

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON DC 20268-0001**

RATE ADJUSTMENT DUE TO )  
EXTRAORDINARY OR EXCEPTIONAL ) Docket No. R2010-4R  
CIRCUMSTANCES )

**COMMENTS OF ALLIANCE OF NONPROFIT MAILERS,  
ASSOCIATION FOR POSTAL COMMERCE,  
DIRECT MARKETING ASSOCIATION AND  
MAGAZINE PUBLISHERS OF AMERICA, INC.  
(July 25, 2011)**

The undersigned parties submit these comments in response to Order No. 757, which seeks comments on the legal issue remanded by the D.C. Circuit in *USPS v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011).

**INTRODUCTION AND SUMMARY**

The scope of this remanded proceeding is narrow. In denying the Postal Service's request for an exigent rate increase last year, the PRC held that (1) the "due to" language of 39 U.S.C. § 3622(d)(1)(E) required the Postal Service to prove that the 2007-2009 recession (the extraordinary or exceptional circumstance invoked by the USPS) was the cause of the revenue shortfall that assertedly justified an above-CPI rate increase, and (2) the Postal Service had failed to establish any such causal link. Order No. 547 at 3-4, 9-14, 34-37, 58-80; Blair concurrence at 2-3; Langley concurrence at 1-2.

On review, the D.C. Circuit agreed with the PRC that the plain meaning of “due to” in Section 3622(d)(1)(E) “mandates a causal relationship between the amount of the required adjustment and the exigent circumstances’ impact on the Postal Service.” 640 F.3d at 1267. “[U]nder the plain meaning of the statutory language, a rate may be ‘adjusted on an expedited basis’ only *because of* ‘extraordinary or exceptional circumstances.’” *Id.* The court held, however, that Section 3622(d)(1)(E) does not specify how “close” or exclusive the causal link must be between the exigent circumstance and the rate increase, particularly when the Postal Service’s revenue shortfall has multiple causes. In other contexts, the court explained, the “causal nexus of ‘due to’ has been given a broad range of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.” *Id.* at 1268 (citations omitted). Where on the spectrum of causation standards the “due to” requirement of Section 3622(d)(1)(E) should be placed, the Court concluded, must be answered by the Commission itself. 640 F.3d at 1267-1268. The purpose of the remand is to address this issue. *Id.* at 1268 (last sentence).

Order No. 757, which establishes procedures on remand, recognizes the narrow scope of the Commission’s task. The order states that the subject of the parties’ comments shall be to “address the causation standard applicable to exigent rate adjustment requests submitted under 39 U.S.C. 3622(d)(1)(E).” Order No. 757 at 1-2; *id.* at 4 (same). Moreover, the Commission has not reopened the evidentiary

record, but simply has adopted by reference the evidentiary record in Docket No. R2010-4. Order No. 757 at 4.

For the reasons explained here, the policies of the Act, the record before the Commission, and the Commission's specific findings in Order No. 547 all warrant interpreting the "due to" clause of 39 U.S.C. § 3622(d)(1)(E) to require the Postal Service to have shown in its initial request for an exigent rate increase that the recession was the primary or "efficient"<sup>1</sup> cause of the Postal Service's financial shortfall. For the same reasons, the amount of any above-CPI increase would have been required to be limited to the dollar shortfall that satisfied this causation test.

The Postal Service has utterly failed to satisfy this burden. As the Commission found in Order No. 547—and reaffirmed again and again in its brief to the D.C. Circuit—the Postal Service failed to establish the existence of *any* causal relationship (strict or not) between the 2007-2009 recession and the Postal Service's projected losses. Consequently, while the Commission should establish a strict causation standard in this proceeding, the evidentiary record warrants reaffirming the Commission's decision to deny the Postal Service's request for an exigent rate increase regardless of the causation standard that the Commission establishes.

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<sup>1</sup> "Efficient cause" is a concept used in insurance coverage litigation when the losses suffered by the policy have multiple concurrent causes, some of which are covered by the insurance policy, and some of which are not. An "efficient cause" is the most important or primary underlying cause, and need not be the last cause immediately producing the loss. *See pp. 11-12, infra.*

## ARGUMENT

### **I. THE POLICIES OF THE ACT AND THE COMMISSION'S OWN FINDINGS WARRANT ADHERENCE TO A STRICT CAUSATION REQUIREMENT FOR ANY EXIGENT INCREASE.**

The issue remanded by the court arises because the Postal Service's losses have multiple causes. Some are on the revenue side: (1) the decline of mail resulting from the 2007-2009 recession; and (2) the longer-term diversion of mail volume to the Internet. Other causes are on the cost side. These include, among others: (3) the Postal Service's oversized and inefficient network of facilities; (4) the Postal Service's oversized work force and above-market rates of compensation; (5) the payments required by the Postal Accountability and Enhancement Act of 2006 ("PAEA") to prefund the Postal Service's retirement health benefits fund; and (6) the overpayment of the Postal Service's pension liabilities. Of all of these factors, the Commission found that only the first one—the decline of mail volume resulting from the recession—qualified as an extraordinary or exceptional circumstance under Section 3622(d)(1)(E).

In Order No. 547, the Commission essentially interpreted the "due to" provision of Section 3622(d)(1)(E) as requiring the Postal Service to show that the 2007-2009 recession was not merely a contributing cause of the need for an above-CPI rate increase, but the primary or efficient cause. This interpretation was correct, and the Commission should reaffirm it on remand. This conclusion is supported by the policies underlying 39 U.S.C. § 3622(d), the PRC's findings in

Order No. 547, and general principles for establishing causation when a condition assertedly has multiple causes.

**A. A strict causation requirement is necessary to preserve the effectiveness of the price cap—as the Commission has found repeatedly.**

The basic purpose of Section 3622(d) was to replace cost-of-service ratemaking and its breakeven guarantee with index or incentive ratemaking. Order No. 547 at 9-13; PRC Brief to D.C. Cir. (Jan. 14, 2011) (“PRC Brief”) at 9-10, 20-21, 22-23. The Commission recognized in Order No. 547 that a “major concern” with the cost-of-service ratemaking model that existed under the Postal Reorganization Act “was the lack of incentive for the Postal Service to operate efficiently or control costs.” Order No. 547 at 9. Consequently, the system established by the PAEA “completely revamped the system for setting rates,” *id.* at 10, including “a price cap [that] provided the Postal Service with the proper incentives to control costs.” *Id.* at 11. Importantly, “the new system for regulating rates was designed to permit the Postal Service to respond to market conditions and provide clear incentives for postal management and the Postal Service as an institution.” *Id.* at 11-12 (citing H.R. Rep. No. 109-66, at 43).

As related by the Commission in Order No. 547, witnesses at the congressional hearings on the PAEA repeatedly emphasized the importance of the price cap to providing the Postal Service with greater incentives to control costs and operate more efficiently. *Id.* at 12. These witnesses pointed to the ability of the

price cap “to give the Postal Service stronger incentives to control its costs by discouraging it from simply passing costs on to ratepayers” and to achieve a “major goal of Postal reform . . . to provide...meaningful incentives that will encourage the Postal Service to be more economical and more efficient.” *Id.* (quoting Timothy Bitsberger, Assistant Secretary of the Treasury for Financial Markets, and George Omas, then-Chairman of the Commission, respectively). As the Commission recognized, “the price cap model benefitted ratepayers and other mail users.” *Id.* In fact, it “stands as the single most important safeguard for mailers.” *Id.* at 13.

Keeping the price cap effective requires strict limits on Section 3622(d)(1)E). Exigency clauses of this kind are the Achilles heel of price cap regulation. Allowing the exigency clause to serve as a make-whole provision whenever the USPS faces a big loss would destroy the credibility of the price cap, its incentive effect on the USPS, and the protection that Congress promised mailers by enacting the cap. *See* Order No. 547 at 13-14 (citing Administration testimony that flexible CPI cap would not provide “the Postal Service with the appropriate incentives to reduce its costs and improve its productivity and efficiency. The Postal Service will come to believe that the CPI cap is not binding, but is instead negotiable.”); *id.* at 56-57 (finding that tough causation requirement “protects the basic integrity of the rate cap system”).<sup>2</sup>

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<sup>2</sup> The price cap has proved, in practice, to have instilled some of this needed discipline. As Commissioner Blair recognized in his concurrence in Order No. 547:

Congress adopted a price cap system as a means of forcing the Postal Service to engage in more efficient behavior. Evidence of this more efficient behavior can be found in the Postal Service’s efforts to trim

The Commission reiterated these findings in its brief to the D.C. Circuit. The Commission argued that “allowing price increases untethered to the claimed exigency would undermine the inflation cap, which requires the Postal Service to improve its management and efficiency in order to improve its bottom line.” PRC Brief at 17. In agreement with Commissioner Blair’s statement quoted above, the Commission explained that “any recent improvements [in the Postal Service’s cost structure] reinforce the need to retain Congress’s incentive-based system, which has prompted the Postal Service to become more efficient.” *Id.* The Commission further argued that, if the requested price increase does not relate to the extraordinary or exceptional circumstance, “the exception to the price cap ‘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.’” *Id.* at 24-25 (quoting Order No. 547 at 55). Fundamentally, “the Commission reasonably concluded that the authority to increase rates in exigent circumstances was ‘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.’” *Id.* at 30-31 (quoting Order No. 547 at 60).

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more than \$6 billion in costs during 2009. Were it not for the discipline the price cap imposes, I doubt the Service would have achieved such significant cost reductions.

Order No. 547, Blair concurrence at 2 (footnote omitted).

There is no reasonable basis for departing from these findings on remand. Absent such a reasonable basis, abandoning those findings would be reversible error. An “agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). *See also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 799 (1990) (“The agency has made no effort to explain the apparent inconsistency between the decision here and its analyses in Service Electric and Leveled Wholesale, and its order is invalid on that basis alone.”); *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (quoting *Greater Boston*).

The recent decision of the D.C. Circuit in *LePage’s 2000, Inc. v. PRC*, 642 F.3d 225 (D.C. Cir. 2011) is particularly instructive. In that decision, the court overturned the Commission action under review because, the Court found, the Commission had departed without reasoned explanation from the Commission’s previous standards governing the definition of nonpostal services and the Commission’s previous findings under 39 U.S.C. § 404(e)(3) concerning the public interest in allowing the Postal Service to offer certain nonpostal services. *Id.* at 232-34. The holding of *LePage’s 2000* applies with equal force here. The Commission’s extensive findings on the appropriate standard of causation in Order



No. 547 leave no rational basis for establishing a laxer standard of causation on remand.

- B. An appropriately strict standard of causation requires that the exigent circumstance relied on by the Postal Service be the primary or efficient cause of the Postal Service’s need for an above-CPI rate increase—not merely a contributing cause.**

When the Postal Service suffers losses that are caused by multiple factors, many of them *not* extraordinary or exceptional, allowing the Postal Service to implement above-CPI rate increases merely because *one* of the causes of the losses was “extraordinary or exceptional” would be unsound policy. The Postal Service must show that the extraordinary or exceptional circumstance was the primary or efficient cause of the need for an above-CPI rate increase.

This conclusion follows from a functional analysis of the incentives and behavior that a standard of causation is likely to produce. Limiting exigent rate increases to cases in which the extraordinary or exceptional event is the primary and efficient cause of the Postal Service’s need for an above-CPI rate increase gives the Postal Service (and its stakeholders) optimal incentives to minimize its costs. Knowing that it will be able to raise rates above the CPI-based cap only to the extent that extraordinary or exceptional circumstances are the primary and efficient cause of a revenue shortfall encourages the Postal Service to act aggressively to minimize all costs that are within its control. A strict standard of causation encourages the Postal Service to restrain these costs to the greatest extent possible rather than defer resolving the problems until an exigency arises,

By contrast, permitting the Postal Service to raise rates when the extraordinary or exceptional circumstance is only one of several contributing causes of the Postal Service's losses, and the other causes include a secular growth in product competition (i.e., the Internet), and long-term or structural factors that have driven up the Postal Service's costs, would undermine the Postal Service's incentive to manage its business more efficiently or to prudently prepare itself to deal with these changes.<sup>3</sup> Instead, the Postal Service would have an incentive to defer necessary but unpleasant efforts to control costs on the assumption that Section 3622(d)(1)(E) can be used to raise rates faster than inflation whenever a recession or other adverse event materializes.

A requirement that the exigent circumstance be the primary or efficient causes of the Postal Service's need for an above-CPI rate increase likewise gives Congress incentives to strike an optimal balance between the Postal Service's financial needs and other policy goals that could be advanced by imposing costs and burdens on the USPS through legislation. Allowing the USPS to shift some or all of those costs to mailers through an above-CPI rate increase would blur this feedback by allowing the Postal Service to diffuse the costs of legislative mandates among

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<sup>3</sup> As the Commission explained in Order No. 547, the key defining aspect of an extraordinary or exceptional circumstance is its "departure from the commonplace." Order No. 547 at 53. Long-term volume declines, high labor costs, excessive and outdated facilities, and other such problems faced by the Postal Service do not qualify as extraordinary or exceptional circumstances as they are long-term problems that the Postal Service, mailers, Congress, and the Commission have been aware of for years.

mailers generally, and could encourage the imposition of legislative mandates whose costs exceed the benefits.

The foregoing analysis finds support by analogy in a number of areas of civil law. One involves the standards in tort law for apportioning liability among multiple actors. Courts and scholars have emphasized the importance of choosing standards of causation that encourage optimal cost-saving measures and risk-avoidant behavior. An appropriate requirement of proximate causation, for example, furnishes the optimal incentives to reduce the risk of harm by making liability equal to the increase in social costs of a defendant's actions. *See generally* Guido Calabresi, *Concerning Cause and the Law of Torts*, 43 U. CHI. L. REV. 69, 77, 81-91 (1975) (discussing causation and deterrence goals in torts, and finding these goals can be "achieved not by mitigating the burden of costs that have already occurred, but by creating incentives so that people will avoid those future injuries worth avoiding. . .").

Another analogous context arises in insurance coverage litigation, where courts have developed the concept of "efficient cause" (also known as "efficient proximate cause") in determining the scope of the property insurance coverage. When a loss occurs as a result of multiple causes, the "efficient cause" is the "predominant" or most important cause in the chain of events, or alternatively, as the "prime" or "moving cause that set the others in motion, and thus was the primary driver of the damage. As described in one commentary:

In determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.

Mark D. Weurfell and Mark Koop, *"Efficient Proximate Causation" in the Context of Property Insurance Claims*, 65 Def. Couns. J. 400 (1998) (quoting 6 Couch, *Insurance* (1930) § 1466); *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 707 (Cal. 1989) (damage to house allegedly caused by combined effect of earth movement (excluded from policy coverage) and negligent construction of house (included in coverage)). As the California Supreme Court explained in *Garvey*:

Frequently property losses occur which involve more than one peril that might be considered legally significant. If one of the causes (perils) arguably falls within the coverage grant -- commonly either because it is specifically insured (as in a named peril policy) or not specifically excepted or excluded (as in an "all risks" policy) -- disputes over coverage can arise. The task becomes one of identifying the most important cause of the loss and attributing the loss to that cause.

770 P.2d at 710 (quoting Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 Forum 386, 387 (1985)).

The same logic applies here. 39 U.S.C. § 3622(d)(1)(E) may be viewed as an insurance policy that compensates the Postal Service only for losses caused by extraordinary or exceptional circumstances. Only if the extraordinary or exceptional circumstances were the primary or efficient cause of the loss should the Postal Service be allowed to recover under this "policy." This limitation is crucial if the Postal Service and its stakeholders are to have proper incentives to minimize its costs.

- C. A strict causation requirement is independently warranted by the separate requirement of 39 U.S.C. § 3622(d)(1)(E) that an exigent rate increase be “reasonable and equitable and necessary . . .”**

As the Commission has recognized, the requirement of 39 U.S.C. § 3622(d)(1)(E) that an exigent increase 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 needs of the United States” is a separate and independent precondition for any exigent rate increase. *See* Order No. 547 at 53-54 (recognizing three independent requirements, all of which must be present to justify an exigent rate increase: (1) the existence of extraordinary or exceptional circumstance; (2) that the adjustment requested is “due to” these circumstances, and (3) that the adjustment is “reasonable and equitable and necessary”). As the Commission further explained in its brief to the D.C. Circuit:

Congress included both requirements in the statute, and each has a separate role: Congress authorized above-inflation price increases only when justified by extraordinary and exceptional circumstances, and even then prohibited price increases if sound management practices would call for addressing those circumstances in other ways, or if the proposed price increases would be unfair or unreasonable. The presence of both requirements does not provide a license to ignore either one.

PRC Brief at 28-29.

The PRC, because it found in Order No. 547 that the USPS had failed to satisfy the “due to” requirement, declined to decide whether the USPS had satisfied the separate “reasonable and equitable and necessary” requirement. Order No. 547

at 27. But the existing record makes clear that the Postal Service also failed to satisfy the latter requirement, and the Commission should so find. A rate increase designed to recover shortfalls based in substantial part on causes other than the extraordinary or exceptional event would be neither reasonable nor equitable; as discussed above, allowing such an increase would eviscerate the whole purpose of the price cap mechanism, which is to limit rate increases to inflation to provide predictability and stability in rates and to provide incentives for the Postal Service to cut costs and operate more efficiently.

## **II. THE POSTAL SERVICE FAILED TO JUSTIFY AN EXIGENT RATE INCREASE UNDER ANY REASONABLE STANDARD OF CAUSATION.**

In one sense, the preceding discussion has been an academic exercise. For, as the Commission found in Order No. 547, the Postal Service made no showing of causation *at all* in its request for an exigent increase. *See* Order No. 547 at 4 (finding that “the Postal Service fails to quantify the impact of the recession on postal finances, address how the requested rate increases relate to the recession’s impact on postal volumes, or identify how the requested rates resolve the crisis at hand”); *id.* at 58-60 (“[T]he Postal Service . . . fails to demonstrate the nexus between the additional \$3 billion in annual revenues it seeks, and the exigent circumstances that purportedly give rise to the need for it. It has not shown how the proposed relief relates to the claimed exigency as required by the Commission’s rules.”). Without even a threshold showing of causation-in-fact, the Postal Service’s

case founders even before reaching the more demanding test of primary or efficient causation.

The Commission, however, should go on to make an explicit finding that the Postal Service failed to establish primary or efficient causation. The “efficient cause” of the Postal Service’s financial problems is its longstanding inability to stem loss of volume to the Internet, rationalize its network, and control its costs. When the recession hit the Postal Service, these more fundamental non-exigent factors were already at work. Because the recession was not the primary or efficient cause of the Postal Service’s losses, they fall outside the scope of Section 3622(d)(1)(E), and cannot be recovered under this section.

The Commission’s findings on this point are clear and unambiguous. *See* Order No. 547, *supra*, at 4 (finding that “the Postal Service fails to quantify the impact of the recession on postal finances, address how the requested rate increases relate to the recession’s impact on postal volumes, or identify how the requested rates resolve the crisis at hand”); *id.* at 58-60 (“[T]he Postal Service . . . fails to demonstrate the nexus between the additional \$3 billion in annual revenues it seeks, and the exigent circumstances that purportedly give rise to the need for it. It has not shown how the proposed relief relates to the claimed exigency as required by the Commission’s rules.”); *id.*, Blair Concurrence at 2-3 (explaining that costs “fixed by law, contracts or regulations” which the Postal Service argued “are the root cause of the Postal Service’s financial problems” are not extraordinary or exceptional circumstances); *id.*, Langley Concurrence at 1-2 (“I believe the

recession-driven volume declines experienced by the Postal Service probably had measurable financial impact that may warrant some financial relief. It is unfortunate the Postal Service did not identify any such impact and design a rate request to recover such funds.”).

Likewise, as the Commission explained in its brief to the D.C. Circuit, “The Service sought to use its exigent-rate request as an opportunity to address numerous other financial issues, such as structural problems with its business model, the increasing use of electronic mail, and its statutory obligation to prefund retiree health benefits.” PRC Br. to D.C. Cir. at 17. And, while “[t]he Postal Service’s request cited the recent recession and associated volume declines as an extraordinary or exceptional circumstance,” the Postal Service “made no attempt to link the requested price increases to the claimed exigency.” *Id.* at 31. In fact, “the request did not make even a rudimentary attempt to relate the proposed price increase to the effects of the recession.” *Id.* at 18.

These findings, and the Commission’s representations on brief to the Court of Appeals, were amply supported by the record. The Commission received 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. The non-exigent circumstances that are the primary causes of the Postal Service's recent losses include (1) an oversized network of undersized and obsolete mail processing facilities; (2) a labor compensation premium of approximately 30 percent; (3) a workforce that is approximately 30 percent too large for the Postal Service's workload; (4) the long-term migration of communications from mail to the internet; (5) the requirement imposed by PAEA § 803 to prefund retiree health care obligations by over \$5 billion per year; and (6) the overfunding of the Postal Service's pension obligations. *See* Order No. 547 at 3 (“The Commission’s decision is supported by analyses showing that the impending cash flow crisis identified by the Postal Service is not a result of the recession. To the contrary, this cash flow crisis would have occurred whether or not the recession took place, and it is the result of other unrelated structural problems. The Commission’s analysis shows that the proposed exigent rate adjustments will neither solve, nor even serve to delay that crisis”; “Whether the requested rate increases are approved or not, the Postal Service will be unable to meet this annual [retiree health benefits payment] obligation either in 2011 or in succeeding years.”); *id.* at 34 (explaining that the Postal Service attributed its financial conditions to three factors, not just the recession: “the diversion of mail to electronic alternatives; the initial and subsequent effects of the economic recession; and the statutory obligation to pre-fund retiree health benefits at an accelerated pace”); *id.* at 58 (“On March 2, 2010, the Postal Service unveiled a seven-point Action Plan designed to address a host of issues, but principally designed to enhance its finances in the long-term, *i.e.*, by 2020.”); *see generally id.* at 61-80 (discussing in detail the multiple causes for the

Postal Service's current financial crisis and recognizing that the majority of these causes are long-term problems not related to the recession).

The Commission's decision is supported by the Postal Service's own evidence.

As the Commission summarized the evidence in Order No. 547:

The root cause of the Postal Service's "existing financial crisis" or, alternatively, its "liquidity problem" is clear from the theme that permeates Mr. Corbett's testimony. *Id.* at 3, 8. It is not the recession or "unprecedented" loss of volume, although those may be contributing factors; rather, it is because "[t]he bulk of [the Postal Service's] costs are fixed by laws, contract or regulations and its operating flexibility is severely limited." *Id.* at 4. Mr. Corbett attributes the Postal Service's current financial condition to a lack of operating flexibility and three factors: diversion of mail to electronic alternatives, the effects of the recession, and the obligation to prefund retiree health benefits at an accelerated pace. *Id.* at 5. "Without fundamental changes," the Postal Service anticipates losses will continue unabated into the future. Corbett Statement at 5.

Order No. 547 at 61-62 (footnotes omitted).

Both the Commission and the Affordable Mail Alliance presented this evidence to the D.C. Circuit. *See* PRC Br. at 31-39 (detailing the long-term problems relied on by the Postal Service as justification for its request and noting that "[i]t was largely these factors, and not the recession, that caused the Postal Service's current financial predicament"); AMA Br. to D.C. Cir. at 29-35 (discussing the structural problems facing the Postal Service, including congressionally-mandated payments, electronic diversion, an oversized network, and above-market compensation).

The D.C. Circuit did not overturn any of the Commission's findings on these points. For the reasons explained previously, the Commission cannot now turn away from its own conclusions on this issue.<sup>4</sup> *See, e.g., LePage's 2000, supra*, 642 F.3d at 233-34.

## CONCLUSION

The D.C. Circuit remanded this case to the Commission for the narrow purpose of determining what *degree* of causal nexus is required between a requested exigent rate increase and the extraordinary or exceptional circumstances claimed to require that increase. The court took no issue with any of the Commission's findings in Order No. 547. The court agreed with the Commission's conclusion that the "due to" language requires a causal connection between an exigent price increase and the claimed extraordinary circumstances, and that the statute clearly requires the Postal Service to demonstrate *some* degree of nexus. Further, the court left in place the Commission's findings that the Postal Service had submitted no evidence indicating that its request was causally related to the recession, and that

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<sup>4</sup> There is no justification for reopening of record to relitigate the economic circumstances that existed in 2010, when this case was litigated before the PRC. The USPS had a full opportunity in 2010 to submit whatever arguments and evidence it wanted to offer in support of its proposed rate increase. *See* PRC Br. at 19-20 (explaining that the statute and the Commission's regulations clearly require the demonstration of a causal relationship required between the requested exigent rate increase and the claimed extraordinary or exceptional circumstances); *id.* at 41-43 ( "The Postal Service . . . had ample notice from the statute, the regulations, and the course of proceedings before the Commission that it could not obtain price increases 'due to either extraordinary or exceptional circumstances' without demonstrating how those circumstances justified the proposed increases.").

the primary causes of the Postal Service's financial problems were longstanding structural issues, not the recession. In fact, the Court's opinion does not in any way suggest that the Commission should reconsider its decision to deny the Postal Service's exigent rate increase. Consequently, the Commission should rely on its earlier findings, establish a strict causation standard to preserve the integrity of the price cap, and reaffirm its decision to deny the exigent rate increase.

Respectfully submitted,

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