

Before The  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

RATE ADJUSTMENT DUE TO EXTRAORDINARY  
OR EXCEPTIONAL CIRCUMSTANCES

Docket No. R2010-4R

REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE  
REGARDING COURT REMAND  
(August 1, 2011)

On May 24, 2011, the Court of Appeals issued its decision remanding the Postal Service's request for exigent rate relief back to the Commission for further proceedings. U.S. Postal Serv. v. Postal Regulatory Comm'n, 640 F.3d 1263 (D.C. Cir. 2011). On July 11, 2011, the Commission issued Order No. 757, designating this stage of the exigent proceeding as Docket No. R2010-4R, establishing procedures on remand, and setting July 25 as the date for initial comments and August 1 as the date for reply comments. The Postal Service hereby provides its reply comments in response to the initial comments of other parties.<sup>1</sup>

In addition to the initial comments of the Postal Service, six sets of comments and a letter were filed with the Commission on this matter. The mere fact that the Postal Service does not discuss a particular aspect of a particular comment in these reply comments cannot be construed as an endorsement. In the context of the Court of

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<sup>1</sup> On July 29, 2011, the Commission issued an additional order clarifying scheduling matters in the light of two motions filed after the submission of initial comments. Order No. 781 (July 29, 2011). Order No. 781 explicitly relieves parties of any obligation to respond to certain specified portions of the Postal Service's Initial Comments on the August 1 deadline. But Order No. 781 does not likewise specify portions of any other submissions as outside the scope of reply comments, so the Postal Service is treating all portions of the filings of other parties as ripe for reply.

Appeals' remand of the Commission's initial disposition of the Postal Service's request for exigent relief, the Postal Service has instead attempted to focus on the more germane issues addressed by the comments, to better aid the Commission in a prompt resolution of that still-outstanding request. In terms of organization, these reply comments generally address each set of initial comments in a separate section, but substantial overlap regarding the correct interpretation of the "due to" clause allows consolidation into one section of the discussion of major portions of several of the comments.

**I. The Postal Service, GCA, SMC/Valassis, APWU, and the Public Representative Present Generally Comparable Interpretations of the "Due To" Clause**

In terms of applying the "due to" clause, the Postal Service, GCA, SMC/Valassis, APWU, and the Public Representative (PR) generally agree that there must be proportionality between the size of the requested increase and the impact of the exigent circumstances on the Postal Service. Any divergence among these parties comes largely in how they phrase this proportionality. GCA, for instance, states that there must be a "reasonably close relationship," or a "substantial match," between the amount of extra revenue generated by the exigent increase and the financial harm caused by the exigent circumstances. GCA Comments at 3, 6. APWU, noting that the "reasonable, equitable, and necessary" standard provides an additional check on exigent increases, indicates that "the Commission should require a weak causative connection requiring only that the Postal Service's rate request be due in part to, or related to the exigent circumstances." APWU Comments at 5. The PR urges the Commission to require that "the level of financial recovery" from an exigent increase be "no more than is shown to

be directly caused by the exigent circumstance.” PR Comments at 17. The Postal Service, for the reasons discussed in its Initial Comments, believes that the Commission should adopt a standard requiring the Postal Service to demonstrate that the requested increase is “generally proportional” to the impact of the exigent circumstances of the Postal Service, noting that this standard best corresponds to the statutory scheme, and to administrative concerns (in particular, the need to maintain a functional and flexible framework for the consideration of exigent cases).

As such, none of these parties—including the Postal Service—are alleging that the occurrence of an exigent circumstance justifies an increase designed to cover the Postal Service’s entire financial shortfall, without considering the extent to which the harm from the exigent circumstance is smaller than the entire shortfall.<sup>2</sup> But, this principle does not mean that a strict or precise correlation between the size of the exigent increase, and the impact of the exigent circumstance, is necessary or appropriate. The exigency clause was designed to be more flexible and functional than such an approach would allow. Indeed, even those parties who propose a “strict” or “close” approach recognize the practical concerns inherent in a strict offset approach.

As the PR notes:

The Postal Service may not be able to estimate the true cost of any exigent circumstance with absolute precision. Thus, some form of best business practices standard of estimation should be established along with the causation standard. In comparison, the Public Representative believes that an only what can be precisely demonstrated standard, for estimating the amount of potential recovery, to be too strict.

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<sup>2</sup> As such, the Postal Service is not asserting that the exigency clause serve as a “make-whole provision whenever the [Postal Service] faces a big loss.” ANPM Comments at 6.

PR Comments at 17 n.11. SMC/Valassis also recognizes that “[a]ny estimates of economic impact will necessarily involve some imprecision,” and states that the Postal Service should provide “a reasonable and supported estimate of the actual harm caused solely by the exigent circumstance, factoring out the impacts of other nonexigent conditions.” SMC/Valassis Comments at 5. Indeed, as the Postal Service’s analysis in its Initial Comments demonstrated, calculating the harm from an exigent circumstance will likely result in a range of outcomes, depending on the precise manner of calculation—all of which can be considered “reasonable”—that is performed. So long as the increase falls within the range of outcomes derived from reasonable calculations, the Commission should consider it to be “due to” the exigent circumstance.

It is also clear beyond reasonable dispute that an increase commensurate with the Postal Service’s proposed measure of harm would be consistent with the proportionality standard set forth by these parties. As the Postal Service demonstrated in its Initial Comments, an exigent increase that seeks an additional \$2.3 billion in contribution is clearly limited to the effects of the identified exigent circumstance on the Postal Service (the recession); in fact, it is lower than what the Postal Service could permissibly seek to recoup from the recession, since it does not consider the recessionary losses in FYs 2010 and 2011.<sup>3</sup> The Postal Service’s proposed increase

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<sup>3</sup> Coincidentally, while an exigent rate increase would normally be implemented above the level allowed by inflation, because of the 1.7 percent rate increase already implemented in April of 2011, an additional increase to be implemented in January of 2012 would need to be only in the neighborhood of 2.1-2.3 percent in order to achieve full offset of the approximate \$2.3 billion of exigent harm identified by the Postal Service in its July 25<sup>th</sup> initial comments. A January exigent increase of approximately 2.1-2.3 percent is essentially equivalent to what the Postal Service would implement in January under its CPI authority, were it not entitled to an exigent increase.

therefore clearly satisfies SMC/Valassis' argument that it must "provide a reasonable and supported estimate of the actual financial harm caused solely by the exigent circumstance, factoring out the impacts of other nonexigent conditions." It clearly satisfies GCA's argument that there must be a "substantial match" between the financial relief sought from the exigent increase and the size of the exigent harm.<sup>4</sup> It also clearly satisfies the PR's standard that "the level of financial recovery" from an exigent increase be "no more than is shown to be directly caused by the exigent circumstance."

Finally, the "due to" standards proposed by these parties do not suggest that an increase proportional to an identified exigent circumstance fails the "due to" requirement simply because the Postal Service's financial situation may also be the result of other, non-exigent factors. SMC/Valassis, for instance, notes that the role of the Commission in applying "due to" in such a circumstance is to ensure that the size of the increase is commensurate with the exigent circumstances, after "factoring out the effects of other non-extraordinary factors." SMC/Valassis Comments at 4.

## **II. ANPM's Unique Interpretation of the "Due To" Clause Should Be Rejected**

The joint comments of ANPM/PostCom/DMA/MPA (hereinafter "ANPM"), however, take a fundamentally different position, arguing that "due to" requires the Postal Service to show that the recession "was not merely a contributing cause of the need for an above-CPI rate increase, but the primary or efficient one," even if the proposed increase seeks to recover losses only from the exigent circumstance. ANPM

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<sup>4</sup> The Postal Service recognizes, of course, that GCA believes the increase is not valid for other reasons, a topic that is discussed below. Here, the Postal Service simply notes that the proposed increase clearly meets the "due to" standard that GCA discusses in its Comments.

Comments at 4.<sup>5</sup> In other words, the Postal Service cannot utilize the exigency clause even if it can show that the size of the increase is commensurate with the impact of the exigent circumstance on the Postal Service, and even if it can show that it has practiced “honest, efficient, and economical management,” if those losses are not the “primary” cause of the Postal Service’s *entire financial shortfall*. For the reasons discussed below, this interpretation of “due to” should be rejected.

By asking whether the recession is the primary cause of the Postal Service’s entire financial shortfall, ANPM fundamentally misconstrues the question posed by the “due to” clause. The losses that result from the exigent circumstance, and the Postal Service’s financial situation as a whole, are separate and distinct when determining whether a requested increase satisfies the “due to” standard. The statute asks whether the increase is “due to” *the exigent circumstances*. Similarly, the Commission’s rules ask whether the proposed increase “relate[s] to” *the exigent circumstances*. 39 C.F.R. 3010.61(a)(3). Thus, the proper question in applying the “due to” clause is whether the size of the increase proposed by the Postal Service seeks additional contribution that is commensurate with the impact of the exigent circumstance on the Postal Service, after

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<sup>5</sup> It is unclear whether Senator Collins shares this view. Her statement that the Commission should not allow an exigent increase “except when the exigent circumstance the Postal Service invokes is the only significant cause of the proposed rate increase” is ambiguous when paired with her statement that an increase must be “qualitatively, demonstrably, and causally linked to the exigent circumstances.” If Senator Collins was adopting ANPM’s position, then one would have expected the first sentence to end with “financial shortfall” or something to that effect. To the extent she shares ANPM’s position, that view is equally inconsistent with the language of the statute, as discussed herein. To the extent her view is instead that an increase is permissible so long as it is “qualitatively, demonstrably, and causally linked to the exigent circumstances,” then the Postal Service’s \$2.3 billion request clearly satisfies that standard.

factoring out other, non-exigent circumstances that may have also contributed to the Postal Service's overall financial situation.

As such, the mere fact that this increase may not solve the Postal Service's entire financial situation is fundamentally beside the point. See Postal Service Initial Comments at 22-24. See also SMC/Valassis Comments at 3-5. The Commission seems to have recognized this, as it noted in its Brief to the Court that:

The presence of additional factors that contributed to the Postal Service's financial situation does not necessarily preclude price increases based on the recession. It simply requires the Postal Service to establish that the requested price increases were designed to address the effects of the recession and associated volume declines, rather than to address other problems that did not stem from the recession.

Commission Brief at 34. The Court also found that an exigent increase is "due to" an exigent circumstance even if the financial crisis overall is the result of multiple factors. 640 F.3d at 1268.

None of the reasoning employed by ANPM justifies its unique interpretation of "due to." ANPM claims that allowing exigent increases only when the exigent circumstance is the "primary cause" of the Postal Service's entire financial shortfall "gives the Postal Service (and its stakeholders) optimal incentives to minimize its costs." ANPM Comments at 9. Without this interpretation of "due to," ANPM first claims, 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." Id. at 10.

However, this argument completely ignores the "necessary under honest, efficient, and economical management" prong of the exigency provision. To the extent

the Postal Service has failed to control costs in a manner that is inconsistent with this standard, the Commission has a statutory basis to deny or reduce the Postal Service's request. It is improper to pervert the meaning of the "due to" clause to do the work that Congress has assigned to the "necessary" clause. In addition, ANPM's purported concern is wholly unrealistic, and therefore does not provide a rational basis for interpreting the statute in accordance with its views: in an environment of ever-decreasing volumes, the Postal Service has every incentive to cut those costs within its control, and it is absurd to think that the Postal Service would delay making the necessary changes to its costs to restore financial solvency in the hope that another "extraordinary or exceptional" circumstance occurs in the future.

ANPM's position is in reality predicated on its belief that the Commission must interpret "due to" in this manner so as to give *Congress* an incentive "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 [Postal Service] through legislation." *Id.* at 10-11. This remarkable position boils down to the proposition that Congress for policy reasons has chosen to require the Postal Service to incur certain costs, and that it is unfair for the Postal Service to increase rates through the exigency clause, even to compensate itself only for the exigent harm, because if Congress simply changed those policies, costs could be reduced and there would be no need for an exigent increase.

But, it is not the role of the Commission, or any administrative agency, to interpret a statute that it administers so as to incent Congress to take certain legislative action, or to dictate to Congress what an "optimal balance" is when it comes to policy.



Under Step Two of Chevron, the Commission’s task is to set forth a “permissible construction of the statute,” which involves “a reasonable accommodation of conflicting policies [Congress] committed to the agency’s care.” Page v. Pension Ben. Guar. Corp., 968 F.2d 1310, 1313-14 (D.C. Cir. 1992) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 845 (1984)). In other words, Congress guides the exercise of decision-making by the administrative agency, not the other way around.

Therefore, the Commission cannot eviscerate the exigency clause by making it unavailable unless and until Congress changes the Postal Service’s cost structure in a way that the Commission and ANPM deem to be “optimal.” The statute is clear that the Postal Service’s cost structure is relevant only if it is inconsistent with the statutory standard of “honest, efficient, and economical management.” By definition, the occurrence of costs by the Postal Service that are the result of policy choices made by Congress cannot be considered inconsistent with that standard, even if those policy choices may diverge from ANPM’s preferences.

In addition, while ANPM asserts that the exigency clause cannot “serve as a make-whole provision whenever the [Postal Service] faces a big loss,” ANPM Comments at 6, it is in fact ANPM’s position—contrary to the position of all of the other parties—that would threaten to turn the exigency clause into a “make-whole provision.” ANPM suggests that the Commission’s role in analyzing an exigent request is to look at the Postal Service’s overall financial shortfall, to determine what contributing factor “is the primary driver” of that shortfall, and to attribute to that factor all of the blame for the shortfall. Id. at 11-12. Under this approach, if an exigent circumstance was in fact found to be the “primary driver” of the shortfall, then the Postal Service could seemingly

raise prices to cover the entire shortfall, even if that increase might be disproportionate to the impact of that circumstance on the Postal Service. While it seems likely that ANPM would contest this outcome, perhaps by arguing that such an increase is not “reasonable and equitable,” id. at 14, it further demonstrates the illogical manner in which they are interpreting the “due to” clause.

Applying the ANPM standard to this case further demonstrates its flaws. ANPM identifies six factors as being the “efficient cause” of the Postal Service’s financial shortfall. Id. at 15, 17. It is decidedly unclear how these diverse factors can all be the “efficient” or “primary” cause of the shortfall. Indeed, if one were looking at factors individually in deciding which is the “efficient” factor, which logic and ANPM’s analysis would seem to call for, it is quite easy to characterize the volume losses precipitated by the recession as being the “moving cause” that put the Postal Service’s grave financial shortfall “into motion,” id. at 11-12, by vitiating the financial model set forth in the PAEA. When the PAEA was enacted, the volume environment was characterized by stable or growing overall volumes, and gradual electronic diversion. Once the economic slowdown occurred, volume suddenly declined by 20 percent in only a few years, from 213 billion to 171 billion pieces of mail. As these declines occurred, revenues declined, and the Postal Service was unable to maintain financial balance despite its significant cost savings. Thus, the Postal Service is where it is today predominantly because of the economic slowdown. Furthermore, characterizing the recession as being the “efficient cause” also avoids the grave statutory problems in refusing to allow an exigent increase based on statutorily imposed costs.

The Postal Service is, of course, not advocating that ANPM's position be adopted in this manner. Therefore, leaving that issue aside, it is sufficient to say that ANPM's view of "due to" is a transparent attempt to render the exigency clause unavailable to address the effects of volume declines, even though, as the Commission found, the plain meaning of "extraordinary or exceptional circumstances" encompasses circumstances that precipitate such declines. As the Postal Service discussed in its Initial Comments, it will always be possible to point to fixed costs, imposed as a result of policy choices by Congress, as being "contributing factors" to any Postal Service financial shortfall. It will also be possible, as ANPM does, to combine those costs together and claim that they are the "primary" cause of the problem. Thus, under ANPM's approach, no exigency increase would be permissible, unless and until Congress sets forth a cost structure that is to the Commission's and ANPM's liking, such that "non-optimal" costs imposed by Congress can no longer be accorded the status of the "efficient cause" of the Postal Service's shortfall. There is absolutely no basis in the statutory scheme for limiting the applicability of the exigent provision in this manner.

### **III. Additional Procedural Comments of the Public Representative**

The Public Representative (PR) "urges" the Commission to ignore the mandate of the Court of Appeals and "repeat and expand" on its finding that "no causal relationship exists between the cited exigent circumstances and the exigent Request and bring this docket to a rapid conclusion." PR Comments at 19. Instead, the PR suggests that a separate rulemaking should be initiated "to determine the level of

necessary causation consistent with the direction provided by the court.” Such a course of action is not open to the Commission.

The Court of Appeals, on review of the Commission’s decision to deny the request for an exigent rate increase, granted the Postal Service’s petition for review in part and remanded this proceeding back to the Commission for the purpose of deciding “how closely the amount of the adjustments must match the amount of the revenue lost as a result of the exigent circumstances.” USPS v. PRC, 640 F.3d 1263, 1268 (D.C. Cir. 2011). The Commission’s duty is to carry out that mandate in *this* expedited proceeding, not to start a new proceeding with a drawn-out, leisurely schedule. Once the Commission exercises its authority to interpret the exigency provision in a manner consistent with the Court’s opinion, the logical next step must then be to apply its newly announced standard to the Postal Service’s request. Because the Commission materially changed the nature of the exigent circumstance articulated by the Postal Service in its request and failed to correctly explain how closely the amount of the adjustments must match the amount of the revenue lost, it would be arbitrary and capricious to prematurely terminate this proceeding without providing the Postal Service with an opportunity to be heard on whether the Postal Service’s evidence meets the Commission’s yet-to-be-announced standard.

The PR is simply wrong, moreover, when it suggests that Postal Service did not establish a causal connection between its requested rate increase and the exigent circumstance that prompted its request. Apparently suffering from selective amnesia, the PR states that “the Postal Service has cited the recession and decline in mail volume as the exigent circumstance.” PR Comments at 7. But that was not the exigent

circumstance cited by the Postal Service; the Postal Service cited the precipitous drop in volume (irrespective of cause) as the exigent circumstance. It was the Commission, without notice to the parties or an opportunity to be heard, that narrowed the exigent circumstance to volume losses caused by the recession, and it did so in Order No. 547, which it intended as the conclusion of the proceeding.<sup>6</sup> While the Postal Service chose not to challenge the Commission's recasting of the exigent circumstance, with its concomitant narrowing of the resulting harm, it never conceded that it had been given notice of this recasting prior to the Commission's Order No. 547. Until its Initial Comments on remand, the Postal Service has never had an opportunity to demonstrate the causal relationship between the amount requested and the exigent circumstance first announced by the Commission in Order No. 547.

No one should be surprised that the Postal Service's previous filings did not isolate volume losses caused by the recession from other volume losses because the

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<sup>6</sup> Interestingly, in his concurring opinion, Commission Blair had no trouble in correctly stating the broader nature of the exigent circumstances identified by the Postal Service in its filing, even though he did not agree that those circumstances constituted the type contemplated by the statute:

In the instant case, the Postal Service argues that the current financial crisis is a result of a broken business model dependent on volume growth. The Postal Service points to the steep volume decline over the past three year period as meeting the "extraordinary or exceptional circumstances" threshold.

In my view, a broken business model evidenced by a volume decline is not an "extraordinary or exceptional circumstance." This volume decline, while significant, was brought on by the recession and the continuing trend of electronic diversion. The country has weathered periodic recessions in the past and predictions regarding decline in mail volumes due to electronic diversion have been made by the Postal Service and others for at least two decades. While the drop in volume due to electronic diversion occurred sooner than expected, it clearly had been contemplated by policy makers and the Postal Service for some time.

Concurring Opinion of Commissioner Blair, Order No. 547 (footnotes omitted).

Postal Service is not clairvoyant – it could not have known that the Commission would narrow the exigent circumstance in that manner. Now, however, the Postal Service in its Initial Comments on remand has used the evidence in the record or information otherwise available to the Commission to adjust its submissions to match the Commission’s preferred articulation of the exigent circumstance. In these circumstances, the Commission cannot rest on its previous finding of “no causation” and terminate the proceeding as the PR suggests. PR Comments at 7-8. The Postal Service’s submissions – not to mention common sense – demonstrate that the recession caused substantial volume losses, and that those recession-related volume losses constitute an exigent circumstance that caused the Postal Service to suffer significant losses in contribution, which in turn caused the Postal Service to seek an exigent rate increase to partially compensate it for the lost contribution.

The Commission is also precluded from relying on its prior finding of “no causation” because the Court of Appeals implicitly rejected its argument that under any causation standard the Postal Service has failed to meet its burden. In its brief, the Commission argued that the “fundamental flaw” in the Postal Service’s request was that “the request did not make even a rudimentary attempt to relate the proposed price increase to the effects of the recession, and was instead designed to use the recession as an opportunity to address unrelated financial problems.” Br. at 18. If the Court of Appeals had accepted that argument, it would not have had to consider how closely related the amount of the request and the losses caused by the exigency must be or remanded the matter to the Commission to address that issue. Moreover, the Court explicitly stated as follows:

A financial crisis can often result from multiple contributing factors, of which only one may be “extraordinary or exceptional.” It would not be incorrect to say that the requested rate increase is “due to” the extraordinary factor simply because it is also “due to” other factors as well.

640 F.3d at 1268. The Commission repeatedly admitted before the Court that the recession was *one of* the causes of the Postal Service’s extraordinary volume losses but claimed that it had rejected the Postal Service’s request for failing to show with specificity how much of the volume losses could be attributed to the recession. If the Court had accepted this failure-of-proof argument, that would have been the end of the matter, and it could have denied the petition for review in its entirety. The fact that the Court did not do so is an implicit rejection of the argument, and an acceptance of the Postal Service’s argument that it had submitted more-than-sufficient evidence to meet the Commission’s rudimentary-relatedness test. Reply Br. at 15-20.

Even assuming the Postal Service “failed” to address with precision the relationship between the recession-related volume losses (which the Commission first identified as the exigent circumstance in Order No. 547) and the amount of its proposed rate increase, it was the Commission’s fault and should not be held against the Postal Service. While the Commission never sought from the Postal Service, as contemplated by its rules, a calculation of the harm attributable solely to the recession – and criticized the Postal Service for its failure to provide it, notwithstanding the lack of notice as to the need – all the information necessary to make the calculation, at least for FY2009, was publicly available. Had the Commission advised the Postal Service that it intended to narrow the exigent circumstance identified by the Postal Service before issuing Order No. 547, the Postal Service could have pointed the Commission to the evidence that

demonstrated the fact that the requested rate increase was proportionate to the recession-related volume losses. It was arbitrary and capricious for the Commission to fail to do so the first time around; it would be inexcusable for the Commission to deny the Postal Service the opportunity to be heard on that question on remand after the Court concluded that the Commission had not correctly ascertained the plain meaning of the relatedness requirement of the exigency clause in its order. Moreover, it would run afoul of a basic point of administrative law as it is well-settled that an agency cannot apply a “new rule” of law without giving the parties “notice and an opportunity to offer evidence bearing on the new standard.” BNSF Ry. Co. v. Surface Transp. Bd., 526 F.3d 770, 784 (D.C. Cir. 2008) (quoting Consol. Edison Co. v. FERC, 315 F.3d 316, 323 (D.C. Cir. 2003)).

The PR’s concern about “due process issues,” PR Comments at 19, is commendable but somewhat belated and inconsistent with the expedited nature of the exigent proceeding. The PR should have been equally concerned with the Commission’s failure to observe basic notions of due process when it materially changed the exigent circumstance on which the Postal Service based its request without allowing the Postal Service to adjust its submission accordingly, and the PR should be advocating in favor of rather than against the Postal Service’s efforts to do so on remand. The PR should be on the same side as the Postal Service on this issue if for no other reason than the fact that all parties would be served by a final order that is not procedurally deficient and likely to be set aside (again). Additionally, the PR’s preference for delaying an exigent increase even longer is contrary to the clear congressional intent that such requests be resolved within 90 days. 39 U.S.C



§ 3622(d)(1)(E). The Commission has already taken more than a year to act on the Postal Service's request correctly. Thus the PR's suggestion to terminate this proceeding, initiate a rulemaking, and require the Postal Service to file a new request once the Commission finally adopts a standard would be a gross abuse of the statutory scheme and manifestly unfair to the Postal Service. The Commission is required to articulate the proper standard in *this* proceeding and apply that standard to the Postal Service's request in *this* proceeding on an expedited basis.

Given the Court's implicit rejection of the PR's argument that the Postal Service failed to prove causation under any standard, the Commission is not free to adopt the PR's "preferred option" for quickly terminating this proceeding without addressing how closely "the Postal Service [must] match the amount of the proposed adjustments . . . to the amount of revenue lost as a result of the exigent circumstances" as the Court directed. Indeed, following the PR's advice could subject the Commission to a petition of a writ of mandamus. As the Court recently explained, it has "exclusive jurisdiction to issue writs of mandamus to compel agency actions that have been unreasonably delayed" and reiterated that it would "'interfere with the normal progression of agency proceedings to correct *transparent violations of a clear duty to act.*'" In re Aiken County, --- F.3d ----, 2011 WL 2600685 at \*5 (D.C. Cir. July 1, 2011) (quoting In re Am. Rivers and Idaho Rivers United, 372 F.3d 413, 418 (D.C. Cir. 2004)) (emphasis added by Aiken panel). The Court's order to the Commission, especially when combined with the statutory obligation to expedite an exigent request, constitutes just such a "clear duty to act."

#### **IV. GCA Advances Several Additional Arguments That Are Without Merit**

While, as discussed above, the Postal Service does not have fundamental disagreement with GCA regarding the appropriate interpretation of the “due to” clause, GCA raises several other matters that the Postal Service finds to be factually incorrect, legally inapposite, or both.

##### **A. GCA’s Claims Regarding the Absence of Exigent Circumstances Are Both Untimely and Wrong**

In its initial comments, GCA astonishingly now claims that there were no “extraordinary or exceptional” circumstances that would allow the establishment of exigent rates. GCA Comments at 2, 19. Yet the Commission in Order No. 547 already found that the recent recession and its effects on postal volumes constituted “extraordinary or exceptional circumstances,” and GCA chose not to challenge that finding before the court of appeals. As a matter of sound administrative law, GCA is foreclosed from any claim that relief under section 3622(d)(1)(E) is not available by virtue of the absence of “extraordinary or exceptional” circumstances.<sup>7</sup>

Even assuming, contrary to fact, that GCA could be allowed to raise this argument, its claims are nothing short of fanciful. The conceptual premise of GCA’s entire line of argument – that assessment of the relative significance of the recession can be entirely divorced from its effect on mail volume – is untenable. GCA now alleges

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<sup>7</sup> Moreover, on page 19 of its comments, GCA gets its argument hopelessly muddled, suggesting that the court’s opinion regarding the need for a causal link between the exigent circumstances and the rate adjustments is somehow relevant to the entirely independent threshold question of whether in fact exigent circumstances have occurred. The Commission concluded exigent circumstances existed, GCA did not challenge that finding, and the court had no occasion to address it. Nothing in the court’s opinion allows GCA to go back and attempt to reopen the question of whether exigent circumstances occurred.

that the 2008-2009 recession was not “exceptional.” GCA Comments at 2. While the substantial deficiencies in that claim will be discussed further below, what is perhaps most disappointing is the blatant inconsistency between the positions that GCA espouses in this proceeding, in which it is transparently seeking to *minimize* the alleged effects of the recession, and the claims GCA made in the 5-day case, in which it was equally transparently seeking to *maximize* the alleged effects of the recession. In its Initial Brief in the 5-day case, filed October 15, 2010, GCA made the following statements:

That past year [FY 2009], moreover, was an abnormal one in terms of postal volumes and revenues – coming, as it did, at the bottom of the most severe postwar recession. *GCA Initial Brief (Docket No. N2010-1, Oct. 15, 2010) at 2*

But FY 2009 was characterized by a precipitous decline in volume, largely due to the recession. *GCA Initial Brief (Docket No. N2010-1, Oct. 15, 2010) at 3*

*FY 2009 volumes were abnormally low.* It is generally agreed that FY 2009 saw a highly atypical pattern of mail volume changes. Postal Service witness Corbett noted this departure from even recent trends: a one-year drop of 26 billion pieces, or 12.7 percent, from FY 2008. Because much of this loss is due to the current recession, it is *pro tanto* not a permanent change. *GCA Initial Brief (Docket No. N2010-1, Oct. 15, 2010) at 10 (footnote omitted)*

That the recession is largely responsible for the FY 2009 loss is clear from the Service’s detailed response to GCA/USPS-T2-1 and -2, which were redirected from Mr. Corbett. *GCA Initial Brief (Docket No. N2010-1, Oct. 15, 2010) at 7-8*

The FY 2009 volume loss – the steepest in modern postal history – was largely due to the effects of the economic recession[.] *GCA Initial Brief (Docket No. N2010-1, Oct. 15, 2010) at 11.*

GCA cannot have it both ways. The same volume losses that in the 5-day case were “abnormal,” “precipitous,” “highly atypical,” and “the steepest in modern postal history,”

and which were “largely” due to the “most severe postwar recession,” cannot suddenly become “not exceptional” in the context of the exigent case. The self-serving shift in GCA’s views is manifest.

On page 2 of its current comments, GCA mentions “analysis now feasible” to support its claim that the recession was not exceptional, as if additional analysis were conducted to reach that conclusion. Perhaps that might explain the gross disparities in what GCA said in its brief in the 5-day case last year, and what it saying now. In fact, however, GCA has done no new analysis on this issue. Instead, all GCA has done is discard the portions of its earlier (August 2010) analysis that were presented to cover a set of possible answers to the as-of-then-unresolved question of when the recession formally ended. As GCA explains on pages 13-14 of its current comments, because the National Bureau of Economic Research (NBER) has since announced an end date of June 2009, its earlier alternative analyses using different potential end dates are no longer relevant. This series of events, however, offers no help to GCA in rationalizing the discrepancies between what it said in the 5-day case and what it says now, because the announcement by NBER as to when the recession had officially ended came on September 20, 2010, nearly a month before it filed its brief in the 5-day case. And if there is any doubt that GCA would have been aware of the NBER announcement, the fact that NBER’s press release was noted on page 67 of Order No. 547 on September 30 makes it somewhat difficult for GCA to claim not to have been aware of that development prior to filing its 5-day brief.

Even putting aside GCA’s inconsistent statements from the 5-day case, however, there is in reality no credible basis on which to challenge the Commission’s

determination that, at the very least, the volume losses caused by the recession must be considered “extraordinary or exceptional” circumstances. Consider the analysis filed by GCA in its Detailed Analysis, upon which, as indicated on page 13 of the its Comments, GCA bases its claims regarding the “ordinary” nature of the recession. The Detailed Analysis relies on two flawed assumptions and uses them to draw an entirely inapt conclusion. GCA compares the 2008-09 recession to past U.S. recessions dating back to 1857. It does so by comparing the number of months from “peak to trough” as determined by NBER. This particular comparison rests upon two assumptions, neither of which is acknowledged by GCA, and both of which are incorrect.

- (i) The timing of a recession is always precisely uniform over all aspects of the economy, beginning precisely on the date when the NBER declares that the recession starts and ending precisely on the date that the NBER declares the recession over.
- (ii) The severity of all recessions is exactly equal within any particular month of recession, so that the only difference in recession severity is due entirely to differences in the length of the recession.

Clearly, neither the timing nor the magnitude of a recession will affect all aspects of the economy the same. In the 2008-09 recession, for example, GDP declined for four consecutive quarters, from 2008Q2 to 2009Q2, by a total of 4.1 percent. In contrast, gross private domestic investment declined for eight consecutive quarters, from 2007Q2 to 2009Q2, by 33.8 percent. Private employment, meanwhile, declined for nine consecutive quarters, from 2007Q4 to 2010Q1, by 7.5 percent.

The references here to Investment and Employment are not coincidental, but quite intentional. Econometric analysis performed by the Postal Service over many years tells us that Investment is the best macro-economic predictor of Standard Mail volume, while Employment is the best macro-economic predictor of First-Class Mail.

The “extraordinary and exceptional” impact of the 2008-09 recession on mail volume came not simply from the fact that the recession was so severe (although it obviously was), but also that it was concentrated most heavily in the segments of the economy that were the heaviest users of the mail, including the financial sector and advertising.

Table A1-1 of the Detailed Analysis identifies the 2008-09 recession as having lasted 18 months. In contrast, it identifies the 2001 recession as having lasted 8 months (Mar – Nov, 2001). Relying solely on the number of months of recession as their measure of severity, GCA implicitly assumes that the 2008-09 recession was, therefore, 2.25 times (18/8) as severe as the 2001 recession. In the 2001 recession, GDP fell from peak (2000Q4) to trough (2001Q1) 0.3 percent. (GDP also fell by 0.3 percent from 2001Q2 to 2001Q3, but only after rising 0.6 percent from 2001Q1 to 2001Q2.) Comparing GDP declines, the 2008-09 recession, with its GDP decline of 4.1 percent, was not 2.25 times worse than the 2001 recession with a GDP decline of 0.3 percent, but rather was 13.7 times worse. Plainly, GCA’s use of the number of months as the measure of severity of the recession is grossly insufficient for that purpose.

If one was truly interested in answering the first question posed on page 1 of the Detailed Analysis (“whether the 2008-09 recession caused exceptional or exigent declines in the overall mail volume”), one should focus on the macro-economic drivers that actually affect mail volumes, look at how those factors changed in the 2008-09 recession as compared to how they changed in past recessions, and to see how mail volume reacted to those changes. In the Detailed Statement filed with its Comments, GCA takes none of these steps. Yet in the 5-day case, as quoted above, GCA explicitly embraced the analysis presented by the Postal Service in responses to GCA/USPS-T2-

1 and 2 that, in fact, took all of those steps.<sup>8</sup> Surprisingly, the Detailed Analysis now presented by GCA makes no attempt to acknowledge, much less address, the conclusions that emerge from the very analysis that GCA cited in the 5-day case as clearly establishing the extent to which the “precipitous” FY09 volume declines were due to the recession.

The omission of any mention of the Postal Service’s 5-day comprehensive econometric analysis is glaring, when all GCA presents as an alternative is its “voodoo economics” table of recessions and their severity as measured by their length in months. The import of what GCA is postulating is really rather staggering. GCA is actually claiming that the amount of exigent relief the Postal Service should be afforded is a direct mathematical function of how many months each recession in US history lasted – including recessions in the 1850s, 1860s, 1870s, 1880s, 1890s, 1900s, 1910s, and every decade thereafter up to the present. Specifically:

Using an average of all U. S. recessions, the exigency factor is 3%, i.e. the drop in mail volume from peak to trough that is exigent is 3%, the drop that is due to a normal recession of average length as defined that is non-exigent is 97%.

GCA Detailed Analysis at 7. How is the 3 percent figure derived? It is apparently derived by taking the length in months of each recession shown in Table A1-1, summing the total number of months across all recessions, and dividing by the total number of recessions to obtain the average recession length in months. That average is 17.45 months (not shown in Table A1-1, but shown in the virtually identical Table One presented on page 11 of the Detailed Comments filed by GCA in this docket on August

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<sup>8</sup> That analysis, of course, is the one provided again as the sources-of-changes tab in the Excel spreadsheet attached to the Postal Service’s July 25 initial comments on remand.

17, 2010). Then, the “exigency factor” is calculated by dividing the NBER length of the instant recession (18 months) by the average length of 17.45 months (which yields the ratio of 1.03), subtracting one, and then expressing the remaining value (.03) as a percentage (3 percent). Consequently, any change in the estimated length of any recession in US history, including those going back to the 1850s, would necessarily change the calculated average, and thus the calculated “exigency factor,” and thus the calculated amount the Postal Service should be allowed to increase rates directly in response to the volume losses it incurred as a result of the *this* recession.<sup>9</sup> Such a proposal, which makes no use of information about mail volume changes in the instant recession or in any prior recession, cannot be treated seriously.<sup>10</sup>

Clearly, GCA’s attempt to calculate the allowed level of exigent relief (in response to cumulative volume declines that GCA itself described as “precipitous”) merely as a function of how many months previous recessions (including many 19<sup>th</sup>

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<sup>9</sup> GCA ties its “exigency factor” to the calculated level of available rate relief in the sentence immediately following that quoted above:

At most, the Commission could raise prices in response to the exigent rate request by 2/10 of one percent on average, not the 5.6% requested by the Postal Service.

Detailed Analysis at 7. In this instance, the arithmetic appears to be to start with the 5.6 percent amount proposed by the Postal Service, multiply it by the “exigency factor” of 3 percent, and the result is an allowed increase of 0.168 percent, which GCA rounds up to 0.2 percent (“2/10 of one percent”).

<sup>10</sup> One of the particularly pernicious aspects of the way GCA describes its “exigency factor” of 3 percent in the above quotation from page 7 is the insertion of the reference to “the drop in mail volume from peak to trough that is exigent,” as if mail volume in any way, shape, or form played some role in this analysis. It does not. As described above, the only variables affecting the calculation are the NBER estimates of the length in months of each recession in US history. Whether mail volume was increasing, decreasing, or steady over each of those months is as unrelated to this calculation as the price of tea in China.



century recessions) lasted can only be described as fallacious. Even more misguided, though, is the confounded logic by which GCA attempts to justify its selection of the set of every recession during the entire history of the country as the relevant set of “comparators.” In its Detailed Analysis document, GCA correctly concludes that “[t]he only modern American recession that falls within the thirteen most severe is the 2008-2009 recession.” (page. 5) and that “[t]here is nothing about the 2008-2009 recession or the recovery from it that corresponds to any post-war economic recession” (pages 6 – 7). Rather than accept the overwhelmingly obvious conclusion that these facts emphatically confirm the “extraordinary and exceptional” nature of the 2008-2009 recession, however, GCA (Comments at 14-15, Detailed Statement at 6-7) astoundingly cites these facts to suggest that, in order to *avoid* reaching that conclusion, one must expand from the set of relevant comparisons to a set which includes essentially irrelevant (i.e., pre-modern, pre-war, 19<sup>th</sup> century) comparisons. The Detailed Analysis (page 7) even audaciously suggests that excluding these irrelevant comparisons would constitute a “mission-oriented” analysis, rather than an objective one.

While the temptation to attempt to respond to this level of illogic is strong, it will hopefully suffice to note that, after duly noting GCA’s arguments about pre-war versus post-war recessions on page 49 of Order No. 547, on page 50 the Commission’s comments and conclusions were limited to the following:

GCA’s comments are helpful in explaining why the recent recession is unique in America’s post-World War II experience. Not only was the recent recession unique in kind and severity in post-war America, its impact on the Postal Service was unique in kind and severity as well. The credit crisis disproportionately damaged the very economic sectors on which demand for postal services depends most—real estate, banking, mortgage lending, credit card lending, insurance, and advertising. Mr. Corbett argues that the Postal Service experienced a volume decline of

over 20 percent during the last 3 years, a decline greater than the cumulative decline associated with all other recessions experienced in the last 35 years. Corbett Statement at 11-15. Given these facts, the Commission concludes that the recent recession and its impact on postal volumes is an “extraordinary or exceptional” circumstance.

The Commission obviously had no trouble correctly maintaining its “focal point” on post-war and post-PRA recessions, GCA’s admonitions (Detailed Analysis at 6) to the contrary notwithstanding.<sup>11</sup>

### **B. GCA’s Claim that the Recession had No Effect on the Volume Of First-Class Mail is Also Incorrect**

A second erroneous claim made by GCA is that “the recession had essentially no effect on First-Class Mail volumes.” GCA Comments at 2. GCA purports to make this claim based on econometric analysis (presented in the Detailed Analysis document) that apparently allows one to segregate the effects on First-Class Mail volume of the recession from the effects of electronic diversion. See id. at 11-12. In fact, however, examination of the First-Class Mail models actually included in the Detailed Analysis (pages 8-16) shows no such thing. GCA has presented no econometric analysis with variables intended to capture the effects of either the recession or electronic diversion. In fact, the GCA analysis includes no explanatory *economic* variables at all. Instead,

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<sup>11</sup> For whatever it might be worth, there is also an incongruity regarding the appropriate set of “comparators” between the GCA Comments and the Detailed Analysis. The GCA Comments at 15 conclude that the appropriate comparison includes *all* recessions, pre-modern “as well as those of more recent date,” and that, as “explained in the Detailed Analysis,” this comparison yields the result “that no exigent increase is warranted.” In fact, however, when one examines the Detailed Analysis, the conclusion of “no increase” (i.e., zero percent) comes only when the comparison is restricted to *pre-war* recessions, *excluding those from the post-war era*. Detailed Statement at 7. Using the set of *all* recessions, as discussed in detail above, the Detailed Statement methodology instead yields an “exigency factor” of 3 percent, resulting in an allowed exigent increase of 0.2 percent. *Id.* An increase of 0.2 percent is small, but it is not zero.

the only variable used to estimate changes in volume is time. The sole assertion that GCA has empirically tested is its hypothesis that the relationship it has specified between First-Class Mail volume and time over the period FY2005Q1 to FY2011Q2 is approximately the same whether volume and time data from the period FY2008Q2 to FYFY2009Q3 are included or excluded. Even if true, that claim has virtually no relevance to GCA's larger argument that the recession had no effect on First-Class Mail volume, because the economic effects of the recession and internet diversion are not appropriately captured in a simple regression of time on volume.

Readers may not appreciate the extreme limitations of the simple time trend provided by GCA because the description in the Detailed Statement distorts the features of that analysis. For example, the claim is made that the equations were run omitting six quarters of data "to establish the current long run trend in internet diversion absent the short term influence of the recession." Detailed Analysis at 9. Similarly, the Detailed Analysis on page 10 speaks of a "dashed line indicating the current long run broadband diversion of single-piece letters." The "dashed line," however, indicates no such thing. There is no measure of electronic diversion of any kind, much less a specific measure of broadband diversion, reflected in the figure to which this statement refers. Instead, the dashed line indicates nothing more and nothing less than the trend over time of all of the influences on single-piece mail volume, including price, population, macro-economic factors, electronic diversion, and any other factors affecting demand for the product. There is nothing in the model controlling for the effects of changes in any variable, much less variables other than electronic diversion. The only difference between the dashed line and the solid line in Figure 1-A on page 11 is the

omission of six quarters of data. Each of the two lines (solid and dashed) therefore reflects the effects of both electronic diversion and macro-economic factors over its respective sample range. The suggestion (page 10) that the slope of the dashed line “could be explained by the impact of internet diversion alone” is, at best, misleading.

Equally misleading is the suggestion that, whether the six quarters of “recession” data are included or excluded, single piece volumes “continued to fall at the same rate” over the period examined. Detailed Statement at 10. GCA misuses the term “rate,” as it is generally used to refer to slopes. Specifically, GCA fits linear models of (unadjusted) volume as a linear function of a simple time trend. For First-Class single-piece letters, the trend has a coefficient just under -180 (-182.7 excluding the 6 quarters, -187.7 including the 6 quarters). *Id.* at 9. This means that First-Class single-piece letter volume declined by an average of 180 (million) pieces per quarter over the 2005-2011 time period. Yet in 2005Q2, 180 million pieces would have been 1.6 percent of total First-Class single-piece mail, while by 2011Q2, First-Class single-piece mail volume had declined by 40 percent and 180 million pieces was now 2.7 percent of total First-Class single-piece mail. The result is not at all a decline at “the same rate,” as most people would use the term, but rather it is an increase in the rate of decline from 1.6 percent to 2.7 percent, an increase of approximately two-thirds.

Nonetheless, one still might be tempted to ask, why is there not a greater difference in the slope estimates between the two equations with and without the six quarters of data? The fundamental answer goes back to one of points made above. The timing of a recession is *not* always precisely uniform over all aspects of the economy, beginning precisely on the date when the NBER declares that the recession

starts, and ending precisely on the date that the NBER declares the recession over. The macro-economic driver that most accurately models First-Class mail volume is employment. Employment did not reach its trough in June 2009, but rather continued to decline in 2010 and remains sluggish to this day. Therefore, the finding that nothing noteworthy happened to the trend of First-Class Mail volumes at the end of FY2009Q3 is hardly surprising. It reflects most prominently the lack of sophistication of the simple time trend regression model specification chosen by GCA.<sup>12</sup>

In reality, and contrary to the claims currently made by GCA in this proceeding based on its time trend models, we know from much more sophisticated and comprehensive econometric demand analyses that the recession did have a profound effect on First-Class Mail volumes. Those analyses are the demand models prepared by the Postal Service and routinely presented to the Commission – previously presented in rate cases, now generally presented under the periodic reporting rules – with which the Commission is quite familiar. Rather than expressing mail volumes as a

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<sup>12</sup> Another fundamental conceptual flaw in GCA’s pre-recession/post-recession comparison is an apparent failure to appreciate the significance of the fact that the official “end” of the recession identified by NBER was merely the “trough” of the economic decline – the point at which things presumably stopped getting worse. In the periods immediately following the trough, however, economic activity was not necessarily any higher than it was in the periods immediately preceding the trough. Imagine a flood insurance company that responds to a homeowners’ claim by noting that, while they had water in their house for a week, the Army Corp of Engineers determined that the flood officially crested in the middle of that week, and because, over the week, the average water level in the house was the same in the days after the crest as in the days before the crest, the water damage to the house must not have been “due to” the flood. The only salient distinction between this hypothetical and GCA’s analysis is that, from the Postal Service perspective, the water level in the house has *never* receded from where it was when the recession supposedly peaked – total mail volumes since 2009 have never gotten as high as the 2009 volume level of 177 billion pieces.

function of a simple time trend, these models actually use econometric analysis to identify the relevant economic drivers of mail volume for specific products, and estimate the effects of changes in those economic drivers on mail volume. Attached electronically to the Postal Service's July 25 Initial Comments was an Excel spreadsheet that reproduced the results of such an analysis that had previously been provided in the 5-day case. As shown in cells G13 and I13 of the last tab of that spreadsheet, of the 12.9 billion pieces of First-Class Mail volume lost in FY08 and FY08, approximately one-half of that amount (6.5 billion pieces) was lost due to the recession. The source-of-change analysis proves that the recession did have a material effect on First-Class Mail volume (while separately estimating the likewise material effects of internet diversion).

That analysis, moreover, is actually the exact same analysis provided in the 5-day case, in response to GCA interrogatories, which GCA relied upon in its brief in that proceeding to establish that "the recession is largely responsible for the FY 2009 [volume] loss." GCA Initial Brief (Docket No. N2010-1, Oct. 15, 2010) at 7-8 (citing responses to GCA/USPS-T2-1 and 2, redirected from witness Corbett, Tr. 7/1759-64). Having endorsed the Postal Service's source-of-change analysis in the 5-day case, if GCA were of the opinion that its new analysis reaching a diametrically opposite conclusion is to be preferred over the one upon which it relied earlier, it would have been incumbent on GCA to show why that might be the situation. Of course, GCA did not and cannot make any such showing, because its time trend analysis fails to bring to

bear the scope of necessary information that is used in the econometric models.<sup>13</sup> As noted above, that deficiency explains why the time trend approach focuses on an inappropriate inflection point (i.e., a quarter in which the employment trend did not change), fails to reveal the underlying economic reality, and thus spuriously allows GCA to draw contrary (and erroneous) conclusions.

There is a perhaps equally fundamental deficiency in the approach GCA deploys both in its Comments and in its Detailed Analysis. In its Comments, GCA opines:

It is well known that First-Class Mail is experiencing major volume losses by reason of diversion – especially of transactional mail – to the Internet. Internet diversion, it is agreed, is not an exigency but a relatively long-run historical trend. As a consequence, volume and revenue losses due to Internet diversion are not the result of a extraordinary or exceptional circumstances, and do not constitute grounds for a revenue increase. This is so, first, simply because they are not “due to” the exigency underlying this case – the 2008-09 recession.

GCA Initial Comments at 11. Similar statements appear on pages 8-9 of the Detailed Analysis, which then proceeds to describe its approach as first estimating a baseline trend in mail volume changes due to electronic diversion, and then seeking to detect an “independent” impact of the recession on the decline in single-piece volume. Id. at 8. One critical flaw in this approach is that it requires the assumption that electronic diversion is entirely unrelated to (“independent” of) the economic slowdown (which for

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<sup>13</sup> To give just one example of the relative merits of the GCA approach versus the Postal Service’s econometric models, with regard to the equations for Single-Piece letters, page 9 of the Detailed Analysis claims “reasonable fits for quarterly data, with a level of statistical significance exceeding 80%.” The  $R^2$  statistic GCA reports on that page is approximately 0.80. But examining the Postal Service equation for Single-Piece letters provided to the Commission on January 20, 2010 (the equation that forms the basis for the source-of-change table provided in the 5-day case), the adjusted  $R^2$  is 0.9942. The variation in volume that is unexplained by GCA’s model (0.20 or 20 percent) is 34 times as high as the variation in volume that is unexplained by the Postal Service’s model (0.0058 or .58 percent).

purposes of its model GCA assumes is confined to a mere 6 quarters). GCA makes the assumption that the two factors are independent, but never explains why that assumption is correct. In fact, it is not a correct assumption.

To show why the assumption of independence is wrong, we can first turn once again to the interrogatory responses in the 5-day case that GCA embraced as the compelling explanation of why FY09 volume losses were primarily due to the recession. The response to GCA/USPS-T2-2, cited by GCA on page 7 of its Initial Brief in the 5-day case, included the following discussion:

Examining the table above, and focusing on the yearly "Percent" column, one sees a bump in estimated diversion from figures in the 2-3 percent range from 2002 to 2006, up to figures above 4 percent in the 2007-2009 period, coinciding with what we now believe to be the beginning of the recession. While disentangling various effects is not an easy task, these data support the hypothesis that the recession may have accelerated diversion of First-Class Mail to the Internet. The intuitive logic behind the hypothesis is that, as companies and households struggle in a recession and pressures mount to cut costs, the balance can start to swing between what were previously perceived as obstacles to electronic diversion, and the cost economies associated with a switch to non-postal modes for communication and transactions. Thus, for example, data from the Household Diary Study show that the decline in the share of bill payments by mail accelerated during 2008 and 2009.

Postal Service Response to GCA/USPS-T2-2(a)(ii), redirected from Mr. Corbett (Docket No. N2010-1, Tr. 7/1762)

Subsequently, Mr. Corbett on the stand in this proceeding explained again the interrelationship between the recession and electronic diversion:

Actually the drop in the mail volume, which is the extraordinary event, there are a number of things driving that, the recession in large part, and electronic migration are two. Migration, we believe, has been accelerated by the recession given people are looking at their checkbooks a little bit more closely and businesses are looking at their bottom line more closely than they ever have before; in some cases just to stay in business. And one thing they can quickly identify is that the faster they can move



customers, they can move themselves to electronic communications the faster they can save money and improve their bottom lines. So it's really the drop in overall volumes which we believe is the exigent driver. (Corbett Hearing, Tr. 1/29-30)<sup>14</sup>

The Postal Service, moreover, is not alone in its assessment of this phenomenon:

The economic downturn has hurt most those sectors that relied heavily on the mails. Further, the gradual diversion of single-piece First Class Mail to e-mail and electronic bill payment accelerated as a result of pressures to reduce costs. The result has been the most severe mail volume declines since the Great Depression and significant financial losses for the Postal Service.

Postal Regulatory Commission, Congressional Budget Justification (Performance Budget Plan), Fiscal Year 2012 (available on Commission Daily Listings for Feb. 16, 2011) at 1.

As explained on pages 29-30 of its July 25<sup>th</sup> Initial Comments on Remand, the Postal Service is of the view that the interaction between the recession and electronic diversion is one reason why the harm associated with the totality of lost volume over recent years constitutes the “extraordinary or exceptional” circumstances that this proceeding should be addressing, rather than just some subset of harm deemed to be related to the recession. Therefore, GCA is in error in its explicit assertion (Detailed Analysis at 8) and its implicit assertion (Comments at 11) that the Postal Service agrees that volume lost to electronic diversion is categorically excluded from “exigent” volume losses. But since GCA cites Order No. 547 as the basis for those assertions, it is necessary to review the relevant portions of that Order, and the Postal Service statements cited therein, in some detail.

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<sup>14</sup> Mr. Corbett’s comments on the stand about this effect of the recession echo a similar observation on page 15 of his Statement (“Cost concerns led to accelerated efforts to convert billing and payment processes to electronic alternatives.”)

Order No. 547 in two places claims that the Postal Service “agrees” that volume lost to electronic diversion does not qualify as “extraordinary or exceptional.” On page 52, Order No. 547 cites a footnote on page 13 of the Postal Service’s Response to the AMA Motion to Dismiss to support the claim that the Postal Service “agrees” that the “the diversion of mail volume to electronic alternatives is a long-term trend that does not qualify as ‘extraordinary or exceptional circumstances.’” But the relevant portion of the footnote says something quite distinct from what Order No. 547 suggests:

The Motion spends a great deal of time arguing that electronic diversion does not constitute an “extraordinary or exceptional circumstance.” Motion at 35-39, 65. All of this is irrelevant, because the Postal Service is not claiming for purposes of this proceeding that electronic diversion, **standing alone**, constitutes “extraordinary or exceptional circumstances.” This is clear from the statement of witness Corbett, which identifies the severe, abrupt, and historic volume losses precipitated by the recession. See Corbett Statement at 11-16. **Electronic diversion is relevant to this proceeding in that the current economic circumstances clearly accelerated what was heretofore a gradual, long-term trend.**

Postal Service’s Response to the AMA Motion to Dismiss (August 2, 2010), n.2, pg 13 (emphasis added).

Similarly, on page 62, Order No. 547 cites one page – page 17 – of the Postal Service’s Reply Comments to support the claim that the Postal Service is not claiming that volume loss attributable to electronic diversion qualifies as exigent circumstances. If one looks only at page 17 in isolation, it is perhaps conceivable that one might be tempted to draw the conclusion stated by Order No. 547:

As witness Corbett discusses, a portion of the recent declines are due to materials being diverted from the mail to electronic means of communications. See Tr. 1/29-30. Several parties assert that any volume losses due to electronic diversion cannot constitute “extraordinary or exceptional circumstances.” See, e.g., GCA Comments at 10-11. However, the Postal Service is not claiming for purposes of this proceeding that the well-understood and gradual diversion of mail to

electronic means of communication constitutes circumstances that are unusual or out-of-the-ordinary, and thus “extraordinary or exceptional” within the plain meaning of those terms.

Postal Service Reply Comments (Sept. 2, 2010) at 17. But what was apparently overlooked in Order No. 547 is that the discussion on this topic in the Postal Service’s Reply Comments did not end on page 17. It continued on to page 18, where the Postal Service explained the critical distinction between the “gradual” decline of the pre-recession era and the “accelerated” decline thereafter:

As this discussion indicates, the important fact is that while the gradual diversion of mail to electronic communications is not “abnormal,” the situation changes substantially when that trend begins to accelerate significantly in a very short number of years, caused in large part by the recession itself. See Masse Response to POIR No. 4, Question 10; Tr. 1/29-30.

*Id.* at 18.<sup>15</sup> It is very clear, therefore, that, even within the very limited portions of Postal Service submissions cited by Order No. 547, the Postal Service expressed no blanket “agreement” that volume lost to electronic diversion is automatically excluded from consideration as volume lost due to the exigent circumstances. Instead, the only agreement was that mail volume lost due to the “well-understood and gradual” diversion **prior to the recession** should not be considered as part of the “extraordinary or exceptional circumstances.” Which is why, as set forth in the numerous quotations on page 25-26 of the Postal Service’s July 25<sup>th</sup> Initial Comments on Remand, the Postal Service’s identified the precipitous volume drop beginning in FY2007 as the exigent circumstances, rather than all volume losses due to electronic diversion (which go back to the late 1980s).

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<sup>15</sup> Note that the correct transcript cite for the Masse Response is Tr. 2/169-70.

As noted above, one significance of the interaction between the economic slowdown and electronic diversions, which even the Commission in its Budget Justification agrees has occurred, is that it entirely obliterates any possible validity of the naïve time trend comparison that GCA is trying to float. GCA implicitly concedes that its methodology requires that the effects of electronic diversion and the recession be independent if one wishes to draw any conclusion simply by comparing the time trends with and without the six quarters of “recession” data. That assumption falls apart, and the entire effort sinks with its demise.

In reality, of course, one hardly needs to deconstruct GCA’s time trend analysis to reject GCA’s claim (Comments at 2) that “the recession had essentially no effect on First-Class Mail volumes.” On its very face, this claim lacks credibility. Virtually any introductory economic textbook would suggest that demand for specific products is generally related to broader measures of economic activity. Mail in general is no exception, and neither is First-Class Mail specifically. If one nonetheless seeks direct empirical refutation of GCA’s rather absurd postulation, however, a table in the recently filed FY2010 Household Diary Study (available on the Commission’s Daily Listing for July 7, 2011) does the job nicely. Table 4.10 on page 33 presents information about total bills paid, and bills paid by mail. On an average monthly basis, bills per household paid by mail fell from 6.7 bills in 2008 to 5.4 bills in 2010. In part, this obviously reflects some diversion of bill payments away from the mail. But the *total* number of bills per month, paid by all methods, also fell between 2008 and 2010, from 12.4 bills to 11.5 bills. Electronic diversion could not have caused that decline; the recession did. Therefore, one ineluctable conclusion from the data in HDS Table 4.10 is that, with a

decline in the total number of bills paid, the recession unavoidably had an impact on First-Class Mail volume. The impact on First-Class Mail volume would come from both the number of bills presented, and the number of bills paid. Nothing GCA says or does in its analysis can possibly overcome the economic reality manifest in HDS Table 4.10 – the recession had a very tangible effect on First-Class Mail volume. The notion that First-Class Mail should be exempt from exigent rate increases designed to counter the financial effects of the volume lost due to the recession is nothing short of ludicrous.

**C. GCA Fails to Present Any Valid Reason to Question Whether Exigent Rate Increases for First-Class Mail are Reasonable, Equitable, and Necessary**

Beyond its unfounded claim that the recession did not affect First-Class Mail volumes, GCA makes the equally unfounded claim that an exigent rate increase for First-Class Mail would not be reasonable, equitable, or necessary. On the one hand, this view seems to be based on the notion that if a category of mail did not lose volume, it should not have to pay any share of the contribution lost due to volume losses in other classes. GCA Initial Comments at 12. On the other hand, it also seems to be based on the notion that an increase in First-Class Mail rates would lead to revenue *reductions*, and therefore would be counterproductive. *Id.* at 8-9, 11-12. Both notions are intrinsically without merit.

With regard to the first notion, in its Initial Comments on Remand, the Postal Service already explained why an approach that attempts to foist the burden of recovering lost contribution solely on the “survivors” of the categories that lost volume is inappropriate. Initial Comments at 53-54. When addressing “reasonable and equitable,” the correct approach instead is to ignore contribution shares that might have

made sense with the pre-exigent set of volume distributions, and focus rather on matters as they exist after significant volumes have been lost, and a whole new set of volume, revenue, and cost distributions is operative. While the premise of GCA's arguments in this regard is inapplicable (because, as explained above, major amounts of First-Class Mail volume were lost due to the recession), even were that not the case, the logic by which GCA claims the hypothesized circumstances would exempt First-Class Mail from exigent rate increases is flawed.

With regard to the second notion, GCA is to some extent just trying to resurrect the claim it advanced in Docket No. R2006-1, that the factors causing electronic diversion necessarily make First-Class Mail more price elastic. In that instance, the Commission appropriately rejected GCA's attempts to, on that basis, substitute a higher own-price elasticity for single-piece First-Class Mail than that estimated by witness Thress. PRC Op, Docket No. R2006-1, Vol. 1 at 8-9 (Feb. 26, 2007). In its Initial Comments in this proceeding, GCA even acknowledges that the cost of paying a bill online is already "negligible" compared with paying by mail. GCA Initial Comments at 12. Therefore, why a small marginal increase in postage is by itself likely to drive a disproportionate portion of bill payments from mail to electronic payment methods is both unexplained and inexplicable.

But GCA is actually making a much stronger claim than it did in Docket No. R2006-1. GCA repeatedly states that increasing First-Class rates would actually result in not only less volume, but also less *revenue*. *Id.* at 8-9, 12. Without stating so explicitly (for obvious reasons), GCA would have the Commission assume that single-piece mail is now price elastic. Such an extreme (and unfounded) assumption is

required to support GCA's claims (page 9) that a rate increase could not be considered either "reasonable" or "necessary" because it would be reducing revenue and harming financial stability. With these claims, GCA is merely clutching at straws. There is absolutely no basis for GCA or anyone else to suggest that a rate increase for First-Class Mail would have the drastic result (an absolute revenue reduction) that GCA postulates.

#### **V. Comments of Time Warner Inc.**

Time Warner adopts a radical approach to the question remanded to the Commission, arguing that the Commission should ignore the D.C. Circuit's decision and analysis entirely, pretend that the appellate proceedings never occurred, and "take an entirely fresh look at the question which the Court has remanded to it" concerning the interpretation of the "due do" clause, unencumbered either by the positions advanced by the Commission previously or the court's teachings. Time Warner Initial Comments ("TW Comments") at 2. As though this were not enough, Time Warner invites the Commission to ignore entirely the question that the court remanded, id. at 18 (the Commission has "an obligation" to "reformulate the question remanded to it by the Court"), asserting that the question "confounded two separate and distinct issues," id. at 5, and "is not susceptible of any answer which is either coherent or consistent with the meaning of the statute." Id. at 13. The Commission should not accept Time Warner's invitation, which flies in the face of a court order and is premised on a gross misunderstanding of the relevant principles of appellate procedure and the respective roles of the Commission and its reviewing court.

The role of the D.C. Circuit is set forth in 39 U.S.C. § 3663, which vests in the D.C. Circuit exclusive jurisdiction “to review the order or decision in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28.” The cited provisions, in turn, authorize the D.C. Circuit, among other things, to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action,” 5 U.S.C. § 706, to “set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.* § 706(2), and to enter “a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.” 28 U.S.C. § 2349(a).

These powers are not absolute, of course. Where a party believes that the D.C. Circuit itself exceeded its power or otherwise erroneously construed a statute, as Time Warner apparently believes here, an aggrieved party always has the right to seek rehearing before the court or petition the Supreme Court for a writ of certiorari. See 28 U.S.C. § 2350(a). Because no party here sought further review of the D.C. Circuit’s remand order, however, it is final and binding, not only on the court itself, but on the parties and the Commission. See, e.g., U.S. Postal Serv. v. Gregory, 534 U.S. 1, 16 (2001) (“It is well settled that one who fails to timely appeal an adverse decision is bound by that decision in later proceedings.”); Belbacha v. Bush, 520 F.3d 452, 457 (D.C. Cir. 2008) (appeals court’s decision is binding on later appellate panels and on lower court); City of Cleveland v. Fed. Power Comm’n, 561 F.2d 344, 346-47 (D.C. Cir. 1977) (same rule applies to administrative agencies); Karrick v. Edes, 19 F.2d 693, 694 (D.C. Cir. 1927) (when an issue is decided by the court, it is final, and lower courts may



not vary it, examine it for any purpose other than execution, nor “intermeddle with it, further than to settle so much as had been remanded”) (citation omitted). Because no party sought further review, Time Warner’s arguments for ignoring the D.C. Circuit’s remand order – that it was wrongly decided, that it remanded the wrong question, and that it overstepped its role as a reviewing court – are not, and cannot be, properly before the Commission.

Time Warner’s suggestion that Chevron somehow authorizes the Commission to ignore or reformulate the court’s remand order is misplaced. Chevron, fundamentally, is about the standards of review courts use when reviewing an agency’s interpretation of a statute; it does not strip courts of their power to review administrative decisions, to set aside such decisions where they are deemed erroneous, or to remand cases for further proceedings. Cf., e.g., Sec’y of Labor v. Nat’l Cement Co. of Cal., 573 F.3d 788, 793, 795-97 (D.C. Cir. 2009) (upholding agency decision as reasonable under Chevron step 2 and for adequately addressing concerns raised in court’s previous remand order).

Similarly misplaced is Time Warner’s suggestion that much of the D.C. Circuit’s decision is comprised of *dicta* that can readily be ignored. While it is undeniably true that *dicta* in one decision does not bind courts in future decisions, it is not true that an agency on remand is bound to follow only the narrowest possible reading of a reviewing court’s holding. Instead, an agency is bound to follow the court’s mandate, which encompasses “everything decided, either expressly or by necessary implication,” and is “without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case.” City of Cleveland, 561 F.2d at 346-47, 348 (citations omitted). The D.C. Circuit’s opinion here

cannot be limited to the narrowest reading of its holding – *e.g.*, that the phrase “due to” is ambiguous as to “how closely the amount of the adjustments must match the amount of the revenue lost as a result the exigent circumstances,” 640 F.3d at 1268 – but instead must encompass the analysis underlying the court’s conclusion and guidance provided by the court’s opinion, which defined the parameters within which the Commission may properly exercise its discretion.

Finally, Time Warner’s assertion that the D.C. Circuit’s question on remand erroneously conflated two issues is both irrelevant and incorrect. The court remanded a question that is neither difficult to understand nor impossible to answer: “how closely [must] the amount of the [proposed] adjustments match the amount of the revenue lost as a result of the exigent circumstances.” 640 F.3d at 1268. There are not two questions buried within this question; and, indeed, this was the question that all the parties debated before the D.C. Circuit. Time Warner’s conception that “due to” may also refer to an entirely different inquiry is difficult to fathom – Time Warner never explains how one phrase can perform two different analytical tasks – and, in any event, was advanced by no party on appeal. It cannot be raised for the first time on remand, given that the order already identified the scope of the ambiguity – how close must the match be between the proposed adjustments and the revenue lost as a result of an exigent circumstance – and ordered the Commission to resolve it. The Commission’s job on remand is to answer the court’s question and determine, in light of its interpretation of the ambiguous provision, whether the Postal Service’s rate request should be granted, modified, or rejected. This is not the time for advancing a new interpretation of the “due to” phrase.

## CONCLUSION

Therefore, at this stage of the proceeding, in accordance with Commission Order No. 781 regarding the appropriate scope of these reply comments, the Postal Service respectfully requests that the Commission adopt the “general proportionality” approach to the interpretation of the “due to” language as a causal link in exigent cases, as set forth in the Postal Service’s July 25<sup>th</sup> Initial Comment on Remand at pages 6-24. As further explained above, initial comments of other parties suggesting otherwise should be rejected, as should be the other matters raised in comments that have been shown above to lack merit.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that I have this date served the foregoing document in accordance with Section 12 of the Rules of Practice and Procedure.

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