

UNITED STATES OF AMERICA
BEFORE THE POSTAL REGULATORY COMMISSION
Washington, DC 20268

IN RE MARKET DOMINANT PRICE
CHANGE

Docket No. R2020-1

COMMENTS OF
THE PRISON POLICY INITIATIVE, INC.

The Prison Policy Initiative, Inc. (“PPI”) hereby submits the following comments pursuant to the Commission’s Notice and Order on Price Adjustments and Classification Changes for Market Dominant Products (Order No. 5273, Oct. 10, 2019) and 39 C.F.R. § 3010.11. We write to express our opposition to the Postal Service’s policy of five-cent rounding for stamped single-piece, one-ounce, first-class letters.

PPI is a nonprofit organization that uses data analysis to demonstrate how the American system of incarceration negatively impacts everyone, not just incarcerated people. It publishes its findings and takes on selected legal campaigns in order to create a fairer justice system through policy change. PPI has published numerous reports concerning communications options available to incarcerated people.¹ This line of research reveals that financial exploitation is often built into communication-providers’ business models. While the U.S. Postal Service has generally stood out as a universally accessible communications network that gives incarcerated people access to quality service at a reasonable price, the five-cent rounding policy threatens to tarnish the reputations of the Postal Service and the Commission in this respect.

PPI submits these comments on behalf of the 2.3 million people incarcerated in the United States,² most of whom rely heavily on the Postal Service to send and receive

¹ See <https://www.prisonpolicy.org/communications.html>.

² Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019* (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

correspondence. Given the compressed timeline the Commission has established for this proceeding, most incarcerated people have no practical ability to participate.³

As explained in more detail below, the Postal Service's five-cent rounding policy is an arbitrary and capricious pricing policy that violates several objectives and factors set forth in 39 U.S.C. § 3622(b) and (c).

I. The Five-Cent Rounding Policy is Not Just and Reasonable (Objective 8)

In regards to market-dominant products, such as letter mail, the Commission is charged with the responsibility of establishing a modern postal rate system that, among other things, ensures “a just and reasonable schedule for rates and classifications.” 39 U.S.C. § 3622(b)(8); see also § 101(d) (“Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.”). The Postal Service's purported justification for the five-cent rounding policy is unconvincing and implausible, resulting in rates that are manifestly unjust and unreasonable.

The Postal Service commenced this proceeding by filing a Notice of Market-Dominant Price Change (the “Notice”). In the Notice, the Postal Service claims that the five-cent rounding policy is just and reasonable because the annual impact on the average household amounts to “only \$2.85 over the entire year: a mere 0.004 percent of that average household's total spending in 2018.” Notice at 15. This logic is fatally flawed as applied to incarcerated customers.

To begin, the Postal Service's focus on the “average household” contravenes the agency's duty to “provide adequate and efficient postal services at fair and reasonable rates” to, “as nearly as practicable[,] the *entire population* of the United States.” 39

³ Because of substantial barriers that the Commission's timeline presents to the meaningful participation of incarcerated postal customers, PPI joins in the comments of the National Postal Policy Council, the Greeting Card Association, and the Major Mailers Association (Oct. 10, 2019), stating that “*Carlson [v. PRC]*, 938 F.3d 337 (D.C. Cir. 2019) casts doubt on the fast-track with which the Commission has reviewed every index rate case since enactment of the [Postal Accountability and Enhancement Act].” NPCC at 2.

U.S.C. § 403(a). Thus, the just-and-reasonable-rate requirement applies to all customers, not just the average household. As explained in the subsequent section, the rounding policy's cumulative financial impact on incarcerated mailers is substantial.

The Postal Service's reliance on average household spending also bespeaks a lack of reasoned decisionmaking in derogation of the agency's duties under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* This error is illustrated by a recent judicial ruling concerning a different type of prison-based communication. In *Global Tel*Link v. Federal Communications Commission*, 866 F.3d 397 (D.C. Cir. 2017), the Court of Appeals reviewed FCC-imposed price caps on telecommunications carriers that exclusively serve incarcerated callers (so-called "inmate communications services" carriers). The FCC set the rate caps to allow carriers to earn a reasonable return, but calculated the caps based on industry-wide *average* costs. *Id.* at 414. Upon finding that the FCC's rate calculus did not allow high-cost carriers to recover their costs, the D.C. Circuit invalidated the rate caps, noting that the FCC's "analysis of the record data in setting rate caps was not the product of reasoned decisionmaking." *Id.* at 415.

Here, the Postal Service's attempt to summarily dismiss the financial impact of five-cent rounding presents an inverse application of the holding in *Global Tel*Link*. While the Postal Service focuses on the low financial burden the policy will create for the "average" household, it completely ignores the very tangible hardship imposed on low-income customers (including incarcerated mailers), and fails to balance this hardship with the implausible claim of convenience that the Postal Service puts forth in defense of this policy. See Notice at 12 (alleging that "rates denominated in five-cent increments are easier to remember and compute than those denominated otherwise").

In particular, there are two ways in which five-cent rounding present greater challenges to incarcerated customers and their families than to the average household. First, incarcerated people who wish to communicate with friends or families have

restricted access to telephone communications⁴ and limited or non-existent access to electronic text messaging.⁵ Accordingly, this population is likely to send significantly more postal correspondence than the average household. See Notice at 15 (citing an average of 57 pieces of first-class mail sent by households during FY 2018, according to the Postal Service’s Household Diary Study). By way of illustration, if someone in prison has a child,⁶ it is reasonable (perhaps conservative) to estimate that he would write to the child each least once a week (52 letters annually). If the same person has a living parent, he may wish to send a letter to that parent every other week (26 letters per year). Correspondence with other friends and relatives could easily account for an additional 20 letters over the course of a year. Finally, people in prison or jail still have transactional needs that can often only be accomplished via mail (e.g., communicating with legal counsel, filing tax returns, subscribing to publications, and establishing connections with employers or service providers in anticipation of release). One such transaction per month would equate to another 12 letters per year, yielding a total mailing volume of 110 letters annually.

One indication that the hypothetical mailing volume of 110 letters per year is a reasonable (if not conservative) estimate can be found in state corrections departments’ indigent postage policies. Although not strictly required, prison systems commonly have policies establishing a weekly or monthly postage allowance for people who cannot

⁴ Telephone access in jails and prisons is nearly always restricted to a certain number of minutes per day or week. Telephone rates have historically been egregiously high in most jurisdictions. While recent FCC rate caps have helped to curb some abuses, the validity of those rate caps is uncertain and phone calls still present financial burdens for many incarcerated people and their families. See Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers* (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

⁵ Electronic messaging programs in prisons and jails allow incarcerated people and outside correspondents to exchange plain-text written messages, subject to character limits. See Stephen Raher, *You’ve Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation* (Jan. 2016), <https://www.prisonpolicy.org/messaging/report.html>.

⁶ Fifty-two per cent of people incarcerated in state prisons in 2007 were parents of at least one child under 18. U.S. Dept. of Justice, Bureau of Justice Statistics, “Parents in Prison and Their Minor Children,” NCJ 222984 (Aug. 2008).

afford to send letters. While such policies serve important rehabilitative goals, corrections agencies are under pressure to restrain spending, so there is a built-in incentive to not make such allowance overly generous (in other words, an indigent postage policy can be viewed as establishing a not-overly-generous baseline of basic mail use for a typical incarcerated person). A survey of five randomly selected states indicates that indigent mail policies provide between 96 and 520 letters per person per year.⁷ Thus, while PPI is not aware of any definitive studies that have measured letter-mailing rates among incarcerated people or their families, it is almost certainly greater than the average rate cited in by the Postal Service.

The second way in which incarcerated mailers differ from the average household cited by the Postal Service is in their severely limited means of earning money. In a 50-state survey, PPI discovered that wage scales for people incarcerated in state prison systems average 14¢ to 60¢ per hour for standard prison-based jobs (or 33¢ to \$1.41 per hour for work in certified prison industry programs).⁸ These shockingly low average figures mask substantial variation, with four states paying nothing for non-certified jobs, and an additional 14 states starting non-certified wages at 10¢ or less per hour. While no reliable research exists on the income of incarcerated peoples' families, one can infer that such relatives are more likely to be low-income based on the fact that incarcerated people are disproportionately likely to have low pre-incarceration incomes.⁹

⁷ 15 Cal. Code Regs. tit. 15, § 3138 (5 one-ounce first-class letters per week); 103 Mass. Code Regs. 481.09 (3 one-ounce letters per week); Penn. Dept. of Corr. Admin. Reg. 803, § 1(A)(7) (8 one-ounce first-class letters per month); Tex. Dept. of Crim. Justice, Board Policy 03.91, § 1(6) (5 letters to "general correspondents," plus 5 letters to "legal or special correspondents" per week); Wash. Admin. Code. § 137-48-060(3) (10 standard first-class letters per month).

⁸ Wendy Sawyer, "How much do incarcerated people earn in each state?" (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

⁹ Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned* (Jul. 2015), <https://www.prisonpolicy.org/reports/income.html> (finding median incomes of incarcerated men and women to be 52% and 42% (respectively) lower than those of non-incarcerated people).

As described in the following section, the combination of increased letter-writing and decreased earning capacity magnifies the impact of the five-cent rounding policy for incarcerated customers of the Postal Service. The Postal Service's attempts to minimize the financial impact fail to take into account the circumstances of millions of people in prisons and jail, as well as their numerous family members. This oversight, combined with the Postal Service's inability to come forth with any realistic customer benefit that would result from five-cent rounding, makes the policy unreasonable and unjust for purposes of § 3622(b)(8). See *Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006) ("This court routinely defers to administrative agencies on matters relating to their areas of technical expertise. We do not, however, simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment.").

II. The Financial Impact of Five-Cent Rounding is Substantial for Incarcerated Customers and Their Families (Factors 2 and 3)

As noted above, someone in prison or jail is likely to have less money and more reliance on postal mail than the average household. Accordingly, the financial impact of five-cent rounding is substantial for this population. According to Douglas Carlson, if single-piece, first-class postage rates for 2019 and 2020 were set in accordance with the CPI price cap, without rounding, then the first-ounce rate in the Notice (for FY 2020) would be 52- or 53¢ rather than 55¢. Comments of Douglas F. Carlson (Oct. 24, 2019) at 2. Assuming a 52¢ rate, then a typical incarcerated person who sends 110 letters per year (see previous section for explanation of this figure) would see a total annual price increase of \$5.50 as a result of the last rate increase, of which amount \$3.30 would be attributable to the rounding policy. While \$3.30 may not sound like much to most people, for someone earning 14¢ per hour in a prison-based job it represents 23.5 hours of earnings. Given that postal letters are a vital lifeline for incarcerated people,

the effect of the rounding policy is incontestably substantial and the Commission must consider this impact under 39 U.S.C. § 3622(c)(3).

This is not to say that the Commission must set rates at an amount that is not burdensome to all customers. Although financial burden to the customer is a relevant factor under 39 U.S.C. § 3622(c)(1), (3), and (8), these factors must admittedly be balanced with the Postal Service's need to collect adequate revenue (§ 3622(b)(5)) and the allocate direct and indirect costs among different classes and types of mail (§ 3622(c)(2)). But the cost-allocation rule (Factor 2) strongly weighs against approval of the rounding policy. In the context of a Type 1-A or 1-B rate adjustment, five-cent rounding means that direct and indirect costs are allocated among classes and types of mail, and *then* single-piece, first-class stamped letters incur an additional surcharge (equal to the amount of the rounding) for no substantive reason. As other commenters have already noted, the Postal Service's attempt to justify rounding as a beneficial policy for customers lacks credibility and does not pass the proverbial smell test. See Carlson; Comments of Stephen A. Raher (Oct. 25, 2019). Thus, the amount of any single-piece, first-class postage attributable to the rounding policy represents a *de facto* penalty imposed without regards to the cost-allocation requirement of Factor 2.

III. Incarcerated Postal Customers Have Few Alternatives to First-Class Letter Mail (Factors 4 and 14)

Incarcerated people cannot go to a post office and cannot use electronic communication alternatives that the rest of the world takes for granted. Since first-class mail is the lowest-cost mail classification for single-piece items, there are no “available alternative means of sending . . . letters . . . at reasonable costs.” 39 U.S.C. § 3622(c)(4). First-class letters are relied upon by incarcerated people to maintain their ties with the larger world, and the the Commission should not inflate the rates applied to this class simply to go along with the Postal Service's ill-conceived notions of convenience.

Moreover, Congress has established as a matter of national postal policy that “[t]he costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.” 39 U.S.C. § 101(a). The first-class rate scheme in the notice grants discounts to commercial mailers who use metering systems while effectively surcharging (through 5¢ rounding) stamp users for illusory benefits of convenience. The fact that this *de facto* surcharge will acutely impact incarcerated customers of limited financial means (while providing them with no concomitant benefit) unquestionably “impairs the value” of postal services to this constituency. This matter of general policy can and should be considered by the Commission pursuant to 39 U.S.C. § 3622(c)(14). See *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 676 F.3d 1105, 1107-1108 (D.C. Cir. 2012) (Factor 14 allows the Commission to consider the broadly applicable policies of § 101 when evaluating rates for market dominant products).

IV. Five-Cent Rounding is Contrary to the Policy Expressed in the PAEA

As a purely textual matter, PPI asserts that the five-cent rounding policy is implicitly prohibited by the terms of the Postal Accountability and Enhancement Act, Pub. L. 109-435, 120 Stat. 3198 (2006). When Congress established the criteria for a system of modern postal rate regulation, it set forth a detailed scheme for rate computation, and noted that nothing in the statute “shall preclude the Postal Service from rounding rates and fees *to the nearest whole integer*, if the effect of such rounding does not cause the overall rate increase for any class to exceed the Consumer Price Index for All Urban Consumers.” 39 U.S.C. § 3622(d)(2)(B) (emphasis added). By allowing the Postal Service to round to the nearest whole integer, Congress impliedly prohibited rounding to more distant integers, pursuant to the canon of *expression unis, exclusio alterius*. See *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 392 (2013) (“[W]hen Congress includes one possibility in a statute, it excludes another by implication.”).

V. Conclusion

Incarcerated people and their families represent a constituency that is uniquely dependent on letter mail sent via the U.S. Postal Service. The Postal Service's five-cent rounding policy imposes substantial negative effects on this constituency. Unless the Postal Service is willing to create a new classification to provide reduced rates for mail sent by or to an incarcerated person,¹⁰ the needs of incarcerated customers must be accounted for in this proceeding.

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Respectfully submitted,

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¹⁰ PPI would support such a new classification and believes that such action would be in line with the provisions of 39 U.S.C. § 3622(c)(10). Nonetheless, we recognize that the Commission and the Postal Service are unlikely to agree to the administrative burden that would result from such a proposal. The price for avoiding that burden is careful consideration of the situation of incarcerated customers in this proceeding.