, 2010
Order	<i>Order Denying Request for Exigent Rate Adjustments</i> , Order No. 547, Docket No. R2010-4 (Sept. 30, 2010)
PRC	Postal Regulatory Commission (before 2007, Postal Rate Commission)
RHBF	Retiree Health Benefits Fund
SA	Supplemental Appendix filed January 14, 2011
USPS	United States Postal Service

## STATEMENT OF ISSUES

In 2006, Congress reformed postal rate regulation by replacing cost-of-service regulation with index or incentive regulation, which generally limits overall rate increases on market dominant services to changes in the Consumer Price Index (“CPI”). 39 U.S.C. §3622(d). The legislation created a narrow exception to the CPI-based rate cap for “extraordinary or exceptional circumstances.” *Id.* § 3622(d)(1)(E). The latter provision directed the Postal Regulatory Commission (“PRC”) to:

establish procedures whereby rates may be adjusted on an expedited basis *due to either extraordinary or exceptional circumstances*, provided that the Commission determines . . . that such adjustment is reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

*Id.* (emphasis added).

In the decision under review, the PRC construed the phrase “due to extraordinary or exceptional circumstances” as requiring the United States Postal Service (“USPS”) to establish a causal relationship between above-CPI rate increases sought under § 3622(d)(1)(E) and the “extraordinary or exceptional” circumstances invoked to justify the proposed increases. Finding that the USPS had made no such showing,

the PRC disallowed a USPS request for such an increase. The Postal Service's challenge to this decision raises two issues:

(1) Was the Commission's construction of section 3622(d)(1)(E) arbitrary, capricious or otherwise contrary to law under 5 U.S.C. § 706? (No.)

(2) Did the USPS receive reasonable notice of the causation requirement? (Yes.)

## **STATEMENT OF FACTS**

### **A. 39 U.S.C. § 3622(d)(1)(E)**

This case involves a subsection of 39 U.S.C. § 3622(d), which generally limits overall rate increases on any class of market-dominant mail to the rate of change in the Consumer Price Index for All Urban Consumers ("CPI"). Section 3622(d) was enacted in 2006 as part of a general revision of the postal laws by the Postal Accountability and Enhancement Act of 2006 ("PAEA"), Pub. L. No. 109-435, 120 Stat. 3198 (2006). Pre-2006 law required the USPS and the Postal Rate Commission (the predecessor of the current Postal Regulatory Commission) to set postal rates that would generate total revenue equal to total costs "as nearly as practicable." Former 39 U.S.C. § 3621 (2000) (repealed). Total costs, also known as the "revenue requirement," were

determined by computing the Postal Service's actual costs during a recent period and projecting those costs forward to a future "test year" that was representative of the period when the proposed rates were likely to be in effect. Order at 7-8 (JA154-155); *United Parcel Service v. USPS*, 184 F.3d 827, 829-36 (D.C. Cir. 1999); *Newsweek, Inc. v. USPS*, 663 F.2d 1186, 1203-06 (2d Cir. 1981), *reviewed on other grounds*, *Nat'l Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810 (1983). By 2006, however, a consensus had developed that Title 39, including its ratemaking provisions, needed thorough reform. Many observers had concluded that traditional cost-of-service regulation and its break-even provision provided insufficient incentives for the USPS to control its costs. Order at 9-10 (JA156-157).<sup>1</sup>

Congress, after considering the problem, decided to replace cost-of-service ratemaking with incentive or index ratemaking, an alternative approach that had gained increasing use in other regulated industries

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<sup>1</sup> *Accord* STEPHEN BREYER, REGULATION AND ITS REFORM 16, 47-50 (1982); MICHAEL A. EINHORN, PRICE CAPS AND INCENTIVE REGULATION IN TELECOMMUNICATIONS 2-3 (1991); 1 ALFRED E. KAHN, THE ECONOMICS OF REGULATION 27-30 (1970); KENNETH E. TRAIN, OPTIMAL REGULATION xi-xii (1991); Peter Navarro, *The Simple Analytics of Performance-based Ratemaking: A Guide for the PBR Regulator*, 13 YALE J. ON REG. 105, 108 (1996) (traditional rate regulation "creates perverse incentives which encourage managers to inflate the firm's operation and maintenance expenses, 'gold plate' or over-invest in capital, avoid optimal risk-taking, and otherwise operate inefficiently"); MICHAEL A. CREW, ECONOMIC INNOVATIONS IN PUBLIC UTILITY REGULATION 63 (1992).

since the late 1980s. Incentive regulation constrains prices by reference to an external cost index such as the Consumer Price Index, rather than the costs of the regulated firm itself.<sup>2</sup>

PAEA replaced cost-of-service regulation with index ratemaking as the primary constraint on the overall level of all rates for market-dominant postal services. *Id.* at 10 (JA157). Under PAEA, the Postal Service's overall revenue requirement no longer sets either a floor under or a ceiling over the Postal Service's overall revenues. Instead, with narrow exceptions, 39 U.S.C. § 3622(d) caps the annual increase in rates for market-dominant classes of mail at the rate of increase in the Consumer Price Index ("CPI"). 39 U.S.C. § 3622(d)(1), (2); Order at 6-7, 10 (JA153-154, 157).

By "severing the linkage under traditional cost-of-service ratemaking" between a regulated company's costs and rates, Congress sought to (1) create an incentive for the USPS to hold its cost increases below the level of the index, and (2) protect ratepayers if the regulated company's costs nonetheless outstrip inflation. Order at 11-13 (JA158-160). If the Postal Service's unit costs increase more slowly than the

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<sup>2</sup> *Accord 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); EINHORN, *supra*, at 4-8; CREW, *supra*, at 57-60; Navarro, *supra*, at 108.

CPI, then the USPS is entitled to keep the extra income for itself. Conversely, if the Postal Service's costs increase faster than the CPI, than the USPS must absorb the shortfall or reduce its costs. Order at 11 (JA158). As the House committee report explained:

The objective of the bill is to position the Postal Service to operate in a more business-like manner. To achieve this goal, the system must be responsive to market considerations and must provide clear incentives for postal management and the Postal Service as an institution. The Postal Service would no longer operate under a break-even mandate. By 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. In the same way, losses could not be recovered by increasing rates beyond specific parameters without regulatory approval.

H.R. REP. No. 66, 109th Cong., 1st. Sess. 43-44 (2005); *accord* S. REP. No. 318, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 9 (2004) (the price cap mechanism was chosen to put “downward pressure on costs through restrictions on price changes” as an “incentive to control costs”); PRC Annual Report to the President and Congress for FY 2009 at 20 (“Nor does the PAEA require the Postal Service to break even.”).

The narrow scope of the exception to the CPI-based cap, set forth in 39 U.S.C. § 3622(d)(1)(E)—the provision at issue in this case—reflects the same philosophy. Congress was aware that unusual circumstances might arise in which a CPI cap could prevent the USPS

from recovering all of its costs. In 2004, for example, the Postmaster General testified before Congress that, because an imperfectly crafted price cap could be harmful “given the volatility of today’s marketplace,” the price cap should “be constructed to recognize the many cost factors which enter into the ratemaking process, many of which are beyond our control.”<sup>3</sup>

Consistent with this position, early versions of the reform legislation did not require the existence of a causal relationship between an above-CPI increase sought by the USPS and any unexpected, extraordinary or exceptional circumstances that the USPS might offer as justification. Order at 16-19 (JA163-166). For example, several postal reform bills considered by Congress between 2004 and 2006 would have allowed the USPS to exceed the CPI cap merely by showing that above-CPI rate increases were “reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” See H.R. 22 § 201 (as reported in H.R. REP. No. 66, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4, 46 (2005) (to be

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<sup>3</sup> *The Postal Service in Crisis: A Joint Senate-House Hearing on Principles for Meaningful Reform, Joint Hearing Before the H. Comm. on Government Reform & the S. Comm. on Governmental Affairs*, 108<sup>th</sup> Cong. 63 (2004) (“2004 Joint Hearings”).

codified as proposed 39 U.S.C. § 3622(d) and (e)). These provisions were not enacted.

Mailers, regulatory experts (including the then-chairman of the PRC) and representatives of the Administration repeatedly expressed concern to Congress that a broad exception of this kind could destroy the effectiveness of index regulation, and reintroduce cost-of-service regulation and its breakeven guarantee by the back door. Order at 13-14 (JA160-161) (discussing legislative history). In response to these concerns, the legislative drafters made the proposed exception to the pricing constraints progressively more narrow and restrictive. As the PRC explained in its review of the “extensive 11-year legislative history that informs the Commission’s interpretation of 39 U.S.C. § 3622(d)(1)(E)”:

In general, the exigent rate provisions evolved from a less restrictive to a more restrictive standard. As the language changed from one Congress to the next, requirements relating to both exigency and the Commission’s determination became more strict and difficult to meet.

Order at 13-14 (JA160-161); *see generally id.* at 14-24 (JA161-171). “These changes culminated in the PAEA.” Order at 20 (JA167).

The causation requirement first appeared in 2004, when the Senate reported a bill requiring that an above-CPI rate increase must be “due to extraordinary and exceptional circumstances.” Order at 19

(JA166) (discussing S. 2468); S. REP. No. 318, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess. at 1, 11-12 (2004) (same); *see also id.* at 43 (explaining that the purpose of this language was to authorize the Postal Regulatory Commission to “establish procedures whereby rates may be adjusted on an expedited basis *due to* unexpected or extraordinary circumstances such as the September 11, 2001 terrorist attacks or the use of the mails to transmit anthrax.”) (emphasis added). With a change of the conjunction from “and” to “or,” the requirement that an above-CPI increase be “due to extraordinary or exceptional circumstances” was included in 39 U.S.C. § 3622(d)(1)(E) as enacted.

## **B. The USPS Request**

The proceeding below was the first case in which the USPS sought approval of above-CPI rate increases under Section 3622(d)(1)(E). On July 6, 2010, the USPS asked the PRC to approve rate increases averaging approximately 5.6 percent, several times the cumulative change in the CPI since the last rate increase, to take effect in January 2011. Order at 29, 31 (JA176, 178). In support of this request, the USPS projected that it would suffer a “multi-billion dollar shortfall” in Fiscal Year 2011 (*i.e.*, the 12-month period ending on September 30, 2011), and asserted that these losses were due in large part to the decline in mail volume and revenue caused by the 2007-2009 recession. *Id.* at 31-37 (JA178-184). These events, the USPS argued, constituted

an “extraordinary or exceptional circumstance” within the meaning of 39 U.S.C. § 3622(d)(1)(E). Order at 31, 33-37, 42-45 (JA178, 180-184, 189-192).

### **C. The PRC Decision**

The Commission issued its final order on September 30, 2010. The order disallowed the requested rate changes in their entirety. Order No. 547 (JA145-255).

The Commission agreed with the USPS that the recent recession, and the resulting downturn in mail volume and revenue, amounted to “extraordinary or exceptional circumstances” under 39 U.S.C. § 3622(d)(1)(E). Order at 49-53 (JA196-200). *Contra* Blair concurrence (JA235-237). The Commission unanimously held, however, that the USPS had failed to show that the proposed rate increases were “due to” (*i.e.*, caused by) the 2007-2009 recession—the only circumstance identified by the USPS as “extraordinary or exceptional”—rather than the longer-term or structural problems whose existence the USPS had acknowledged. Order 3-4, 26-27, 53-86 (JA150-151, 173-174, 200-233); Blair concurrence at 1 (JA235); Langley concurrence (JA238-239).<sup>4</sup>

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<sup>4</sup> In light of this holding, the Commission did not determine whether the requested rate adjustment would be “reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the

In reaching this conclusion, the Commission carefully considered the statute, its underlying policies and legislative history, and the record submitted by the USPS. Reviewing the text and legislative history of Section 3622, the Commission found that the three preconditions imposed by § 3622(d)(1)(E) for above-CPI rate increases—“the existence of extraordinary or exceptional circumstances; the requirement that the adjustment be ‘due to’ those circumstances; and the requirement that the adjustment be reasonable and equitable and necessary”—together “create a narrow exception to the general statutory rule that rates for market dominant products are limited by CPI-U-based rate caps.” Order at 26-27, 53-54 (JA173-174, 200-201).

The “due to” requirement, in particular, means that “the Postal Service’s proposed adjustment must be *causally related to* the alleged extraordinary or exceptional circumstance.” *Id.* at 54 (JA201). The Commission found support for this construction not only in the standard dictionary definitions of “due to,” *id.* (quoting dictionaries), but also in “the broader statutory context in which section 3622(d)(1)(E)

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needs of the United States.” Order at 26-27 (JA173-174). Needless to say, if the Court were to overturn the PRC’s finding that the USPS had failed to satisfy the causation requirement of section 3622(d)(1)(E), the matter would need to be remanded to the PRC to determine whether the proposed increase satisfied the other elements of the same section.

appears and with the purposes for which the PAEA was enacted.” Order at 56 (JA203). Section 3622(d)(1)(E), the Commission explained,

was designed as a narrow exception to the rate cap regime. Then-Postal Rate Commission Chairman George Omas testified that the exigent rate provision “represents an enormous exception to the general thrust of postal ratemaking reform....” S. Hrg. 108-527 at 52. The Administration supported a rate cap “with a strict exigency requirement....limiting the circumstances in which rate increases can exceed the CPI rate...” Statement of Administration Policy, *supra*, note 12. Assistant Secretary Bitsberger concurred, supporting an exigent rate provision “which establishes a very high bar to increase rates above CPI.” S. Hrg. 109-198 at 10.

Order at 56 (JA203). As interpreted and applied in the foregoing manner, “the ‘due to’ requirement prevents a *bona fide* extraordinary or exceptional circumstance from being misused as a general revenue enhancement mechanism that circumvents the rate cap system enacted by the PAEA.” *Id.*

Finally, the Commission found support for its interpretation of the causation requirement in the progressive narrowing of the exception to the CPI-based price cap during the evolution of the postal reform bills introduced between 1996 and 2006. Order at 14-24 (JA161- 171).

For these reasons, the Commission concluded, the exception to the price cap provided by section 3622(d)(1)(E) “is to be narrowly

construed.” Order at 60 (JA207). The “modern system of regulation adopted by the PAEA,” the Commission explained,

imposes a price cap on rates tied to inflation. It is designed to incent the Postal Service to reduce its costs and improve efficiency, while creating predictable and stable rates.

Order at 64 (JA211). Hence, the exception provided by section 3622(d)(1)(E)

is not intended as a surrogate for cost-of-service ratemaking to be invoked by the Postal Service simply by demonstrating a need for revenues detached from the circumstances giving rise to that need and from the specific increases requested. Instead, rates in excess of inflation may be authorized only upon a showing that the proposed rate adjustment is both due to the claimed extraordinary or exceptional circumstance, and a “reasonable and equitable and necessary” response to that circumstance. Stated otherwise, as provided by the Commission’s rules, the relief requested must relate to the exigency claimed.

Order at 60 (JA207). Thus, section 3622(d)(1)(E)

does not provide an all purpose exception to the price cap. It may not be invoked simply by demonstrating a need for revenues, as was permissible under earlier iterations of the PAEA. Instead, *an exigent rate adjustment must be due to, and commensurate with, some specific extraordinary or exceptional circumstance.*

Order at 64 (JA211) (emphasis added).

The PRC then considered whether the USPS had satisfied this requirement. The PRC found that the USPS had not:

The Request is simply not focused on the specific effects of the claimed exigency. . . . In reviewing the record, including the testimony supporting the Request, the Commission finds that the Postal Service has not made that showing.

Order at 64 (JA211); *see generally, id.* at 58-68 (JA215-225). Rather, a review of the USPS's request and supporting testimony

fails to reveal how either the rate increases in general, or the specific rate increases proposed, relate to the extraordinary or exceptional circumstances that purportedly give rise to them. Instead, the proposed rate increases are identified as part of a *long-term* plan designed to address, among other things, liquidity issues.

Order at 60 (JA215) (emphasis added).

As support for this conclusion, the Commission noted the substantial (and largely undisputed) evidence concerning the Postal Service's long-term "structural" cost problems and lack of "operating flexibility";<sup>5</sup> the progressive diversion of mail volume to the Internet;<sup>6</sup> and the financial impacts of the \$5+ billion annual payment to the Treasury mandated by Congress for the prefunding of retiree health care benefits<sup>7</sup> and the overpayment to the Treasury of funding for

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<sup>5</sup> Order at 3, 7, 51, 60-62, 65, 68-79, 81-86 (JA150, 154, 198, 207-209, 212, 2215-226, 228-233); Blair concurrence (JA235-237).

<sup>6</sup> Order at 51 & n. 43, 62, 79 (JA108-109, 226); Blair concurrence at 1 (JA235).

<sup>7</sup> Order at 60-62, 65 n. 53, 68-79, 81 (JA207-209, 212, 215-225, 228).

pension benefits.<sup>8</sup> The Commission also noted that the USPS “would still face a cash flow problem . . . even if the extraordinary or exceptional circumstance had not occurred”;<sup>9</sup> that the proposed rate increase, without reform of the Postal Service’s structural issues, would not postpone insolvency by a single day;<sup>10</sup> but achieving a single one of the items in the Postal Service’s Action Plan for legislative relief from the Postal Service’s structural problems—deferral of the retiree health care prefunding requirement—alone “would be sufficient to avoid liquidity problems.”<sup>11</sup>

## SUMMARY OF ARGUMENT

### (1)

(a) The Commission’s holding that the phrase “due to extraordinary or exceptional circumstances” in section 3622(d)(1)(E) requires the USPS to “demonstrate how the specific rate increases it proposed flow from”—*i.e.*, were caused by—“the particular circumstances that it cites as exceptional” was a reasonable interpretation of the statute. The PRC interpretation follows directly

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<sup>8</sup> Order at 65 n. 53 (JA212).

<sup>9</sup> Order at 78-80 (JA225-227).

<sup>10</sup> Order at 62-64, 78-90 (JA209-211, 226-227).

<sup>11</sup> Order at 58, 68-78 (JA205, 215-225)

from the plain language of section 3622(d)(1)(E), the overriding statutory goal of replacing cost-of-service rate regulation with index or incentive regulation, and the progressive narrowing of section 3622(d)(1)(E)—including by the addition of the “due to” requirement in 2004—during the 11-year gestation of PAEA in Congress.

By contrast, the Postal Service’s position effectively reads “due to” out of section 3622(d)(1)(E). The USPS never explains what function the phrase serves, let alone *what* must be “due to” the “extraordinary or exceptional circumstances” if not the need for the increase itself. Nor does the USPS reconcile its position with the legislative intent of section 3622(d)(1)(E). The USPS position essentially recasts section 3622(d)(1)(E) as an all-purpose make-whole provision that would allow the USPS to use above-CPI rate increases to cover revenue shortfalls regardless of their cause. This would defeat the entire purpose of index or incentive regulation, and resurrect cost-of-service regulation, the very methodology that Congress sought in PAEA to retire.

(b) The Postal Service’s alternative challenge to the Commission’s application of the causation requirement—that the Commission demanded an unreasonably high degree of precision or exactitude of proof by interpreting “due to” as “precisely” or having a “strict nexus” with—is an attack on a straw man. The Commission never required the USPS to prove that the “nexus,” “match,” or “offset”

between the losses caused by the extraordinary or exceptional circumstances and the amount of the above-CPI increase was “close,” “tight,” “strict,” “precise,” “equal,” or “exact”: these adjectives are inventions of appellate counsel that appear nowhere in the PRC order. The PRC rejected the proposed increase not because the showing of causation offered by the USPS was too imprecise or uncertain, but because the USPS made no showing of causation at all. The mailers established—and the USPS essentially conceded—that (1) its most serious problems are long term and structural, not extraordinary or exceptional; (2) solving those problems would be necessary and sufficient to restore the USPS to financial solvency; (3) the problems have been created and maintained by legislation; and (4) the above-CPI rate increase sought by the USPS, without resolution of its structural and long-term problems, would not resolve the insolvency problem.

(2)

The Postal Service’s claim that it lacked adequate notice that “due to” might mean “causally related to” is frivolous. The equivalence of the two phrases is obvious from the plain language of section 3622(d)(1)(E) as well as the Commission’s implementing rules. In any event, several members of the Commission, as well as its Public Representative, put the USPS on notice during the case that its compliance with the causation requirement was at issue; and the USPS tried to address the

issue in response. The USPS had ample time to cure this deficiency—if the USPS had an answer.

## **ARGUMENT**

### **I. THE COMMISSION’S INTERPRETATION OF 39 U.S.C. § 3622(d)(1)(E) WAS PLAINLY REASONABLE.**

The Postal Service’s attack on the PRC order is a tale of a callous regulator that arbitrarily shut the “safety valve” of section 3622(d)(1)(E) by contriving an impossible burden of proof that appears nowhere in the statute. USPS Br. 34-47. This proof requirement, according to the USPS, would require it to “untangl[e] the interaction of multiple macro- and microeconomic factors,” “parse out the exact portion of the Postal Service’s losses that is attributable to a particular circumstance,” and prove, in a “finely calibrated” way, that the “expected gains from the rate request . . . precisely equal [the] losses caused by the exigency.” USPS Br. 19. 27, 32. According to the USPS, the “nexus,” “match” or “offset” that the PRC requires proven between the financial costs of the extraordinary or exceptional circumstances identified by the USPS and the amount of the rate increase sought is so “close,” “tight,” “strict,” “precise,” “equal” or “exact” that the USPS, despite its “commendable” efforts, could never hope to meet this standard. USPS Br. iii, 4-6, 9, 19-22, 24, 26-33, 35, 36, 38-39, 41.

The story is fiction. The USPS argument, stripped of its rhetoric, reduces to two claims: (1) the PRC erred as a matter of law in deriving *any* causation requirement from the statutory phrase “due to extraordinary or exceptional circumstances”; and (2) even if *some* causation requirement were appropriate, the PRC demanded a level of proof that was too strict or exact. Neither claim has merit. We respond to each one in turn.

**A. The Commission Reasonably Held That Section 3622(d)(1)(E) Contains A Causation Requirement.**

In construing the requirement of § 3622(d)(1)(E) that the above-CPI increases requested by the USPS must be “due to” a particular “extraordinary or exceptional circumstance,” the PRC held that (1) the exigent circumstances must have harmed the Postal Service, triggering the need for an adjustment” (Order at 55 (JA202) (citing S. REP. 108-318, at 11); (2) “the relief requested must relate to the exigency claimed” (Order at 60 (JA207)); and (3) the USPS must “demonstrate how the specific rate increases it proposes flow from the particular circumstances that it cites as exceptional” (Order at 60-61 (JA207-208)). This construction of section 3622(d)(1)(E) was reasonable and lawful.

When a court reviews an agency’s construction of a statute that the agency administers, the court must follow the intent of Congress if “unambiguously expressed.” *Chevron, U.S.A, Inc. v. Natural Resources*

*Defense Council*, 467 U.S. 837, 842-43 (1984). If, however, “Congress has not directly addressed the precise question at issue,” the agency’s construction of the statute must be upheld if the construction is “a reasonable policy choice for the agency to make.” *Id.* at 843-45. Congress delegated to the PRC, not the USPS, the power to issue rules implementing section 3622(d), and to decide whether to approve a particular USPS request for an above-CPI rate increase. 39 U.S.C. §§ 3622(a), 3622(d)(1)(D), 3622(d)(1)(E). Accordingly, the federal agency whose interpretation receives *Chevron* deference is the PRC, not the USPS. *USPS v. PRC*, 599 F.3d 705, 710 (D.C. Cir. 2010).

The PRC order readily satisfies this standard of review. The PRC's method of interpreting the “due to” requirement could not have been more conventional, straightforward, or unexceptionable. The PRC reasoned as follows:

First, the proposed adjustment must be 'due to' the extraordinary or exceptional circumstances. . . . [T]he starting point for the Commission’s analysis is the plain meaning of the expression "due to" that links the proposed adjustments to the specific extraordinary or exceptional circumstances identified. . . . [T]he expression "due to" means "because of" . . . "by reason of"; "by cause of"; "by virtue of"; and "as a result of." Each meaning and synonym expresses a causal relationship and leads the Commission to conclude that the Postal Service’s proposed adjustment must be causally related to the alleged extraordinary or exceptional circumstance.

The statutory context or legislative history underlying section 3622(d)(1)(E) does not contradict the requirement of such a causal connection. . . . The exigent rate provision in S. 2468 had the same “due to” language, . . . [T]he Committee Report to S. 2468 emphasized the need to address exigent circumstances “and their effect on the Postal Service and its financial requirements.” . . . The legislative history thus supports interpreting “due to” in order to relate the effects of the exigent circumstances and the proposed rate adjustment.

Order at 53-55 (JA200-202); *accord id.* at 10 (JA157) (PAEA “establish[ed] the price cap as the only regulatory model to be used under the new rate system”); *id.* at 56 (JA203) (“due to” requirement “prevents a *bona fide* extraordinary or exceptional circumstances from being misused as a general revenue enhancement mechanism that circumvents the rate cap enacted by the PAEA”); *id.* at 62 (JA209) (legislative history shows that section 3622(d)(1)(E) was intended to allow only “a narrow exception to inflation-based rates,” not a back-door return to cost-of-service ratemaking and its breakeven guarantee).

In short, the PRC’s interpretation of the “due to” clause was comprehensive, coherent, and consistent with the policies and legislative history of PAEA. If the “due to” phrase did not mandate outright the causation requirement imposed by the PRC—and it arguably did—the PRC interpretation certainly was reasonable and permissible. As the Commission stated, “the plain meaning of section 3622(d)(1)(E) is both clear, and an accurate reflection of Congressional

intent. This plain meaning provides the basis for the Commission’s decision.” Order at 27 (JA174).

By contrast, the position of the USPS violates basic norms of statutory construction. First, the USPS never explains what role the words “due to extraordinary or exceptional circumstances” would actually play in its scheme. The USPS brief, while long on irrelevant detail about the grammatical classification of the phrase (“prepositional”) and its location (“in a clause directing the PRC to promulgate regulations”), never says *what*, according to section 3622(d)(1)(E), must be “due to” the “extraordinary or exceptional circumstances” referenced in the section. The reason for this omission is obvious: the USPS position leaves no role for the words “due to” at all. The USPS effectively rewrites section 3622(d)(1)(E) to read:

Whenever there are extraordinary or unusual circumstances, the Postal Service may raise rates in excess of inflation to whatever levels the Commission determines are reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.<sup>12</sup>

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<sup>12</sup> Intervening petitioner National Postal Mail Handlers Union is more candid. It forthrightly argues that the phrase “due to” should be simply ignored. NPMHU Br. 14.

In effect, the USPS would need to show only that (1) *some* “extraordinary or exceptional circumstance,” major or minor, has occurred, and (2) the USPS, despite its best efforts, needs more money. Once an “extraordinary or exceptional circumstance” was identified—no matter how small or local—section 3622(d)(1)(E) would become an all-purpose regulatory spackle that could be used to fill in any revenue gap of any size, regardless of cause. As the Commission found:

If section 3622(d)(1)(E) did not include the phrase “due to,” extraordinary or exceptional circumstance could conceivably be used to justify any proposed adjustment without regard to whether or how the proposed adjustment would address the consequences of the specific circumstances that had triggered the adjustment request. For example, an adjustment based upon an anthrax attack would then be possible without any showing that increased revenues generated by the adjustment would be needed to address costs incurred because of the attack. In that case, revenues produced by an adjustment could be used for general corporate purposes unrelated to the attack.

Order at 55 (JA202).

The USPS position violates the basic canon of construction that every word in a statute should be presumed to have a purpose, and, if possible, given operative effect. Order at 25 (JA172) (citing cases); *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); *Dole Food Co. v. Patrickson*, 538

U.S. 468, 477 (2003); *Mail Order Ass'n of America v. USPS*, 986 F.2d 509, 515, 518 (D.C. Cir. 1993).<sup>13</sup>

Second, the USPS position cannot be reconciled with the *policies* underlying section 3622(d). As explained above, the basic purpose of section 3622(d) was to replace cost-of-service ratemaking and its breakeven guarantee with index or incentive ratemaking. To minimize the risk that the exigency exception might undermine the incentive mechanism or indirectly restore cost-of-service ratemaking, Congress made the exception narrow. *See* pp. 5-8, 10, 15, *supra*. Moreover, after several years of consideration of bills that would have allowed the USPS to breach the CPI cap without any showing that the Postal Service's need for the extra funds was "due to extraordinary or exceptional circumstances," Congress added this further condition to the legislation two years before its final enactment. *See* pp. 6-8, *supra*.

The Postal Service's reading of the "due to" requirement would convert section 3622(d)(1)(E) into precisely what Congress deliberately

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<sup>13</sup> The Postal Service's claim that the "words 'due to' do not appear in [the] standard, but instead are located in a clause directing the PRC to promulgate regulations" (USPS Br. 23) is nonsensical. The immediately following requirement of "extraordinary or exceptional circumstances" is certainly part of the standard; and the grammatical linkage between "due to" and "extraordinary or exceptional circumstances" could not be more obvious and direct ("due to extraordinary or exceptional circumstances").

rejected: an “all purpose exception to the price cap” that could be “invoked simply by demonstrating a need for revenues, as was permissible under earlier iterations of the PAEA.” Order at 9-14, 56-57, 60, 62, 64-65 (JA156-161, 203-204, 207, 209, 211-212); *see generally* pp. 2-8, *supra*. The USPS would be subject to the discipline of the price cap only until the USPS became hard up and needed additional revenues; at that point the price cap would evaporate, and cost-of-service ratemaking would spring back into effect. This, as the PRC noted, “harkens back to cost-of-service ratemaking.” Order at 65 (JA212). The USPS interpretation therefore violates the canon that a statute should be construed in light of its “structure and purpose” within “the broader context of the statute as a whole.” Order at 25 (JA172); *accord Russello*, 464 U.S. at 23; *Robinson*, 519 U.S. at 341; *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132-33; *Intercollegiate Broadcasting System v. Copyright Royalty Board*, 574 F.3d 748, 771 (D.C. Cir. 2009).<sup>14</sup>

The USPS tries to evade this problem by claiming that the general ratemaking “objectives” of PAEA, codified at 39 U.S.C. § 3622(b)(1) through (9), give priority to the supposedly “overarching” goal of

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<sup>14</sup> The Postal Service’s claim that imposing a causation requirement improperly restores cost-of-service ratemaking (USPS Br. 29-31) has it exactly backwards. It is the Postal Service’s reading of section 3622(d)(1)(E) that would improperly bootleg cost-of-service ratemaking and the break-even standard back into the law.

“assuring adequate revenues” (39 U.S.C. §§ 3622(b)(1), (3), (5)) over the supposedly subordinate goal of “maximiz[ing] incentives to reduce costs and increase efficiency” and “creat[ing] predictability and stability in rates” (id. §§ 3622(b)(1)-(2)), and that section 3622(d)(1)(E) enforces this supposed “balance” by operating as “safety valve for additional rate increases” (USPS Br. 10-11). Nothing in section 3622, however, reveals any such intent. Section 3622(b) does not rank the nine enumerated “objectives”; rather, each “shall be applied in conjunction with the others.” *Id.* Absent “a legislative direction as to precisely what gravity each factor bears,” the Court “may not . . . reassess the weights given by a rate-making agency to different factors.” *United Parcel Service*, 184 F.2d at 845 (quoting *Ass’n of Am. Publishers, Inc. v. Governors of United States Postal Serv.*, 485 F.2d 768, 774-75 (D.C. Cir. 1973)).

Moreover, a general list of ratemaking factors or objectives may not be assumed to trump a more specific inconsistent provision elsewhere in the statute. *Mail Order Ass’n of America v. USPS*, 986 F.2d 509, 515 (D.C. Cir. 1993) (specific provision preferred over general one). The “balance” that Congress struck is defined by the specific operative limitations of section 3622(d)(1)(E). Those limitations are controlling. When “Congress provides exceptions to a statute,” the “proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.” *United States*

*v. Johnson*, 529 U.S. 53, 58 (2000); accord *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001).

The USPS's contention that enforcing the "due to" causation limitation abdicates the PRC's responsibility to "cure a serious problem that Congress has directed it to address" (USPS Br. 35-37) is equally wrongheaded. Congress was well aware when enacting PAEA that many of the financial problems of the USPS were structural or long-standing, or resulted from deliberate policy choices made by Congress in prior law or PAEA itself. Order at 55, 64 n. 52 (JA202, 211); S. REP. No. 318, 108<sup>th</sup> Cong. 2<sup>nd</sup> Sess. 2-5, 24-27, 34-36 (2004); H.R. REP. No. 66, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. 42-43 (2005); *see also* USPS Response to Motion to Dismiss at 6 (SA146) ("Congress legitimately considers a wide range of societal policy concerns to be important when operating the Postal Service"). By limiting above-CPI increases to the recovery of losses that are "due to" extraordinary or exceptional circumstances, Congress necessarily foreclosed the USPS from using section 3622(d)(1)(E) as an all-purpose "cure" for financial problems stemming from causes that are *not* extraordinary or exceptional. Hence, the PRC, in deferring to Congress on these matters, was not "passing the buck," USPS Br. 34, but showing proper respect for the limits of its delegated authority. Order at 65 (JA212) ("Those issues . . . must be decided in a different forum.").

The possibility of relief from Congress is not an empty one. Congress has intervened repeatedly to provide relief to the USPS when Congress found relief to be necessary and appropriate. In 2003, for example, Congress reduced the Postal Service’s future pension payment obligations by approximately \$78 billion. Blair Concurring Opinion at 2 (JA236). In 2006, Congress waived another \$27 billion in future retirement payments associated with military service credits. *Id.* Most recently, Congress deferred \$4 billion of the \$5.4 billion payment to the Treasury for future retiree health care obligations due on September 30, 2009, when Congress concluded that the USPS lacked the funds to make the payment. Order at 81 (JA228); Blair at 2 (JA236).

**B. The Commission Did Not Enforce The Causation Requirement With Unreasonable Strictness.**

The Postal Service’s alternative challenge to the causation requirement—that the level of proof demanded by the PRC was too strict, rigid or precise—is equally wide of the mark. The colorful terms that populate the USPS brief—“tight nexus,” “strict nexus,” “exact portion,” “offset exactly,” “precisely offset,” “strict offset,” “precise matching” and “closely matching”—appear nowhere in the PRC order.<sup>15</sup>

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<sup>15</sup> The USPS Brief uses the terms “precisely offset” six times, “strict nexus” seven times, and “strict offset” ten times.

The standard that the PRC actually applied was much more modest, prosaic and straightforward.

The PRC did not find that the USPS had failed to make a showing of causation with an arbitrarily heightened degree of closeness, tightness, strictness, precision, or exactitude. Rather, the PRC found that the USPS had made *no such showing at all*:

In response to this requirement, the Postal Service cites the statements of Joseph Corbett and Stephen J. Masse. A review of those statements, including their oral testimony, fails to reveal how either the rate increases in general, or the specific rate increases proposed, relate to the extraordinary or exceptional circumstances that purportedly give rise to them. Instead, the proposed rate increases are identified as part of a long-term plan designed to address, among other things, liquidity issues. Action Plan at 1 and 14.

Order at 60 (JA207). As the USPS acknowledges (USPS Br. 33):

The PRC rejected the Postal Service's request for a modest rate increase as one part of its overall plan to deal with a financial crisis caused by a combination of, *inter alia*, the recession, electronic diversion, and the "prefunding" requirement on the ground that the Postal Service did not adequately "isolate and explain how [the recession] caused its cash flow problem" or adequately "show that its proposed rate adjustments are tailored to offset the specific effects of the claimed exigency.

The PRC based these findings on the essentially undisputed evidence that (1) the Postal Service's most important problems were long term and structural rather than extraordinary or exceptional; (2)

solving the long term and structural problems would be both necessary and sufficient for the USPS to regain financial solvency; (3) many of the problems were created or maintained by legislation; and (4) the above-CPI rate increase sought by the USPS, without resolution of its structural and long-term problems, would not restore solvency. Order at 3-4, 34-36, 58, 60-80, Blair at 2, Langley at 1 (JA150-151, 181-183, 205, 207-227, 236, 238).

The Commission had ample basis for these findings. The mailing industry opposed the proposed rate increases on several grounds, two of which related to the Postal Service's longstanding cost and operational problems. The mailers submitted documentation that the proposed increases were not "due to" the 2007-2009 recession, the supposedly "extraordinary" and "exceptional" circumstance invoked by the USPS, but were an attempt to recoup shortfalls caused by longstanding and chronic structural problems that were neither "extraordinary" nor "exceptional." The documentation, which included several decades of data and reports by government oversight bodies, blue ribbon commissions, and the USPS itself, confirmed that the Postal Service's financial problems did not originate with the 2007-2009 recession, but had much deeper roots.

The most fundamental causes of those problems have existed for decades, or are the result of deliberate policy choices by Congress that

limited the profitability of the USPS to achieve other social goals. AMA Motion to Dismiss at 2-5, 17-67 (SA72-75, 87-137); AMA Comments at 17-18 (SA219-220). For example:

- The USPS has suffered for decades from an oversized network of undersized and obsolete mail processing facilities. Order at 34, 62, 81 (JA179, 209, 228); AMA Motion at 5-6, 17-30 (SA52-53, 75, 87-100, 122-123).
- The USPS, by its own admission, compensates its unionized work force at rates that exceed by as much as 34 percent the compensation paid by the private sector for comparable work. Evidence of this fact includes the unusually long waiting lists for USPS jobs, and the extraordinarily low quit rates of existing employees. The average total compensation (including benefits) of a postal employee now exceeds \$80,000. Excessive compensation rates alone cost the USPS \$10-14 billion annually. AMA Motion at 30-34, 53-55 (SA100-104, 123-125).
- Since the late 1980s, a steadily growing share of communications volume in the United States has migrated from the mail to the Internet. This trend has been particularly costly to the USPS, because the classes of mail hardest hit by this trend have included First-Class Mail and Express Mail,

two of the Postal Service's most profitable products. The USPS and outside observers have recognized this trend for years. Order at 9, 34, 44, 51, 62, Blair 1 (JA156, 181, 191, 198, 209, 235); AMA Motion at 35-39, 65 (SA105-131, 135); USPS witness Kiefer (SA15-17); USPS witness Masse (Tr. 246-246 (SA200-201)); Public Representative comments 24-25 (SA240-241). Congress, when enacting PAEA in 2006, was well aware of the growing threat to the USPS from electronic diversion. S. REP. No. 318, 108<sup>th</sup> Cong., 2d Sess. at 3 (2004); H.R. REP. No. 66, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 42 (2005).

- PAEA requires the USPS to make annual payments to the U.S. Treasury to prefund the expected future obligations of the USPS to retired employees for their health care insurance. PAEA § 803(a)(1)(B), Pub. L. No. 109-435, 120 Stat. 3198, 3251 (codified at 5 U.S.C. § 8909a). The annual payment to the Treasury between Fiscal Year 2007 and Fiscal Year 2016 is specified by the statute, and ranges between \$5.4 and \$5.8 billion. 5 U.S.C. § 8909a(d)(3)(A). These annual payments are a cost burden on the USPS above and beyond the costs of its current operations. Order at 35-36, 71-78 (JA182-183, 218-225); AMA Motion at 68-69 (SA138-139).

- Another financial burden on the USPS that is completely unrelated to the recession is the overfunding of USPS pension obligations caused by its obligation to pay an excessive share of the pension costs of employees whose careers overlapped the July 1, 1971, transition from the Post Office Department to the USPS. As both the Postal Service's Office of Inspector General and the PRC have observed, the current attribution formula has assigned to the USPS a significant amount of costs more properly attributable to the Post Office Department. The accumulated overpayment is approximately \$50-70 billion. Order at 65 n. 53 (JA212); AMA Motion at 68-69 (SA138-139); USPS witness Masse (Tr. 214-215 (SA191-192)).

The record shows that the costs of these longstanding or structural problems dwarfed the financial effects of the 2007-2009 recession. For example, alleviating even a subset of the Postal Service's structural problems would eliminate its revenue shortfall—recession or no recession. Eliminating the required annual payment of \$5+ billion to Treasury to prefund future retiree health care benefits alone would eliminate the Postal Service's liquidity crisis. Order at 68-78 (JA215-225); AMA Motion at 69 (SA139); USPS witness Masse, Tr. 216, 237, 241 (SA193, 195, 199); AMA Comments at 5-6, 20-21 (SASA207-208, 222-223).

Conversely, if these structural problems were unsolved, the above-CPI rate increase proposed by the USPS would not postpone insolvency by a single day. With or without the rate increase, the USPS would have enough cash to operate until September 30, 2011—the last day of Fiscal Year 2011—but would be unable to make the full amount of the \$5.5 billion health care prefunding payment owed to the Treasury on that day. The only effect of the \$3 billion rate increase would be to increase the size of the partial payment that the USPS could make on that day by exhausting its cash and borrowing capacity. Order at 62-64 (JA209-211); Motion to Dismiss at 70-71 (SA140-141); USPS CFO Corbett (Tr. 39-40 (SA 178-179); AMA Comments at 4-6 (SA206-208); AMA reply comments at 1-2 (SA245-246); USPS Reply Comments at 44 (SA253).

The USPS did not seriously dispute the existence or magnitude of these chronic structural problems. Instead, the USPS contended that the problems were forced on it by laws, regulations and political pressures that left “the majority of the Postal Service’s costs outside management control (including health care, worker’s compensation, Federal pensions, wages, and network expansion)”; conferred “statutory guarantees and leverage” on postal labor unions; “mandated pre-funding of retiree health benefits payments”; and limited the ability of the USPS to close money-losing facilities or reduce mail delivery

frequencies. USPS witness Kiefer (SA5) (plan to seek legislative relief); USPS Response to Motion to Dismiss at 4-7, 26-35, 41-42, 49 (SA144-147, 156-165, 171-172, 174-175); Tr. 82-83, 98-99 (SA180-181, 182-184); AMA Comments 12-14, 17-18 (SA214-216, 219, 220); USPS Reply Comments 65-66 (SA265-266).

The Postal Service's initial brief in this Court is in the same vein. It acknowledges that the "drop in volume, associated *primarily* with the recent recession" (USPS Br. at 12 (emphasis added)) was but one relatively modest item on a list of causes of impending financial crisis. Other causes acknowledged in the brief include "the high level of fixed costs associated with the massive delivery network," the fact that "by law the Postal Service cannot close post offices solely for economic reasons . . . or reduce days of delivery, . . . or cut back on the ever-increasing number of delivery points," "substitution of electronic communications for traditional mail," "artificial obligations imposed by Congress . . . to 'prefund' retiree health benefits by making annual payments into the Postal Service Retiree Health Benefits Fund ('RHBF') . . . ranging from \$5.4 billion to \$5.8 billion annually," and limitation by law to "no more than \$3 billion of new debt outstanding in any one year, and no more than a cumulative total of \$15 billion." USPS Br. at 12, 13, 14 (internal citation and quotation marks omitted).

These statements underscore the Postal Service’s failure to meet the separate causation requirement of section 3622(d)(1)(E). How do cost constraints that are longstanding (and deliberately imposed or sanctioned by Congress) qualify as “extraordinary or exceptional circumstances” within the meaning of section 3622(d)(1)(E)?<sup>16</sup>

## **II. THE POSTAL SERVICE RECEIVED AMPLE NOTICE OF THE CAUSATION REQUIREMENT.**

The Postal Service’s remaining challenge to the PRC Order—that the USPS was never given advance notice that “due to” might be construed as “causally related to” or “caused by” (USPS Br. 37-42)—is equally unfounded. The notice required in both on-the-record hearings and informal rulemakings under 5 U.S.C. § 553 is notice sufficient to alert a reasonable person of the matters at issue. *See Dow Jones & Co., Inc. v. USPS*, 110 F.3d 80 (D.C. Cir. 1997) (on-the-record adjudication); *Boston Carrier, Inc. v. ICC*, 746 F.2d 1555, 1559-1560 (D.C. Cir. 1984) (same); *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004) (citations omitted) (in an informal rulemaking, “an agency satisfies the notice requirement, and need not

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<sup>16</sup> *See also* USPS Reply Comments at 17 (SA251) (“the Postal Service is not claiming for purposes of this proceeding that the well-understood and gradual diversion of mail to electronic means of communication constitutes circumstances that are unusual or out-of-the-ordinary, and thus “extraordinary or exceptional” within the plain meaning of those terms.”).

conduct a further round of public comment, as long as its final rule is a ‘logical outgrowth’ of the rule it originally proposed”—*i.e.*, if interested parties “should have anticipated that” the agency action was “possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”).

The USPS reasonably “should have anticipated” that it would be required to show that the rate increases it was proposing were “due to”—*i.e.*, caused by—the “extraordinary or exceptional circumstances” it was claiming. As discussed above, this requirement follows directly from the plain language of the statute, its overall purposes, and its legislative history. *See* pp. 4-8, 10-12, 19-27, *supra*. Moreover, the Commission’s rules implementing section 3622(d)(1)(E) require that a rate request under that section include “[a] full discussion of the extraordinary or exceptional circumstance(s) giving rise to the request, and a complete explanation of how both the requested overall increase, and the specific rate increases requested, relate to those circumstances.” 39 C.F.R. § 3010.61(a)(3).

The USPS gains nothing by complaining that this rule should have been more specific. USPS Br. 38-39. When the PRC proposed this and other rules implementing 39 U.S.C. § 3622(d)(1)(E) in 2007, the USPS asked that the rules *not* be more specific:

The Postal Service does not believe that it is necessary or prudent to attempt, in this rulemaking, to specify the situations this exigency standard might cover in advance of an actual need to do so, since it would appear to call for a highly fact-intensive analysis.

PRC Docket No. RM2007-1, *Regulations Establishing System of Ratemaking*, USPS Initial Comments (April 6, 2007), at 16, *available at* [www.prc.gov/prc-pages/library/dockets.aspx?activeview=DocketView&docketType=Rulemaking](http://www.prc.gov/prc-pages/library/dockets.aspx?activeview=DocketView&docketType=Rulemaking). The USPS reiterated in its reply comments that the Commission “should adhere to its careful approach of establishing a procedural framework . . . without specifying the circumstances in which such [i.e., exigency] filings can be made [or] the specific nature of allowable increases.” PRC Docket No. RM2007-1, USPS Reply Comments (Oct. 9, 2007), at 43-44, 45, *available at* [www.prc.gov/prc-pages/library/dockets.aspx?activeview=DocketView&docketType=Rulemaking](http://www.prc.gov/prc-pages/library/dockets.aspx?activeview=DocketView&docketType=Rulemaking). The USPS added that “the proposed procedures”—which, with one minor change supported by the USPS, were adopted in that docket as a final rule and under which the proceedings now on appeal were conducted—

seem to be fully consistent with the Act, and with the Commission’s broad discretion concerning how to implement the requirement that parties be accorded ‘notice and opportunity for a public hearing and comment.’

*Id.* at 45; *see also Order No. 43 - Order Establishing Ratemaking Regulations*, 72 Fed. Reg. 63,662, 63,680-81 (PRC Nov. 9, 2007).

In any event, the USPS clearly received timely actual notice of the causation issue during the proceedings below. During the period between the initial filing of the USPS rate request and the deadlines for filing comments on the request, the Commission held several days of live hearings at which members of the Commission questioned the Postal Service's rate case witnesses. At these hearings, the Commission repeatedly expressed concern about the Postal Service's apparent failure to show that the specific increases sought by the USPS were actually caused by the recession. See Order at 63 (JA210) (quoting Tr. 39-40 (SA178-179)); Tr. 82-83, 98-99, 205, 213, 238-239 (SA180-181, 183-184, 188, 190, 196-197). The USPS thus was clearly on notice that this was an issue, and could have tried to address the Commission's concerns in its subsequent comments.

The USPS also received actual notice of the issue from the comments of the PRC's Public Representative, the PRC staff members appointed to "represent the interests of the general public" in the case.<sup>17</sup> The Public Representative specifically argued that the USPS had failed

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<sup>17</sup> 39 U.S.C. § 505; *Order No. 485 - Notice and Order Concerning Rate Adjustment for Extraordinary or Exceptional Circumstances*, 75 Fed. Reg. 40,855 (PRC July 14, 2010).

to establish a causal relationship between the recession and the amount of the proposed increases. Public Representative comments at 11, 18-19, 24-27 (SA230, 237-238, 240-243). The USPS tried to rebut this criticism in its reply comments. USPS Reply Comments at 54-56 (SA258-260); *see also* Order at 47-48, 59-60 (discussing Public Representative comments and USPS response). The Postal Service's problem was not a lack of notice of the causation issue, but a lack of a good answer.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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January 14, 2010

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a) of the Federal Rules of Civil Procedure and Circuit Rule 32(a)(2), I hereby certify that this brief complies with the length limitations set forth in Circuit Rule 32(a)(2)(B) because it contains 8,451 words, as counted by Microsoft Word, excluding the parts of the brief that are exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

*/s/ David M. Levy*

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for Postal Commerce and Magazine  
Publishers of America, Inc.*

January 14, 2011

## CERTIFICATE OF SERVICE

I certify that I electronically filed this pleading with the Clerk of this Court today via the appellate CM/ECF system. All parties are represented by registered CM/ECF users, and will be served by the appellate CM/ECF system. In addition, the following attorney was served today by First-Class Mail:

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January 14, 2011

# **ADDENDUM**

## **ADDENDUM OF STATUTORY AND REGULATORY PROVISIONS**

In accordance with Rule 28 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 28(a)(5), this Addendum sets forth the relevant parts of the pertinent statutes and regulations cited in the January 14, 2011, brief of Intervening Respondents Affordable Mail Alliance *et al.*

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## **5 U.S.C. § 553. Rule making.**

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments

with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

## **5 U.S.C. § 706. Scope of Review.**

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

(1) compel agency action unlawfully withheld or unreasonably delayed;

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

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

(B) contrary to constitutional right, power, privilege, or immunity;

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

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**5 U.S.C. § 8909a. Postal Service Retiree Health Benefit Fund.**

(a) There is in the Treasury of the United States a Postal Service Retiree Health Benefits Fund which is administered by the Office of Personnel Management.

(b) The Fund is available without fiscal year limitation for payments required under section 8906(g)(2)(A).

(c) The Secretary of the Treasury shall immediately invest, in interest-bearing securities of the United States such currently available portions of the Fund as are not immediately required for payments from the Fund. Such investments shall be made in the same manner as investments for the Civil Service Retirement and Disability Fund under section 8348.

(d)(1) Not later than June 30, 2007, and by June 30 of each succeeding year, the Office shall compute the net present value of the future payments required under section 8906(g)(2)(A) and attributable to the service of Postal Service employees during the most recently ended fiscal year.

(2)(A) Not later than June 30, 2007, the Office shall compute, and by June 30 of each succeeding year, the Office shall recompute the difference between--

(i) the net present value of the excess of future payments required under section 8906(g)(2)(A) for current and future United States Postal Service annuitants as of the end of the fiscal year ending on September 30 of that year; and

(ii)(I) the value of the assets of the Postal Retiree Health Benefits Fund as of the end of the fiscal year ending on September 30 of that year; and

(II) the net present value computed under paragraph (1).

(B) Not later than June 30, 2017, the Office shall compute, and by June 30 of each succeeding year shall recompute, a schedule including a series of annual installments which provide for the liquidation of any liability or surplus by September 30,

2056, or within 15 years, whichever is later, of the net present value determined under subparagraph (A), including interest at the rate used in that computation.

(3)(A) The United States Postal Service shall pay into such Fund--

- (i) \$5,400,000,000, not later than September 30, 2007;
  - (ii) \$5,600,000,000, not later than September 30, 2008;
  - (iii) \$5,400,000,000, not later than September 30, 2009;
  - (iv) \$5,500,000,000, not later than September 30, 2010;
  - (v) \$5,500,000,000, not later than September 30, 2011;
  - (vi) \$5,600,000,000, not later than September 30, 2012;
  - (vii) \$5,600,000,000, not later than September 30, 2013;
  - (viii) \$5,700,000,000, not later than September 30, 2014;
  - (ix) \$5,700,000,000, not later than September 30, 2015;
- and
- (x) \$5,800,000,000, not later than September 30, 2016.

(B) Not later than September 30, 2017, and by September 30 of each succeeding year, the United States Postal Service shall pay into such Fund the sum of--

- (i) the net present value computed under paragraph (1);
- and
- (ii) any annual installment computed under paragraph (2)(B).

(4) Computations under this subsection shall be made consistent with the assumptions and methodology used by the Office for financial reporting under subchapter II of chapter 35 of title 31.

(5)(A)(i) Any computation or other determination of the Office under this subsection shall, upon request of the United States Postal Service, be subject to a review by the Postal Regulatory Commission under this paragraph.

(ii) Upon receiving a request under clause (i), the Commission shall promptly procure the services of an actuary, who shall hold membership in the American Academy of Actuaries and shall be qualified in the evaluation of healthcare insurance obligations, to conduct a review in accordance with generally accepted actuarial practices and principles and to provide a report to the Commission containing the results of the review. The Commission, upon determining that the report satisfies the requirements of this subparagraph, shall approve the report, with any comments it may choose to make, and submit it with any such comments to the Postal Service, the Office of Personnel Management, and Congress.

(B) Upon receiving the report under subparagraph (A), the Office of Personnel Management shall reconsider its determination or redetermination in light of such report, and shall make any appropriate adjustments. The Office shall submit a report containing the results of its reconsideration to the Commission, the Postal Service, and Congress.

(6) After consultation with the United States Postal Service, the Office shall promulgate any regulations the Office determines necessary under this subsection.

**39 U.S.C. § 505. Officer of the Postal Regulatory Commission representing the general public.**

The Postal Regulatory Commission shall designate an officer of the Postal Regulatory Commission in all public proceedings (such as developing rules, regulations, and procedures) who shall represent the interests of the general public.

**39 U.S.C. § 3621 (2000) (repealed). Authority to Fix Rates and Classes.**

Except as otherwise provided, the Governors are authorized to establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services in accordance with the provisions of this chapter. Postal rates and fees shall be reasonable and equitable and sufficient to enable the Postal Service under 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. Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service. For purposes of this section, "total estimated costs" shall include (without limitation) operating expenses, depreciation on capital facilities and equipment, debt service (including interest, amortization of debt discount and expense, and provision for sinking funds or other retirements of obligations to the extent that such provision exceeds applicable depreciation charges), and a reasonable provision for contingencies.

### **39 U.S.C. § 3622. Modern Rate Regulation.**

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

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

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

\* \* \*

(d) Requirements.--

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

(A) include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal variation over the most recent available 12-month period preceding the date the Postal Service files notice of its intention to increase rates;

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

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

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

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

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

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

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

(E) notwithstanding any limitation set under subparagraphs (A) and (C), and provided there is not sufficient unused rate authority under paragraph (2)(C), establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or

exceptional circumstances, provided that the Commission determines, after notice and opportunity for a public hearing and comment, and within 90 days after any request by the Postal Service, that such adjustment is reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

(2) Limitations.--

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

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

(C) Use of unused rate authority.--

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

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

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

(ii) Authority.--Subject to clause (iii), the Postal Service may use any unused rate adjustment

authority for any of the 5 years following the year such authority occurred.

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

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

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

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

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

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

\* \* \*

### **39 C.F.R. § 3010.61. Contents of Exigent Requests.**

(a) Each exigent request shall include the following:

(1) A schedule of the proposed rates;

(2) Calculations quantifying the increase for each affected product and class;

(3) A full discussion of the extraordinary or exceptional circumstance(s) giving rise to the request, and a complete explanation of how both the requested overall increase, and the specific rate increases requested, relate to those circumstances;

(4) A full discussion of why the requested increases are necessary to enable the Postal Service, under best practices of honest, efficient and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States;

(5) A full discussion of why the requested increases are reasonable and equitable as among types of users of market dominant products;

(6) An explanation of when, or under what circumstances, the Postal Service expects to be able to rescind the exigent increases in whole or in part;

(7) An analysis of the circumstances giving rise to the request, which should, if applicable, include a discussion of whether the circumstances were foreseeable or could have been avoided by reasonable prior action; and

(8) Such other information as the Postal Service believes will assist the Commission to issue a timely determination of whether the requested increases are consistent with applicable statutory policies.

(b) The Postal Service shall identify one or more knowledgeable Postal Service official(s) who will be available to

provide prompt responses to Commission requests for clarification related to each topic specified in §3010.61(a).