Oral Argument Has Not Been Scheduled

No. 15-1297

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

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

ALLIANCE OF NONPROFIT MAILERS, et al.,
Intervenors for Respondent.

On Petition for Review of Order No. 2623 of
the Postal Regulatory Commission

BRIEF OF THE UNITED STATES POSTAL SERVICE

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FINAL BRIEF:
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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties, Intervenors and Amici

Petitioner in this matter is the United States Postal Service. Respondent in this matter is the Postal Regulatory Commission ("Commission").

This is a petition for review of an agency action. Numerous entities filed comments in the Commission's docket (Docket No. R2013-11R) but did not seek to intervene in the proceedings. Six (6) of those entities have moved to intervene in this review proceeding. They are: the National Postal Policy Council; the Alliance of Nonprofit Mailers; the Association for Postal Commerce; MPA – the Association of Magazine Media; Valpak Direct Marketing Systems, Inc.; and Valpak Dealers' Association, Inc.

No other entities have sought to participate as intervenors or *amici curiae* in this petition for review.

B. Rulings Under Review

The United States Postal Service seeks review of Commission Order Number 2623, *Order Resolving Issues On Remand*, dated July 29, 2015, in Commission Docket Number R2013-11R. Order Number 2623 is located at pages 555 through 624 of the Joint Appendix ("JA").

C. Related Cases

Commission Order Number 2623 has not previously been before this Court or any other court. However, the Commission issued Order Number 2623 in response to this Court's decision in *Alliance of Nonprofit Mailers, et al. v. Postal Regulatory Commission*, Nos. 14-1009 & 14-1010, 790 F.3d 186 (D.C. Cir. 2015) (Brown, Millett, and Wilkins, JJ.), which remanded in part an earlier Commission decision, Order Number 1926 (JA1-219), for further proceedings consistent with the Court's opinion. An earlier review proceeding with the same principal parties and involving the same statutory provisions was before this Court in *United States Postal Service v. Postal Regulatory Commission*, No. 10-1343, 640 F.3d 1263 (D.C. Cir. 2011) (Henderson, Tatel, and Brown, JJ.).

Petitioner's counsel are unaware of any other related cases pending in this Court or any other court.

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GLOSSARY

APA	Administrative Procedure Act
JA	Joint Appendix
PAEA	Postal Accountability and Enhancement Act of 2006
FY	Fiscal Year

JURISDICTIONAL STATEMENT

This petition challenges Order No. 2623 of the Postal Regulatory Commission ("Commission"), JA555-624, which addressed issues remanded or left unresolved by this Court's decision in *Alliance of Nonprofit Mailers, et al. v. Postal Regulatory Commission*, 790 F.3d 186 (D.C. Cir. 2015) (Brown, Millett, and Wilkins, JJ.), concerning the Postal Service's request for an exigent rate increase under 39 U.S.C. § 3622(d)(1)(E). In *Alliance of Nonprofit Mailers*, this Court remanded in part an earlier Commission decision, Order No. 1926, JA1-219, for further proceedings consistent with the Court's opinion. Commission Order No. 1926 granted in part and denied in part the Postal Service's request.

This Court has jurisdiction pursuant to 39 U.S.C. § 3663, under which any "person, including the Postal Service, adversely affected or aggrieved by a final order or decision" of the Commission may institute review proceedings in this Court. Order No. 2623 was issued on July 29, 2015. This Petition was timely filed on August 28, 2015.

STATEMENT OF THE ISSUES

In interpreting 39 U.S.C. § 3622(d)(1)(E), which allows the Postal Service to raise prices for its market-dominant products above the rate of inflation to recapture revenue lost "due to either extraordinary or exceptional circumstances," the Commission fashioned a test under which lost mail volume ceases being "due

to" an exigent event when the impact of the event crests and the Postal Service gains an ability to adjust to the new and lower level of volume that the event produced. In *Alliance of Nonprofit Mailers*, 790 F.3d 186, this Court upheld the Commission's test but remanded the case because the Commission reached contradictory conclusions concerning when the Postal Service gained an ability to adjust. On remand, did the Commission effectively eliminate or redefine the "ability to adjust" component of the test that this Court upheld and thus arbitrarily and capriciously curtail the amount of revenue that was lost due to exigent circumstances? Alternatively, did the Commission refuse to reconcile the conflicts in its previous findings and thus arbitrarily and capriciously conclude that the Postal Service gained the ability to adapt to the Great Recession's impact on mail volume at the same point in time that the recession stopped causing mail volume to fall further on a year-over-year basis?

STATEMENT CONCERNING PERTINENT STATUTORY AND REGULATORY PROVISIONS

The relevant provision of the Postal Accountability and Enhancement Act of 2006, 39 U.S.C. § 3622, is reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

Under 39 U.S.C. § 3622(d)(1)(E), the Postal Service may raise prices for its market-dominant products above the rate of inflation to recapture revenue lost "due to extraordinary or exceptional circumstances" so long as recapturing such revenue

is "necessary" to allow the Postal Service to provide needed services to the public. In a previous order, Order No. 1926, the Commission concluded that the Great Recession (and its impact on mail volume) was an extraordinary or exceptional circumstance, but only until it caused mail volume to settle at a permanently lower "new normal" level and the Postal Service gained an ability to adjust its operations to that new level of volume. In *Alliance of Nonprofit Mailers*, 790 F.3d 186, this Court upheld that framework as a permissible construction of the statute's "due to" prong, but remanded the case because the Commission reached contradictory conclusions concerning when the Postal Service gained an ability to adjust.

On remand, the Commission issued Order No. 2623, JA555-624, which eliminated one finding from its previous order (that the Postal Service could adapt to incremental volume losses in the year immediately after they were first suffered) and concluded that the Postal Service had lost $3.957 in contribution "due to" the Great Recession. However, for that figure to be accurate under the Commission's test, the Postal Service must have been able to adjust to the ongoing recession-produced volume shortfall in the very same year that the effects of the Great Recession stopped driving mail volume further down (*i.e.*, where volume settled at a permanently lower level). The Postal Service addressed the many ways in which such a conclusion was inconsistent with the findings and observations that the Commission had already made, but the Commission refused to reconcile its

conclusion with those findings and observations. The Postal Service seeks judicial review of Order No. 2623.

STATEMENT OF THE FACTS

A. The Relevant Statutory Provision

An independent establishment of the executive branch, 39 U.S.C. § 201, the Postal Service operates as a "basic and fundamental service provided to the people by the Government of the United States," *id.* § 101(a), and the revenues that its mail services generate have been appropriated to it by Congress. *Id.* § 2401(a). Before 2006, the Postal Service was entitled to charge rates for its services that would provide it with sufficient revenues to cover its projected costs. *Id.* § 3621(2005). In 2006, however, Congress passed the Postal Accountability and Enhancement Act ("PAEA"), Pub. L. No. 109-435, 120 Stat. 3198, which replaced the "break even" pricing model with a system in which prices for classes of market-dominant products generally are capped at the rate of inflation. *See* 39 U.S.C. § 3622(d)(1)(A).[1]

While it was expected that the Postal Service could continue to cover its costs and to provide adequate postal services within the restrictions of a price cap, Congress recognized that there may be circumstances that render strict compliance

[1] "Market-dominant" products, generally speaking, are those mail services over which the Postal Service has statutory or effective monopoly power. The price cap applies to each "class" of such products, and the four major market-dominant mail classes are First-Class Mail, Standard Mail, Package Services, and Periodicals.

with the price cap unfeasible. Congress thus included a safety valve in the PAEA that allows the Postal Service to adjust rates above the price cap in response to "exigent" circumstances. Specifically, the statute allows the Postal Service to raise prices above the cap so long as (1) the proposed rate increase is "due to either extraordinary or exceptional circumstances," and (2) the Commission concludes 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.* § 3622(d)(1)(E).

B. Factual Background

Technological change has long been an existential threat to the Postal Service. In July 2003, the President's Commission on the United States Postal Service[2] predicted that electronic alternatives would force mail volume to increase only slightly in the medium term, from 202.2 billion mail pieces in 2003 to 208.9 pieces in 2007, and then to fall to 201.5 billion pieces in 2012 and 181.7 billion

[2] President George W. Bush established the President's Commission to "examine the state of the United States Postal Service, and to prepare and submit to the President a report articulating a proposed vision for the future of the United States Postal Service and recommending the legislative and administrative reforms needed to ensure the viability of postal services." Executive Order No. 13,278, 67 Fed. Reg. 76,671 (Dec. 11, 2002).

pieces in 2017.[3] Through 2007, this forecast proved to be remarkably accurate: in the six-year period between the beginning of Fiscal Year ("FY") 2002 and the end of FY2007, overall market-dominant mail volume grew at an average annual rate of only 0.9 percent, from 200 billion mail pieces in 2002 to 209.4 billion pieces in 2007.[4] Both the Postal Service and the Commission projected as late as April 2007 that the modest growth in overall market-dominant mail volume would continue over the following few years, to 210.7 billion pieces in FY2008 and 213.2 billion pieces in FY2009.[5]

Less than six months after the Commission adopted that projection, the Great Recession began, and even the most pessimistic volume forecasts proved to be wildly optimistic. Rather than increasing marginally, or even flattening, mail volume plummeted: from 209.4 billion pieces in FY2007 to 199.9 billion pieces in FY2008, 174.1 billion pieces in FY2009, 168.2 billion pieces in FY2010, 165.0 billion pieces in FY2011, and 156.3 billion pieces in FY2012 – more than 25

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[3] Report of the President's Commission on the United States Postal Service, *Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service*, at iv (July 31, 2003), available at http://tinyurl.com/jswhe8f.

[4] *See* Response of the U.S. Postal Service to Question 1 of Presiding Officer's Information Request No. 6 (Nov. 13, 2013), available at http://tinyurl.com/q3qb9ga; Further Statement of Thomas E. Thress on Behalf of the U.S. Postal Service, at 7 (Sept. 26, 2013), available at http://tinyurl.com/j79p82v.

[5] *See* R2006-1, Library Reference PRC-LR-23 (filed April 27, 2007), available at http://tinyurl.com/qeev5kn ("Attachment A" tab, Row 116, Columns AV and BC).

percent below its FY2007 peak.[6] Overall, 863.7 billion pieces of market-dominant mail moved through the system between the end of FY2007 and the end of FY2012, *183 billion* fewer pieces than would have moved through the system had the level of mail volume held at its FY2007 level over that five-year period. This staggering decline was far greater than any decline the Postal Service had faced since the Great Depression.

The precipitous drop in mail volume compromised the Postal Service's solvency. Collectively, the prices for the Postal Service's market-dominant products are to be set at a level high enough so that each class of such products not only will cover its "attributable" costs, *i.e.*, the costs associated with handling and delivering that class of mail, *see* 39 U.S.C. § 3622(c)(2), but also will make a contribution toward covering the Postal Service's massive base of "institutional" costs, which are mostly independent of the volume that moves through the system. *See generally Direct Marketing Ass'n v. U.S. Postal Serv.*, 778 F.3d 96, 101 (2d Cir. 1985). Those institutional costs are driven by the Postal Service's obligation to operate nationwide retail, processing, and six-day-a-week delivery networks, as well as meet other congressional mandates, such as the requirement to provide benefits for retired workers. When mail volume falls, fewer mail pieces are left to make that needed contribution toward the Postal Service's institutional costs, so

[6] Further Statement of Thomas E. Thress, at 10.

the Postal Service must increase the per-piece contribution of the remaining mail volume, either by cutting costs or raising prices. But institutional costs are largely either fixed network costs that cannot be eliminated merely because mail volume declines, or costs associated with congressional mandates that cannot be cut under existing law; indeed, institutional costs have risen by six percent since FY2007. *See* Analysis of United States Postal Service Financial Results and 10-K Statement for Fiscal Year 2013 (hereafter "FY2013 Financial Analysis Report"), Docket No. ACR2013, at 23 (P.R.C. Mar. 18, 2014), available at http://tinyurl.com/z3esfh6. Even as to the costs over which the Postal Service has some theoretical control, there are usually limits both on the speed with which such costs can be shed and on the extent to which they can be reduced while still allowing the Postal Service to offer reliable mail service to the American public. The only remaining option for the Postal Service was to request an above-inflation rate increase.

The proceedings at the Commission largely concerned how much of the freefall in mail volume (and consequent decline in contribution) beginning in FY2008 was caused by the Great Recession rather than by other factors.

C. Original Exigent Request and This Court's Remand

In July 2010, citing "the dramatic, rapid, and unprecedented decline in mail volume" that resulted primarily from the "depth and severity of the current recession," the Postal Service submitted its first-ever (and, to date, only) request

under Section 3622(d)(1)(E), seeking to recover a fraction of the lost contribution caused by that decline in volume. In an order dated September 30, 2010, the Commission agreed that the Great Recession and its impact on postal volumes was an "exigent" circumstance (*i.e.*, was "extraordinary or exceptional") within the meaning of the statute. Order No. 547, *Order Denying Request for Exigent Rate Adjustments*, Docket No. R2010-4, at 3 (P.R.C. Sept. 30, 2010), available at http://tinyurl.com/hbz2dhn; *accord* JA9. However, it denied the request, reasoning that the Postal Service had not shown that the request was "due to" the recession because it had failed to link its losses to the recession with sufficient particularity. Order No. 547 at 3-4; *accord* JA9, JA20-21.

The Postal Service sought review in this Court, arguing that the Commission had required too tight a correlation between the amount of the requested rate adjustment and the losses incurred as a result of the exigent circumstance. This Court granted the petition for review in part, holding that – contrary to the Commission's view – the Commission's interpretation of "due to" was not unambiguously required by the statute. *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 640 F.3d 1263, 1266-68 (D.C. Cir. 2011). The Court held that "the plain meaning of 'due to' mandates a causal relationship between the amount of a requested adjustment and the exigent circumstances' impact on the Postal Service," but that the statute is ambiguous as to "how close the relationship must be." *Id.* at

1267. The Court thus remanded to the Commission to "fill the statutory gap by determining how closely the amount of the adjustments must match the amount of the revenue lost as a result of the exigent circumstances." *Id.*

On remand, the Commission issued Order No. 864 to fill that statutory gap. Order No. 864, *Order Resolving Issues on Remand*, Docket No. R2010-4R (P.R.C. Sept. 20, 2011), available at http://tinyurl.com/nkyrhgt. The Commission interpreted the "due to" clause as requiring the Postal Service to quantify the "lost contribution associated with the volume declines from the 2008-2009 recession," *id.* at 45, by "factor[ing] out the financial impact of non-exigent circumstances." *Id.* at 48. The Postal Service need not quantify that impact with "absolute precision," the Commission explained, but need only use "credible proof" and "supportable methods commensurate with the amount of the proposed adjustment," *id.* at 48-49, 52, such as the "sophisticated data collection and estimation methodologies" that the Postal Service had developed and refined for measuring and projecting costs. *Id.* at 49-50; *accord* JA10, JA21-22.

D. Proceedings in the Commission on Remand Concerning the Postal Service's Renewed Request

In accordance with the Commission's instructions in Order No. 864, the Postal Service renewed its request in September 2013, and supported that request with a set of econometric models prepared by economist Thomas Thress based on "calculations which underlie all of the Postal Service's demand equation analysis

and volume forecasts."[7] Employing that longstanding methodology, those models decomposed the Postal Service's volume losses between the beginning of FY2008 and the end of FY2012 into "those stemming from the recession and those stemming from other factors."[8]

Thress concluded that "diversion" to electronic alternatives caused the Postal Service to lose roughly 39 billion mail pieces during the five-year period, while the Great Recession caused the Postal Service to lose 189.7 billion pieces, depriving the Postal Service of roughly $25.7 billion in contribution toward its base of institutional costs.[9] In FY2012 *alone*, Thress concluded, mail volume was 53.5 billion pieces lower (and contribution was $7.7 billion lower) than it would have been had the recession not occurred.[10] The Postal Service sought to recover a small fraction of that shortfall through an exigent rate increase of 4.3 percent, spread among market-dominant mail services, which would yield additional annual contribution of $1.78 billion.

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[7] Further Statement of Thomas E. Thress, at 5.

[8] Renewed Exigent Request of the U.S. Postal Service in Response to Commission Order No. 1059, at 9 (Sept. 26, 2013), available at http://tinyurl.com/qg9fynb.

[9] JA53, JA98-99. As noted at page 7 above, actual mail volume over the five-year period was 183 billion pieces less than it would have been had volume remained flat. Thress's model found that, but for the effects of the Great Recession, volume would actually have grown slightly, with factors that increased volume (such as population growth) more than offsetting factors that decreased volume (such as electronic diversion). *See* Further Statement of Thomas E. Thress, at 10.

[10] JA98. *Accord* Renewed Exigent Request, at 2, 9-10; Reply Comments of the U.S. Postal Service, at 11, 14-16 (Dec. 6, 2013), available at http://tinyurl.com/gqtvu5s.

On December 24, 2013, the Commission issued Order No. 1926, which concluded, by a 2-1 vote, that the Great Recession had caused the Postal Service to lose only 25.3 billion pieces of mail volume, JA6, JA105 – roughly one-seventh of the 189 billion pieces that the Postal Service's models had attributed to the recession – and only $2.8 billion in total contribution. Thus, the Commission granted the proposed 4.3% rate adjustment but ordered that it be rescinded in less than two years, once it produced $2.8 billion in contribution toward the Postal Service's institutional costs. JA185.

The Commission determined that the Postal Service's econometric models were deficient in three respects in satisfying the "due to" prong of 39 U.S.C. § 3622(d)(1)(E). First, the Commission concluded that the models had failed to adequately segregate the impact of electronic diversion from the impact of the Great Recession, and accordingly discarded the models' use of variables designed to capture changes to long-run mail trends. JA65-87.

Second, the Commission determined that, once a "new normal" test was satisfied for a given class of market-dominant mail, the ongoing shortfall in mail volume ceased to be "due to" the Great Recession. The Commission introduced the "new normal" test in Order No. 1926 to identify the period in time where mail volume in a given class stabilized at a new and lower level and the Postal Service demonstrated an ability to project and adjust to that new level. Specifically, the

Commission stated that it "considers mail volume loss as due to the Great Recession only until: (1) a sufficient number of relevant macroeconomic indicators demonstrate a return to positive trends; (2) the rate of change for Postal Service mail volumes is positive; (3) the Postal Service regains its ability to project mail volumes; and (4) the Postal Service demonstrates an ability to adjust operations to the lower volumes." JA6, JA90. The Commission determined that the "new normal" test was satisfied at different times for the four classes of market-dominant mail: in FY2010 for Standard Mail and Package Services, in FY2011 for First-Class Mail, and in FY2012 for Periodicals. JA98.

Finally, the Commission determined that, even before the "new normal" test was satisfied for a given class of mail, volume losses would be counted as "due to" the recession only in the year in which mail volume first left the system, even if the Great Recession prevented such volume from rebounding in subsequent years. JA99-100. Put differently, under this so-called "count once" rule, the Commission decided to count not the total aggregate volume losses "due to" the recession in a given year but, rather, only the extent that such losses exceeded those of the immediately preceding year.

As a result of those three sets of conclusions, the Commission, despite finding previously that the impact of the Great Recession on the Postal Service was "unique in kind and severity," Order No. 547 at 50, and despite conceding that

mail volume would never return to its pre-recession level, JA100, concluded that "the Great Recession caused a total volume loss of 25.3 billion pieces" of mail. JA105. The Commission's breakdown of lost volume is set forth in the following table, which is hereafter referred to as Table 1:

Table 1
Year-Over-Year Changes in Mail Volumes
Due to The Great Recession (in Millions of Pieces)

	FY2008	FY2009	FY2010	FY2011	FY2012	FY2008-FY2012
First-Class Mail	(582.7)	(1,863.9)	(1,043.3)	0.0	0.0	(3,490.0)
Standard Mail	(5,350.0)	(15,572.0)	0.0	0.0	0.0	(20,922.0)
Periodicals Mail	(110.3)	(377.2)	(352.3)	(15.8)	0.0	(855.5)
Package Services	0.0	(3.4)	0.0	0.0	0.0	(3.4)
TOTAL MARKET-DOMINANT MAIL	(6,043.0)	(17,816.5)	(1,395.6)	(15.8)	0.0	(25,270.8)

JA105 (therein labeled Table VI-5, "Commission Estimates Year-over-Year Changes in Mail Volumes due to the Great Recession"); *accord* JA586. The cells with negative numbers represent the incremental "year-over-year" losses in volume that the Commission found were "due to" the recession, and the "0.0" cells reflect years with no net incremental "year-over-year" losses (and further represent the point at which, according to the Commission, the relevant class of mail satisfied the "new normal" test).

E. This Court's Decision in *Alliance of Nonprofit Mailers*

The Postal Service petitioned this Court for review of Order No. 1926, challenging all three components of the Commission's "due to" analysis. A group

of major mailers separately challenged the Commission's finding that the Postal Service had even demonstrated the amount of year-over-year lost volume that the Commission found was "due to" the Great Recession.

This Court affirmed in part and remanded in part. The Court deferred to the Commission's evaluation of the econometric models and therefore rejected both sides' challenges to the Commission's findings concerning the year-over-year volume losses attributable to the Great Recession as reflected in the figures in Table 1 above, concluding that the econometric analysis in the Order fell "solidly within the Commission's wheelhouse." *Alliance of Nonprofit Mailers*, 790 F.3d at 196-97. The rest of the Court's opinion focused on the other two components of the Commission's analysis under the statute's "due to" prong: the "count once" rule and the "new normal" test. *Id.* at 193-96.

1. <u>The "Count Once" Rule</u>

The Commission's primary justification of its "count once" rule – *i.e.*, its decision to attribute volume losses in a given year to the Great Recession only to the extent that they exceeded the volume lost in the preceding year – was that, "once a piece of mail is lost in a given year due to the Great Recession, in subsequent years, the Postal Service is aware of that loss and adjusts its expectations to continue without that mail piece," and that counting such a mail piece as "lost" in subsequent years "would improperly discourage the Postal

Service from taking necessary steps to right-size its network due to an extraordinary or exceptional event." JA100; *accord Alliance of Nonprofit Mailers*, 790 F.3d at 192. The Postal Service challenged that justification in two ways.

First, it argued that the "count once" rule was arbitrary on its own terms – if the Great Recession caused 100 mail pieces to leave the system in 2008 and also prevented the same 100 pieces from returning to the system in 2009, the lost volume over that two-year period was 200 pieces, not 100 pieces. Second, the Postal Service argued that the "count once" rule was inconsistent with the Commission's "new normal" test, which was designed primarily to set a date by which the Postal Service should be able to adjust to the lost volume. So, for example, if the "new normal" test reveals that the Postal Service could not adjust until FY2011 to the absence of a mail piece originally lost in FY2008 (but that did not return in later years), then the "count once" rule's failure to count that piece as lost in FY2009 and FY2010 is inconsistent with that test.

The Court vacated the "count once" rule, determining that it "makes no sense on this record." *Alliance of Nonprofit Mailers*, 790 F.3d at 189. In particular, the Court observed that the rule's "rationale that the Postal Service should have been able to identify and adjust to that downturn [in mail volume] immediately is at war with the Commission's 'new normal' holding, which openly endorsed a longer period of time for such adjustments." *Id.* at 193.

2. **The "New Normal" Test**

Under the "new normal" test, lost volume ceases being "due to" extraordinary or exceptional circumstances at the point where, for a given class of mail, volumes have settled at a new and lower level and the Postal Service has shown an ability to adjust its operations to that new level of volume. The Postal Service challenged that test as inconsistent with the "due to" prong of the statute, which by its language and by the Commission's earlier order simply addresses causation in fact – *i.e.*, the extent to which the Great Recession caused mail volume to fall below what it otherwise would have been. The Postal Service contended that its ability to adjust to volume lost because of the recession should be considered not under the "due to" clause of the statute, but under the "necessary" clause, which asks (in part) whether the Postal Service has engaged in "best practices of honest, efficient, and economical management." 39 U.S.C. § 3622(d)(1)(E).

The Court upheld the Commission's "new normal" test, reasoning that the "due to" language is sufficiently ambiguous that its reference to causation need not be as "woodenly literal" as the Postal Service's argument suggested. *Alliance of Nonprofit Mailers*, 750 F.3d at 194. Instead, the Court reasoned, while the "effects" of the Great Recession on mail volume may "in some literal, but-for causal sense linger . . . for the foreseeable future, that does not mean that those

circumstances remain 'extraordinary' or 'exceptional' for just as long." *Id.* Rather, the Commission could reasonably conclude that, although the Great Recession continued to impact mail volume indefinitely, it lost its character as an extraordinary or exceptional event at the point where the Postal Service "had an opportunity to adjust to the 'new normal' in the mail economy." *Id.* at 193; *accord* JA559 (correctly interpreting the Court's opinion as affirming that "the circumstance remained exigent until the Postal Service had an opportunity to adjust to the 'new normal' in the mail economy"). After that point, the ongoing lower level of volume would no longer be "due to" an extraordinary or exceptional event.

The unresolved factual question presented by that analysis is when the Postal Service could have adjusted to the lower level of volume. Although the Court noted the Commission's position "that, by 2011, the Postal Service should have adjusted to a 'new normal' business environment in which mail volumes appeared to be permanently lower than their pre-recession levels," *Alliance of Nonprofit Mailers*, 790 F.3d at 189, it did not consider whether that finding was reasonable or was consistent with the Commission's discussion in Part V of Order No. 1926, which explained at length the restrictions that limit the Postal Service's ability to change its operations in response to reduced mail volumes. JA130-40.

The Commission's internal inconsistency on the "ability to adjust" issue was a recurring topic during the oral argument. Postal Service counsel argued that

Order No. 1926 was "arbitrary and capricious within [its] four corners" because the Commission's findings about "an ability to adjust" under the "due to" prong of the statute conflicted with the Commission's findings "about the Postal Service's ability to adjust in the 'necessary' prong." *Alliance of Nonprofit Mailers*, Oral Argument Transcript at 19. Counsel also stated later in the argument that:

> There's just no way to look at the fourth factor on the 'new normal' test, the ability to adjust, and not understand that [the Commission is] asking the same question at the 'necessary' step, even if they can have the test in both places the answer has to be the same, and [the Commission] can't have one paragraph of analysis that says hey, by 2010 you guys should be moving forward, and 30 pages of analysis that says … you've got all of these fixed obligations, and … you're going to lose contribution to your fixed costs.

Id. at 30. The Court's opinion declined to address the argument, stating that the "argument was not raised in the Postal Service's briefs, and is not properly before [the] Court." *Alliance of Nonprofit Mailers*, 790 F.3d at 196 n.3. So, although the Court rejected the Postal Service's *statutory* challenges to the "new normal" framework, it left open the question of whether the Commission's "ability to adjust" finding under that framework was inconsistent with the Commission's findings on the same question elsewhere in the order. The Court specifically noted that "[t]he Commission … is free to consider that argument on remand." *Id.*

F. Proceedings on Remand and Commission Order No. 2623

On remand, several parties filed comments concerning the "count once" rule and the "ability to adjust" finding in the "new normal" test. JA254-411 (comments); JA412-554 (reply comments). The Commission resolved the "count once" issue in the Postal Service's favor but did not resolve the inconsistency concerning the Postal Service's ability to adjust.

1. Correction of the "Count Once" Error

The Commission corrected the "count once" error, amending the figures from the above-referenced Table 1 to reflect the degree to which mail volumes in a given year ware lower than they would have been absent the Great Recession rather than merely the degree to which volumes were lower than they were in the previous year. JA597-602. Accordingly, the Commission computed the cumulative effect of the incremental losses it already found.

The Commission's approach implicitly recognized that the volume that was lost due to the Great Recession in a given year remained lost in later years due to the ongoing effects of the recession. As an example, the Commission's previous order concluded that the Postal Service lost 1.864 billion pieces of First-Class Mail due to the Great Recession in FY2009. *See supra* Table 1; *accord* JA105. However, that figure represented only the extent to which the volume lost in FY2009 exceeded the volume first lost in FY2008, even though the volume lost in

FY2008 did not return the following year. On remand, the Commission corrected the error by adding the 1.864 billion pieces first lost in FY2009 to the 583 million pieces that were first lost in FY2008 but that remained lost in FY2009. The result is a new figure of 2.447 billion.

The Commission's corrected tabulation, shown in Table 2 below, was a cumulative volume deficit of 35.088 billion pieces, nearly 10 billion pieces more than the Commission had previously attributed to the Great Recession.

Table 2
Volume Lost "Due to" the Great Recession
without "Count Once" Rule (in Millions of Pieces)

	FY2008	FY2009	FY2010	FY2011	FY2012	FY2008-FY2012
First-Class Mail	(583) (583)	(1,864) (2,447)	(1,043) (3,490)	0.0	0.0	(3,490) (6,519)
Standard Mail	(5,350) (5,350)	(15,572) (20,992)	0.0	0.0	0.0	(20,922) (26,272)
Periodicals Mail	(110) (110)	(377) (487)	(352) (840)	(16) (856)	0.0	(856) (2,293)
Package Services	0.0	(3) (3)	0.0	0.0	0.0	(3) (3)
TOTAL MARKET-DOMINANT MAIL	(6,043) (6,043)	(17,817) (23,859)	(1,396) (4,330)	(16) (856)	0.0	(25,271) (35,088)

See JA588 (therein labeled Table 3), JA598 (adopting the "cumulative method approach" set forth in that table). For each individual cell this table, the top (non-bolded) figure represents incremental losses "due to" the Great Recession – *i.e.*, the extent to which the Great Recession caused mail volume in one year to be lower than it was in the immediately preceding year – while the bottom figure represents

the total volume shortfall "due to" the Great Recession for that year once the "count once" rule (reflected in the non-bolded figures) was eliminated.

2. **"Ability to Adjust" Under the "New Normal" Test**

With cumulative annual losses replacing new incremental annual losses as the correct measure of volume lost "due to" the Great Recession, there remained the matter of whether cumulative annual losses should be used even in years for which there were no new incremental losses for a given class of mail – *i.e.*, for the years represented by "0.0" in the above table, showing that volume had stabilized. Under the "count once" rule, in which only incremental losses were "counted," no consideration of that issue was needed – if there were no new marginal losses in a given year, there was no lost volume to count. But that was no longer true once the Commission recognized on remand that the Great Recession caused volume lost in previous years to remain lost in subsequent years. Just as damage to the labor market cannot be said to have ended at the point when the unemployment rate stops growing, the Great Recession did not stop causing *ongoing* damage to mail volume at the instant when it stopped causing volume losses to grow on a year-over-year basis.

Under the "new normal" test as articulated by the Commission and upheld by this Court on review, once mail volume stabilized and the Great Recession was no longer producing new marginal losses, the remaining question is when the

Postal Service could adjust to the new reality of a stable but permanently lower level of mail volume. But as the Postal Service argued on remand, JA366-68, the Commission had made inconsistent findings on the Postal Service's ability to adjust. Part IV of Order No. 1926 suggested (in a single paragraph) that the Postal Service could adjust as early as FY2010, JA98, whereas Part V of the same Order explained in detail the factors preventing it from making such adjustments. JA132-40. Moreover, in the FY2013 Financial Analysis Report that the Commission issued three months after Order No. 1926, the Commission recognized that the Postal Service's cost-cutting efforts did not produce any degree of stability until FY2013. JA371-79 (citing FY2013 Financial Analysis Report, at ii, 1-3, 18-19).

The Postal Service argued that the Commission should reconcile its inconsistent findings and proposed that, under the evidence already accepted and findings made by the Commission, the Postal Service did not gain the "ability to adjust" to the ongoing recession-produced volume shortfall earlier than the end of FY2012. JA371-79; JA387-93. At the very least, the Postal Service argued, the date by which the Postal Service could adjust its operations in response to the shift in the level of mail volume should be a single, consistent date, given its institutional/network costs, and the date should be no earlier than the end of FY2010, the point at which the Commission concluded (and argued in this Court)

that the precipitous decline in First-Class Mail ceased being "due to" an extraordinary event. JA379-84; JA393-95.

The Commission rejected the Postal Service's arguments, detecting nothing inconsistent in its previous findings concerning the Postal Service's "ability to adjust." JA579-84. Rather, the Commission stated, the "ability to adjust" prong of its test under the statute's "due to" prong merely reflects that fact that, once mail volume shifts to a new and lower level, "it is expected that the Postal Service will make adjustments to its operations to respond to the lower mail volume." JA580; *see also* JA582 (the ability-to-adjust element of the "new normal" test "simply expects that the Postal Service will, as it did, take steps to adjust to lower levels of volume"). While Part V of Order No. 1926 discussed factors that would sharply limit the Postal Service's ability to adjust its operations in response to lower volume, the Commission explained that that discussion occurred as part of the "necessary" prong of the statute rather than the "due to" prong, and that only the "necessary prong" is concerned with "'how the Postal Service has reacted to the volume loss in terms of shedding mail capacity or how it should adjust its network to the new normal.'" JA581-82 (quoting JA102). The "due to" prong (including the "new normal" test) is concerned only with "'quantification of . . . volume losses.'" JA582 (quoting JA102). Accordingly, the Commission concluded that it

need not consider under the "due to" prong of the statute when and how the Postal Service could adjust its operations, and therefore declined to resolve the question.

This petition followed.

SUMMARY OF THE ARGUMENT

Under 39 U.S.C. § 3622(d)(1)(E), Congress permitted the Postal Service to recover contribution lost "due to" exigent circumstances through an above-inflation rate increase if the increase is "necessary" to permit the Postal Service to provide needed services. In interpreting the "due to" prong of the statute, Commission Order No. 1926 announced a test under which mail volume lost by the Great Recession ceases being "due to" exigent circumstances when mail volume stabilizes at a lower, "new normal" level (*i.e.*, where the situation stops getting worse) and the Postal Service has shown an ability to adjust to the new circumstances it faces. In *Alliance of Nonprofit Mailers*, this Court upheld that test as a reasonable construction of the statute's "due to" prong, vacated the Commission's "count once" rule as inconsistent with the underpinnings of that test, and left open the question of whether the Commission had made inconsistent findings about when, in fact, the Postal Service gained an ability to adjust to the economic circumstances that the Great Recession produced.

On remand, the Postal Service pointed out that the Commission's earlier order was hopelessly inconsistent on the "ability to adjust" question and that a

Financial Analysis Report that the Commission issued three months later demonstrated that the Postal Service was unable to adjust until long after the Great Recession's impact peaked. Rather than reconcile its conflicting statements, the Commission instead effectively eliminated the "ability to adjust" prong from its test, stating that, once mail volume settles at a new and permanently lower level, it is simply "expected that the Postal Service will make adjustments to its operations to respond to the lower mail volumes of the 'new normal.'" Because the "ability to adjust" prong was a key component of the test that this Court upheld, the Commission's unexplained decision to eliminate it on remand should be set aside.

To the extent that the Commission's assumption can be read as a factual finding, it is arbitrary and capricious. It is facially absurd to conclude that the Postal Service gained the ability to adjust its operations at the moment when the Great Recession caused the overall level of mail volume to settle at a permanently lower level, or that Postal Service gained the ability in different years to adjust to the loss of different classes of mail. Moreover, the Commission's order failed to even recognize, let alone resolve, the inconsistent statements that the Commission has made on the issue previously. Accordingly, the Commission's order should be remanded for further proceedings.

STANDING

The Postal Service has standing under 39 U.S.C. § 3663 to challenge Order No. 2623 because it is "adversely affected or aggrieved" by the Commission's order. Specifically, by failing to reconcile its inconsistent findings and by otherwise reaching an arbitrary conclusion concerning when the Postal Service could have adjusted to the volume losses caused by the Great Recession, the Commission's order has reduced the length of time that the 4.3 percent exigent rate increase for the Postal Service's market-dominant products can remain in effect. As a result, if allowed to stand, the Commission's decision stands to deprive the Postal Service of revenue it needs to cover its institutional costs (and which must be generated from substantially lower mail volumes) so that it may continue providing postal services of the kind and quality that the American public expects.

This Court can redress these injuries by granting the petition for review and setting aside the Commission's conclusions as contrary to law, arbitrary, and capricious.

ARGUMENT

I. STANDARD OF REVIEW

Order No. 2623 must be held unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or is "unsupported by substantial evidence." *Id.* § 706(2)(E). *See* 39 U.S.C. § 3663

(Commission actions reviewed under APA standards). While the Court will not "substitute its judgment for that of the [Commission]," the Commission must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

The Commission's action must be set aside as arbitrary and capricious if it is "illogical on its own terms," *GameFly, Inc. v. Postal Regulatory Comm'n*, 704 F.3d 145, 148 (D.C. Cir. 2013) (citation omitted); it is "devoid of needed factual support," *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984); it lacks a "rational explanation for its decision . . . based on consideration of the relevant factors," *Am. Fed'n of Gov't Employees v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006) (citation omitted); or it departs without a reasonable explanation from the analytical framework established or the determinations made in a previous order. *LePage's 2000, Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225, 231-34 (D.C. Cir. 2011); *Nat'l Treas. Employees Union v. FLRA*, 404 F.3d 454, 457 (D.C. Cir. 2005). "Put simply, the APA requires that an agency's exercise of its statutory authority be reasonable and reasonably explained." *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012).

This Court has not hesitated to remand a decision of the Commission when it finds that the Commission has "proceed[ed] in a slapdash manner" by issuing an order "rife with anomalies," *LePage's*, 642 F.3d at 230-31, or has failed to enunciate and adhere to a comprehensible standard in resolving a factual issue within the Commission's statutory authority. *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 750, 753, 755-56 (D.C. Cir. 2015).

II. THE COMMISSION ARBITRARILY REMOVED THE ABILITY-TO-ADJUST INQUIRY FROM ITS "NEW NORMAL" TEST ON REMAND

There is a significant difference between the "new normal" and the "new normal test." The Commission used the phrase "new normal" to refer to the business environment that the Postal Service faces in the wake of the Great Recession. In particular, it denotes the point in time at which mail volume stabilized at a new level that was (in contrast to the "old" normal) permanently lower than the level it would have been had the Great Recession not occurred – or, put differently, the point where the Great Recession was no longer causing deeper year-over-year declines in volume for a given class of mail.[11] By contrast, the

[11] *See, e.g.*, JA102 ("Quantification of such volume losses is independent of how the Postal Service has reacted to the volume loss in terms of shedding mail capacity or how it should adjust its network to the new normal"); JA201 (Separate Views of Commissioner Acton) (new normal "defines the business environment in the post-Great Recession world," and "[t]he Postal Service's future. . . lies in its ability to adapt to this 'new normal' environment"); JA206-07 (Dissenting Opinion of Vice Chairman Taub) (noting that the "new normal" reflects the point where

Commission's "new normal" *test* went beyond asking when the Great Recession caused mail volume to settle at a lower "new normal" level, and further asked when the Postal Service could adjust to the new and lower level of volume that the Great Recession left in its wake.

The Court upheld the Commission's test as consistent with the governing statute's "due to" provision – or, as the Commission accurately summarized, the Court upheld the Commission's conclusion that the Great Recession "remained exigent until the Postal Service had an opportunity to adjust to the 'new normal' in the mail economy." JA559. Indeed, the Court vacated the Commission's separate "count once" rule largely because it was inconsistent with the "ability to adjust" component of the "new normal" test. Specifically, this Court concluded that the rationale underlying the "count once" rule, "that the Postal Service should have been able to identify and adjust to" downturns in mail volume "immediately," is "at war with the Commission's 'new normal' holding, which openly endorsed a longer period of time for such adjustments." *Alliance of Nonprofit Mailers*, 790 F.3d at 193.

Although the Court held that the language of 39 U.S.C. § 3622(d)(1)(E) permitted the Commission to consider the Postal Service's "ability to adjust" under

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"volume decline has stabilized"); *cf. Alliance of Nonprofit Mailers*, 790 F.3d at 189 ("new normal" is "business environment in which mail volumes appeared to be permanently lower than their pre-recession levels").

the "due to" prong of the statute rather than solely under the "necessary" prong, it did not opine on the factual question of when the Postal Service actually could have adjusted, or whether the Commission was free to reach different answers to that question in different parts of its order. The Postal Service presented that question on remand, arguing that Order No. 1926 had made contradictory findings on the "ability to adjust" issue – suggesting under the "due to" prong that the Postal Service was able to adjust in FY2010 but finding under the "necessary" prong that it could not have adjusted that quickly – and that any finding that the Postal Service could have immediately adapted was further belied by the evidence relied on in the Commission's FY2013 Financial Analysis Report, which it released while Order No. 1926 was on review in this Court. JA366-79.

Rather than resolve the conflict or even acknowledge its existence, the Commission on remand decided that the "ability to adjust" inquiry was not part of the "due to" prong after all. The "due to" prong is concerned only with "'quantification of . . . volume losses,'" the Commission stated. JA582 (quoting JA102). The "necessary" prong of the statute is instead the appropriate place to consider "how the Postal Service has reacted to the volume loss in terms of shedding mail capacity or how it should adjust its network to the new normal.'" JA581-82 (quoting JA102). Although Order No. 1926 mentioned the ability to adjust in the test applying the statute's "due to" prong, the Commission on remand

explained that reference away, stating that, once the Great Recession peaked – *i.e.*, once it stopped causing new marginal volume losses and volume accordingly settled at a "new normal" level – it is simply "expected that the Postal Service will make adjustments to its operations to respond to the lower mail volume." JA580; *see also* JA582 (the ability-to-adjust element of the "new normal" test "simply expects that the Postal Service will, as it did, take steps to adjust to lower levels of volume"). So, under the Commission's new interpretation of the "due to" prong, the "ability to adjust" is something to be assumed rather than evaluated and resolved, even if the facts belie the validity of that assumption.

The Commission's position on remand – that the statute's "due to" prong is focused on the volume losses that the Great Recession caused rather than on the Postal Service's ability to adjust to such losses – is an ironic twist in the ongoing saga over the meaning of that statutory phrase. The Commission's original position was that the "due to" prong established a causation standard but imposed a high burden of proof, requiring that the Postal Service match the amount of the proposed rate adjustment precisely to the amount of revenue that the Great Recession caused the Postal Service to lose. This Court remanded that interpretation. *See U.S. Postal Serv.*, 640 F.3d at 1267-68. On remand, the Commission continued its focus on causation, determining that the "due to" clause required the Postal Service to prove the "lost contribution associated with the

volume declines" from Great Recession, but no longer required the Postal Service to establish causation with "absolute precision." Order No. 864 at 45, 48-49.

Then, when the Postal Service made the showing that the Commission called for in Order No. 864, the Commission held that the "due to" clause was not solely about causation, concluding that the Great Recession ceased being an extraordinary circumstance when the Postal Service had gained an ability to adjust to the lost contribution that the recession had caused. In defending its new test on review in this Court, the Commission made clear that the "ability to adjust" was a key component of the test it was employing under the "due to" prong. Specifically, it contended that, even if an external event causes a permanent shift in mail volume, the statute does not "compel the Commission to excuse the Postal Service from responding, over time, to the effects of circumstances that were exceptional when they first occurred," *Alliance of Nonprofit Mailers*, Commission Br. at 38, and that the "due to" clause of the statute permitted the Commission to consider whether the Postal Service had an opportunity to "adjust its operations" to account for such long-term volume losses. *Id.* at 38-39. At oral argument, counsel for the Commission further stated that it was reasonable to interpret the "due to" prong of the statute as encompassing more than simply the extent to which the Great Recession caused lost volume or lost revenue but also "the extent that the Postal Service is able to respond by reducing costs." *Alliance of Nonprofit Mailers*, Oral

Argument Transcript at 45; *see also id.* at 41, 44 ("due to" clause may permissibly address "what could the Postal Service have been expected to do," and can "take into account [the Postal Service's] ability to adjust"); *id.* at 53-54 ("new normal" test identifies "the point when we expect you to entirely adapt going forward" and "can adapt to circumstances as they're changing"). This Court upheld the test that the Commission articulated then, but remanded the case because the Commission's "count once" rule had articulated an inconsistent view of what it means to adjust.

Having determined that the "due to" clause is about something more than the extent to which the Great Recession caused volume losses or deprived the Postal Service of contribution, and having persuaded this Court that the Postal Service's "ability to adjust" to volume losses helps determine when such losses cease being "due to extraordinary or exceptional circumstances," the Commission is not free on remand to eliminate that part of its test without at least explaining its reversal. *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1101 (D.C. Cir. 1993) ("[W]hen an agency takes inconsistent positions . . . it must explain its reasoning."). For that reason alone, the case should again be remanded.

III. IF THE COMMISSION'S DISCUSSION OF THE POSTAL SERVICE'S ABILITY TO ADJUST WAS INTENDED AS A FINDING OF FACT, IT IS ARBITRARY AND CAPRICIOUS.

The Commission may contend that it did not read "ability to adjust" out of the "due to" test, but merely found that the Postal Service happened to gain its

ability to adjust to volume losses at the same time that a given class of mail settled at its "new normal" level of volume. If that is the Commission's factual conclusion, then it is arbitrary and capricious. First, that conclusion is illogical on its face. Second, that conclusion ignores the relevant evidence and fails to reconcile the conflicting findings the Commission has already made on the issue.

A. It is Facially Illogical that the Postal Service Gained the Ability to Adjust to the Recession-Caused Volume Shortfall in a Given Class of Mail at the Point When the Great Recession Stopped Causing Volume in that Class to Fall Incrementally Further.

For the Commission's conclusion to be correct, the Postal Service must have gained the ability to adjust to the volume lost by a given class of mail at the moment when that mail class suffered no new incremental volume losses – *i.e.*, when the Great Recession's impact reached its peak. For example, the Commission found that the Postal Service lost nearly *21 billion* pieces of Standard Mail "due to" the Great Recession in FY2009, but lost *no* Standard Mail "due to" the Great Recession in FY2010 – even though the 21 billion pieces previously lost remained lost in FY2010, even though three-quarters of that volume left the system for the first time in just the previous year, and even though the 16 billion pieces first lost in FY2009 and the 21 billion pieces of overall lost volume exceeded, by a large margin, any single-year loss in volume by a class of mail since 1970.

The Commission has never explained how the Postal Service would have been able to adapt to an ongoing shortfall of 21 billion pieces of Standard Mail by

FY2010, or how such a conclusion could be squared with the Commission's simultaneous finding that the Postal Service was *unable* to adjust to a shortfall of 3.5 billion pieces of First-Class Mail or even 840 million pieces of Periodicals in FY2010. If the Postal Service was unable to adjust to those relatively smaller amounts of lost volume in other classes, then it is hard to imagine how it could possibly have adjusted to the loss of 21 billion pieces of Standard Mail. After all, the principal types of "adjustments" available to the Postal Service to shed costs – such as reducing work hours, consolidating processing and delivery operations, and reforming compensation and benefits – are system-wide responses. They do not depend on the precise class of mail that has been lost, nor can they be targeted to address a particular class of lost volume. First-Class Mail, Standard Mail, and Periodicals are all processed, transported and delivered by the same employees over the same networks. The Postal Service could not adjust its networks specifically for Standard Mail losses in one year but make First-Class-Mail-specific adjustments in another year.

Apart from this unexplained gap in logic, the Commission's analysis is also arbitrary in apparently assuming that the ability to adjust is somehow tied entirely to the loss of incremental mail pieces. As embodied in Table 2 above, the Commission's analysis suggests that, so long as even a single piece of mail in a class is *first* lost in a given year, then the Postal Service not only cannot "adjust" to

the loss of that marginal mail piece but also cannot adjust to the total deficit in volume produced by mail pieces lost in previous years that did not return. For example, because the Postal Service lost 16 million marginal Periodicals pieces in FY2011, it could adjust in FY2011 neither to the loss of those 16 million pieces nor to the loss of the 840 million pieces first lost in prior years that did not return in FY2011. Meanwhile, by the Commission's logic, because the Great Recession did not cause the Postal Service to lose an incremental piece of Standard Mail in FY2010, the Postal Service somehow obtained the ability to adjust to the entire cumulative 21-billion-piece shortfall in Standard Mail that remained. That makes no sense at all.

As this Court noted in *Alliance of Nonprofit Mailers*, the ability to adjust must be defined by something other than "the arbitrariness of turning a calendar." 790 F.3d at 196. That observation applies with even more force here, where the Commission concluded that even the turning of the calendar to FY2010 did not allow the Postal Service to adjust to the loss of First-Class Mail and Periodicals volume, but somehow did allow the Postal Service to adapt to the far greater loss of Standard Mail volume. If the Postal Service, as a whole, would be expected to take longer to adjust to the overall losses suffered by one of those three mail classes, it stands to reason that *Standard Mail* losses would require more time,

given that they comprised fully 88 percent of total market-dominant volume lost in FY2008 and FY2009.

B. The Commission's Finding Arbitrarily Fails to Reconcile the Conflicts in its Previous Findings and Statements and Produces a Result that Frustrates the Purpose of 39 U.S.C. § 3622(d)(1)(E)

Even if it were not facially incoherent to conclude that the Postal Service gained the ability to adjust to ongoing shortages of Standard Mail in FY2010, First-Class Mail in FY2011, and Periodicals in FY2012, such a conclusion is inconsistent with the findings the Commission made in Order No. 1926 and the observations it made three months later in its Financial Analysis Report, the Commission's annual comprehensive "analysis of the Postal Service's financial health." FY2013 Financial Analysis Report at i. The Commission's refusal to acknowledge the inconsistencies in its findings and observations, let alone reconcile its conclusion with those findings and observations, renders the conclusion arbitrary and capricious.

1. As noted above, and as recognized intermittently in Order No. 1926, the fundamental problem that a pronounced and permanent downward shift in mail volume creates for the Postal Service is that it deprives it of contribution toward the fixed costs that arise from running a nationwide network that delivers to every address, six days per week. Without sufficient contribution, the Commission has acknowledged, "the ability of the Postal Service to continue to meet the Nation's

postal needs will be severely compromised." JA126. The Postal Service is not a private company. It has a statutory obligation to provide universal mail service to the American public over a nationwide delivery network, and thus cannot respond to a sudden decrease in demand by shrinking the size of its network. JA137 (costs "associated with the time it takes carriers to walk or drive their route will not change noticeably if mail volumes decline"); *accord* FY2013 Financial Analysis at 23. Accordingly, to cover the cost of maintaining the network in response to falling mail volume, it must either raise the prices charged for its remaining mail volume, make deeper cuts in the costs it can control (thereby allowing a larger proportion of the Postal Service's dwindling revenue to be devoted to its base of institutional costs), or both.

Even as to the costs that the Postal Service can shed, moreover, there is inherently a gap between the time that volume losses occur and the time that the Postal Service can reduce its costs in response to such losses. The Commission's Financial Analysis Report recognized that reality, confirming that it was not until FY2013 that the Postal Service was first able to make inroads toward increasing the contribution of its remaining mail volume to its institutional costs and thereby to achieve some degree of stability after the upheaval caused by the Great Recession. Although the Postal Service had long been reducing operating expenses and increasing efficiency "in order to better align operating expenses

with the current volumes," it "began to realize noticeable savings from those efforts in FY 2013." FY2013 Financial Analysis Report at 1. The Postal Service still suffered a billion-dollar net loss in FY2013 – even ignoring its statutory obligation to make specific annual payments into the Postal Service Retiree Health Benefits Fund, *see* 5 U.S.C. §8909a(d)(3), which increased its overall loss for the year to $5 billion – but it was nonetheless a marked improvement over the net losses that the Postal Service suffered in the immediately preceding years. FY2013 Financial Analysis Report at 1, 3. Of particular significance, the Postal Service's percentage decline in attributable costs in FY2013 exceeded the percentage decline in mail volume "[f]or the first time in 10 years," which the Commission deemed "an important indicator of the ability of the Postal Service to effectively manage costs and, if continued, can improve the financial picture in the future." *Id.* at 2.

The Postal Service's comments on remand discussed at length the findings in the FY2013 Financial Analysis Report, *see* JA271-79, but nothing in Order No. 2623 responded to that discussion or explained how its findings in the Financial Analysis Report are consistent with the findings concerning the ability to adjust that the Commission made a mere three months earlier in Order No. 1926.[12] The

[12] Although the Commission did not cite the FY13 Financial Analysis Report, other than to note that the Postal Service had relied on it on remand, JA574, it relied on its FY14 Financial Analysis Report to support its conclusion on remand that the Postal Service's financial situation remains precarious in light of its "rising

failure to address the evident inconsistencies between its two contemporaneous orders renders the Commission's "ability to adjust" analysis arbitrary and capricious.

2. To the extent that any response to this inconsistency can be gleaned from Order No. 2623, it is the Commission's oblique statement that the "ability to adjust," at least under the "due to" prong of the statute, focuses on the actions that the Postal Service took – *i.e.*, whether it has "take[n] steps to adjust to lower levels of mail volume, JA582 – rather than on whether or when those steps actually resulted in increased contribution or otherwise improved its financial position. But that is not how the Commission characterized the "ability to adjust" during oral argument on review in this Court. It said then that the "new normal" test identified "the point when we expected [the Postal Service] to *entirely* adapt going forward." *Alliance of Nonprofit Mailers*, Oral Argument Transcript at 53 (emphasis added).

Even if the focus should be on the actions the Postal Service could take rather than the results such actions would achieve, the Commission's findings are hopelessly inconsistent. In Part IV of Order No. 1926, discussing the "due to" part of the statute, the Commission concluded in a *single paragraph* that the Postal Service should have been able to adjust its operations to lower mail volumes by FY2010. JA98. But nothing in that Order identified any steps that the Postal

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operating costs, constraints on cost-saving measures, and the urgent need for capital investments." JA615.

Service could have taken but failed to take to cut costs or streamline its operations. To the contrary, Part V of the same Order acknowledged that, unlike a private company, the Postal Service faces numerous external mandates – such as its universal service obligation, six-day mail delivery requirement, and statutorily mandated retiree benefits – that sharply curtail its ability to take steps to "adjust" its operations. As the Commission explained, "the unique framework within which the Postal Service must operate is a relevant consideration in determining what constitutes best practices," and any analysis of the Postal Service's actions must examine whether the Postal Service has "appropriately balance[d] financial responsibility and the need to provide postal services of the kind and quality adapted to the needs of the United States," including its "efforts to comply with statutory and regulatory requirements." JA131. The Order went on to describe the many ways in which the Postal Service sought to cut costs and promote efficiency within the bounds of its statutory constraints, JA135-39, without ever suggesting that those steps fell short of "best practices." But when reminded of that discussion on remand, the Commission did not attempt to reconcile the findings in Order No. 1926 with its conclusion in Order No. 2623 that the Postal Service should have been able to adjust its operations to the "new normal" in FY2010.

3. Moreover, it is hard to imagine how an event could lose its extraordinary character (thus rendering the exigency clause inoperable) merely

because the Postal Service began to take steps to respond to it. In the PAEA, Congress balanced the goal of providing incentives for efficient postal management with the need to ensure that the Postal Service has the financial stability and resources required to carry out its obligations to the public. *See* 39 U.S.C. § 3622(b). Congress struck that balance by adopting both an inflation-based price cap and a safety valve. The obvious purpose of the safety valve is to prevent the pricing pressure imposed by the price cap from imperiling the Postal Service's ability to provide quality postal services when extraordinary circumstances threaten that ability. *See* 39 U.S.C. § 3622(d)(1)(E); *see also id.* § 3622(b)(5) (Commission must "assure adequate revenues, including retained earnings, to maintain financial stability."). But under the "take steps" limitation, the Commission treats an extraordinary or exceptional circumstance as having lost its exigent character when the Postal Service has begun taking steps to respond to those circumstances. This is fundamentally illogical, because it renders the statutory safety valve inoperable where its application is most critical: where the Postal Service has taken the appropriate steps to respond to the damage inflicted by an extraordinary event, but where the enormity of the harm overwhelms such efforts and the Postal Service therefore remains in financial turmoil. Nowhere does the Commission's order explain how such a standard is consistent with the purpose of the safety valve that Congress provided. *See, e.g.*, *Shays v. FEC*, 528

F.3d 914, 924-25 (D.C. Cir. 2008) (courts must reject administrative constructions of a statute that frustrate the policy that Congress sought to implement).

4. In any event, equating "taking steps to adjust" with actually "adjusting" proves too much. The Commission recognized as far back as Order No. 547 in 2010 that the Postal Service had taken immediate steps, long before the "new normal" level of mail volume was reached, to reduce costs in response to the Great Recession's impact on revenues. *See* Order No. 547 at 61 n.48 (acknowledging the "commendable job the Postal Service has done in reducing costs, particularly in FY 2009"); *id.* at 80 (noting that, "[i]n FY 2009 alone, the Postal Service reduced costs by $6 billion"); *id.* at 83-84 (noting that the Postal Service "was able to reduce mail processing and customer service workhours by 29.1 percent and 27.3 percent, respectively," between FY2008 and FY2010, a rate exceeding the decline in mail volume over that period). It is undisputed, for example, the Postal Service has eliminated more than 350 million workhours and has reduced the number of its career employees by more than 200,000 since 2006, all while continuing to deliver the mail to an ever-expanding number of delivery points. JA401. The Great Recession was an extraordinary event not because it prevented the Postal Service from reacting to it, but because, as the Commission said in Order No. 1926, it "caused an extraordinary and rapid reduction [in mail volume] that could not be dealt with effectively." JA182. Accordingly, the lost

contribution resulting from the Great Recession retained its "exceptional character" for the period of time in which the Postal Service was undertaking efforts to downsize at the rapid pace necessitated by the Great Recession, but was still unable to make tangible inroads towards the achievement of that objective.

5. Finally, the Commission's order suggests that it is too late to revisit the inconsistencies in the Commission's "ability to adjust" findings "at this late stage in the proceedings." JA579. But the source of many of the inconsistencies is the Commission's FY2013 Financial Analysis Report, which postdated the "ability to adjust" findings in Order No. 1926 and thus could not have been presented to the Commission before the case was remanded. As for the inconsistencies within Order No. 1926 itself, the Postal Service respectfully disagrees with this Court's suggestion that they were not "raised in the Postal Service's briefs" on appeal. *Alliance of Nonprofit Mailers*, 790 F.3d at 196 n.3. Wholly apart from its statutory challenge to the "new normal" test, the Postal Service's briefs argued that Order No. 1926 was arbitrary and capricious because it included inherently contradictory factual findings about *when* and *how* the Postal Service should have adjusted its operations to the lower level of volume.[13] In any event, this Court explicitly

[13] *See, e.g.*, *Alliance of Nonprofit Mailers*, U.S. Postal Serv. Opening Br. 32-34 (Order is "internally inconsistent and self-contradictory" because the Commission's discussion of the Postal Service's ability to adjust under the "new normal" test is "flatly contrary to Part V of the Order," which "exhaustively explained why USPS needs an exigent rate increase because it *cannot* simply

allowed the Commission to address the question on remand, *Alliance of Nonprofit Mailers*, 790 F.3d at 196 n.3, so the Commission's suggestion that it is too late to reach the issue is not a principled reason to refuse to reconcile its conflicting findings.

It is beyond dispute that the Great Recession caused volume to drop to a level that appears to be permanently lower than its pre-recession level. That lower level of volume deprived the Postal Service of its ability to cover its institutional costs, which are largely outside the Postal Service's control and do not fall along with declining volume. That does not mean that the Postal Service is entitled to a permanent infusion of revenue to cover such costs, of course, but it does mean that the Commission must analyze the relevant evidence and offer a cogent explanation for the endpoint it has chosen, particularly where reasonable alternatives were proposed. *See* JA371-84. It has not done so, and accordingly the case must be remanded for further proceedings.

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adjust to changed conditions"); U.S. Postal Serv. Reply Br. 12-14 ("Nor does the Commission attempt to square its 'new normal' rule with its conclusion in Part V of the Order that USPS was following 'best practices of honest, efficient, and economical management' to cut costs within the constraints of its statutory mandate.").

CONCLUSION

For the reasons stated above, this Court should grant the petition for review and remand the matter to the Commission for further proceedings.

Dated: January 4, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7), that the foregoing Brief of the United States Postal Service uses proportionately spaced, 14-point type, and contains 11,340 words as measured by Microsoft Word, a word processing system that includes footnotes and citations in word counts.

/s/ David C. Belt
Attorney for the U.S. Postal Service
Dated: January 4, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on January 4, 2016, the foregoing brief was electronically filed with the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that counsel for the respondent and the intervenor are registered as ECF filers and that they will be served by the CM/ECF system.

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STATUTORY ADDENDUM

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Postal Accountability and Enhancement Act of 2006
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.

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

(1) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
(2) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to each class or type of mail service through reliably identified causal relationships plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
(3) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
(4) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(5) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;
(6) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;
(7) the importance of pricing flexibility to encourage increased mail volume and operational efficiency;
(8) the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classifications and services of mail;
(9) the importance of providing classifications with extremely high degrees of reliability and speed of delivery and of providing those that do not require high degrees of reliability and speed of delivery;
(10) the desirability of special classifications for both postal users and the Postal Service in accordance with the policies of this title, including agreements between the Postal Service and postal users, when available on public and reasonable terms to similarly situated mailers, that–

(A) either–

(i) improve the net financial position of the Postal Service through reducing Postal Service costs or increasing the overall contribution to the institutional costs of the Postal Service; or

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

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

(11) the educational, cultural, scientific, and informational value to the recipient of mail matter;
(12) the need for the Postal Service to increase its efficiency and reduce its costs, including infrastructure costs, to help maintain high quality, affordable postal services;
(13) the value to the Postal Service and postal users of promoting intelligent mail and of secure, sender-identified mail; and
(14) the policies of this title as well as such other factors as the Commission determines appropriate.

(d) REQUIREMENTS.–

(1) IN GENERAL.–The system for regulating rates and classes for market-dominant products shall–

(A) include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal

variation over the most recent available 12-month period preceding the date the Postal Service files notice of its intention to increase rates;

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

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

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

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

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

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

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

(E) notwithstanding any limitation set under subparagraphs (A) and (C), and provided there is not sufficient unused rate authority under paragraph (2)(C), establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances, provided that the Commission determines, after notice and opportunity for a public hearing and comment, and within 90 days after any request by the Postal Service, that such adjustment is reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

(2) LIMITATIONS.–

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

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

(C) Use of unused rate authority.–

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

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

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

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

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

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

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

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

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

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

(e) WORKSHARE DISCOUNTS.–

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

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

(A) the discount is–

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

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

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

(i) is necessary to mitigate rate shock; and

(ii) will be phased out over time;

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

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

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

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

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

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

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

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

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

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