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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Statutory Review of the System	)	
for Regulating Rates and Classes	)	Docket No. RM2017-3
for Market-Dominant Products	)	

**SUPPLEMENTAL COMMENTS OF MPA –
THE ASSOCIATION OF MAGAZINE MEDIA,
THE ALLIANCE OF NONPROFIT MAILERS, AND
THE ASSOCIATION FOR POSTAL COMMERCE**

July 2, 2020

MPA – The Association of Magazine Media ("MPA"), the Alliance of Nonprofit Mailers ("ANM"), and the Association for Postal Commerce ("PostCom") respectfully file these supplemental comments in response to Commission Order No. 5337. In Order No. 5469, the Commission denied the motion of nineteen mailer organizations – including MPA, ANM, and PostCom – to hold this proceeding in abeyance due to the COVID-19 pandemic.[1] The mailer association coalition filed its motion in part to "ensure that any Commission order issued in this proceeding will reflect the significant societal, economic, legal, and regulatory changes that are likely to result from the current emergency." *See* Joint Motion to Hold Proceeding in Abeyance (Mar. 23, 2020) at 1.

[1] The joint motion was supported by separate comments filed by the National Postal Policy Council ("NPPC"), the Major Mailers Association ("MMA"), the National Association of Presort Mailers ("NAPM"), and the Association for Mail Electronic Enhancement ("AMEE"). *See* Comments on Joint Motion to Hold Proceeding In Abeyance, and Request for Official Notice, Request for Issuance of Information Request, and Suggestion for Further Steps (Mar. 30, 2020).

The Commission "acknowledge[d] the concerns regarding the impact of the COVID-19 pandemic on the Postal Service and the mailing industry," but it nonetheless denied the mailers' motion. *See* Order No. 5469 (Apr. 2, 2020) at 3. But the Commission also promised that "[s]hould any substantive issues develop that would affect the Commission's evaluation of the revised proposal, the Commission will address those issues at that time." *See id.*

Now is the time. The postal world (indeed, the entire world) has significantly changed in the nearly four months since the public comment period in this docket closed on March 4. So material is this change that the administrative record in this case must be updated to reflect it.

Our critiques of the retirement-based authority and the performance-based authority proposals remain, and we need not repeat them here. We have made clear in previous comments that *all* of the Commission's proposals in Order No. 5337 violate PAEA and would injure postal customers. *See generally* ANM *et al.* Phase III Initial Comments (Feb. 3, 2020) at 50-82; ANM *et al.* Phase III Reply Comments (Mar. 4, 2020) at 6 ("The Commission should … withdraw its proposed rules, and reevaluate its entire approach to this proceeding."). We focus on the Commission's density-based proposal in these supplemental comments, because the record before the Commission must reflect how recent market-dominant mail volume declines would gift the Postal Service with enormous new pricing authority.

The density proposal is based on the notion that declining mail volume, the universal service obligation, and the CPI cap combine to create "a financial dilemma unique to the Postal Service" – one "which worsens its financial position." *See* Order No. 5337 at 70. That supposition is stale. We now have two months of COVID-era data reflecting Postal Service expenses, volumes, and revenues. Those data reveal that the sky above the Postal Service's head is not falling, as the operator would have the Commission and Congress believe: massive spikes in highly profitable package volume are offsetting volume declines in market-dominant mail. In fact, even excluding a beneficial non-cash workers compensation adjustment, the Postal Service's May 2020 net loss was smaller than the original pre-pandemic plan for the month despite volume being 19 percent below plan.

Those data also expose the arbitrariness and flawed nature of the Commission's density-based proposal, because that proposal would grant the Postal Service supplemental pricing authority based on ***volume*** changes and not ***contribution*** or ***revenue*** changes. This methodology inaccurately portrays the impact of COVID-19 on the Postal Service's finances because it entirely ignores that the average contribution per package is an order of magnitude higher than the average contribution of market-dominant mail. *Compare* Order. No. 547 in Docket No. R2010-4 (Sept. 30, 2010) at 79 (during the exigency docket, the Commission recognized that "[a]ccurately calculating the net impact of the recent recession on postal finances would require distinguishing between volume losses by major product, so that they can be weighted according to the different unit contribution that each product makes."). Its implementation would do even more harm to captive mailers than we had indicated in our initial comments, even as Postal Service revenues are stabilizing. We believe that the Commission should not render a final decision in this docket without having the benefit of an updated, fulsome record. *See Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 326 (7th Cir. 1983) (recognizing the principle that an administrative agency's decision "must stand or fall based on the record before the agency when the decision was announced.").

I. The COVID Pandemic Has Been Disproportionately Harsher on the USPS' Captive Customers Than It Has Been on the USPS Itself

When it opposed the mailers' request to hold this proceeding in abeyance, the Postal Service acknowledged that new circumstances were "having significant impacts upon stakeholder operations and causing uncertainty about the future, just as they have for the Postal Service." *See* USPS Opp. (Mar. 30, 2020) at 1. Whereas mailers believed the pandemic justified temporarily pausing this docket, the Postal Service championed acceleration, arguing that the pandemic "only highlights the urgent need to conclude this proceeding." *See id.* In particular, the Postal Service stated that:

> More than two years ago, in Order No. 4257, the Commission established that the unprecedented acceleration in volume decline - exceeding the Postal Service's substantial efforts at cost control … led the current ratemaking system to fail to achieve the statutory criteria. The current national emergency can only heighten, not diminish, the salience of that conclusion and the urgency of reform.

Id. at 2. Approximately one week after filing its opposition, the then-Postmaster General projected that the Postal Service would "run out of cash this fiscal year" (*i.e.*, by September 2020) and projected "a $13 billion revenue loss directly [attributable] to COVID-19 this fiscal year and a $54.3 billion [in] additional losses over ten years." *See* Press Release, House Cte. on Oversight and Reform, "Postmaster General Warns Committee of Dire Consequences Without Congressional Action," (Apr. 9, 2020), *available at* https://oversight.house.gov/news/press-releases/postmaster-general-warns-committee-of-dire-consequences-without-congressional.

While these projections were necessarily based on incomplete information in a rapidly changing environment, they have, like prior projections of liquidity crises, proved inaccurate. Those prior claims, which began shortly after PAEA's passage, underpin the (illegal) push for above-inflation pricing authority over monopoly postal products. The more recent, COVID-based fears have also not been realized. The administrative record must be renewed to show that these claims were proven inaccurate. The current emergency does not "heighten" the need to reform the market-dominant rate system, as the Postal Service contends. To the contrary, the evidence shows that the Postal Service can weather the current national emergency far better than it told Congress in April due to rising package contributions.

The Postal Service's projected $13 billion in losses due to COVID-19 through the remainder of this fiscal year were "unrealistic." *See* Ltr. to M. Brennan from Chairman Johnson and Ranking Members Jordan and Hice (June 8, 2020) ("Johnson Letter"). The most recent financial data, which includes the Postal Service's May 2020 performance, shows that package volume increased a staggering 61.2 percent and that package revenues increased 55.6 percent year-over-year. This has had an overall positive effect on the Postal Service's financial condition, as the Postal Service earned more revenue from competitive products than from market-dominant products in May and overall revenues improved by more than three percent year-over-year. Moreover, the Postal Service's cash position has improved: "USPS started the crisis with $9.2 billion in cash, and as of June 4th, had $13.2 billion. While USPS availed itself of $3.4 billion in additional cash through short-term notes on April 3rd, even without those notes, USPS's cash position has improved by at least $600 million." *See* Johnson Letter.

The Postal Service has since walked back its April forecast. But mailers' fears about how injurious the Commission's proposals would be to USPS customers have only intensified during the pandemic. Compared with the Postal Service, market-dominant mailers are not withstanding the COVID pandemic nearly as well. Overall, market-dominant mail volume declined by nearly 29 percent year-over-year in May 2020. Marketing Mail volume plummeted by over 40 percent, after falling by 45 percent in April. Single-piece First-Class mail volume dropped by nearly 14 percent, reflecting that our members are experiencing declining subscriptions, membership initiations and renewals, and donations. The declining volumes of Periodicals, First-Class, and Marketing Mail that our members utilize reflect the severe impact that the pandemic has had on the Postal Service's most loyal customers.

That is not all: magazine publishers have experienced a dramatic reduction in advertising revenues. Nonprofit mailers are suffering through significantly diminished levels of charitable giving and fundraising efficacy. Our members, both for-profit and nonprofit organizations, are implementing layoffs, staff furloughs, and closing physical locations; the USPS is not. Worse yet, as devastating as COVID has been to our members, we still do not know the full impact that it will end up having. It is imperative that the Commission know the full extent of this impact before it acts further.

II. The Commission's Density-Based Proposal, Using COVID-Era Data, Would Move the Rate System Even Further Away from PAEA's Objectives

The administrative record must also be refreshed to more accurately depict the likely impact of the density-rate proposal on market-dominant mailers. In Order No. 5337, the Commission proffered hypothetical, illustrative calculations that resulted in supplemental density rate authority of between 1.11 and 1.64 percent (based on market-dominant mail volume changes) and between 1.19 and 1.46 percent (based on total mail volume changes). *See* Order No. 5337 at Table IV-2. Using historical data, the Commission showed that its density formula would have provided the Postal Service additional pricing authority of between 0.36 and 2.69 percent between fiscal years 2013 and 2019. *Id.* at Table IV-3.

These hypotheticals do not portray an accurate record upon which the Commission should base its actions. Because "[t]he grounds upon which an administrative action must be judged are those upon which the record discloses that [the] action was based," *Int'l Union v. Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (*quoting SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), the record in this docket must be updated from the hypothetical impacts depicted in Order No. 5337. The COVID pandemic's impact on mail volume presents a far starker picture, as shown here:

Figure 1 – Estimation of Density Rate Authority Using May 2020 Data

	FY 2019	FY 2020 (Est)	% Change
Delivery Points (millions)	140.0	141.3	0.9%
Institutional Cost Share	43.93%	43.93%	
Market Dominant Mail Vol (millions)	136,208.3	114,389.7	-16.0%
Competitive Mail Vol (millions)	5,506.8	6,932.6	25.9%
Total Mail Vol (millions)	142,570.0	122,017.2	-14.4%

Change in Mrkt Dom Pcs per Delivery Point * Institutional Share	7.38%
Change in Total Pcs per Delivery Point * Institutional Share	6.68%
Density Rate Authority	**6.68%**

Source: Appendix A.

If the Commission were to issue a final rule adopting its density rate proposal today, it would gift the Postal Service massive price-hike authority that is massively higher than any illustrative examples currently contained in the administrative record.

Density-based supplemental pricing authority of nearly seven percent above inflation (which the Postal Service would use fully) would be massive by itself. When aggregated with the additional price increases that would be authorized by the Commission's retirement, productivity, and noncompensatory proposals, the cumulative impact on mailers would be devastating. *See generally* ANM *et al.* Initial Phase III Comments at 25-28.

Besides crippling the Postal Service's captive mailers, implementation of the density rate proposal would violate PAEA by moving the rate system even farther away from important statutory objectives. The Commission must not lose sight of the fact that any new or modified market-dominant rate system must be designed "as necessary to achieve the objectives" Congress identified in PAEA. 39 U.S.C. §

3622(d)(3). A proposal that would grant the Postal Service supplemental pricing authority of nearly **seven percent** above inflation by itself, and total supplemental pricing authority of upwards of ten percent in conjunction with the Commission's other proposals, violates Congress' edict that the rate system must create "predictability and stability in rates" (Objective 2) and "just and reasonable" rates (Objective 8). Moreover, given the considerable contribution to the Postal Service's bottom line from package revenues, the Commission need not implement the density-based proposal in order to satisfy Objective 5.

III. The Commission Can, and Must, Take These Changed Circumstances Into Account As Part of its Rulemaking

We file these supplemental comments not merely to inform the Commission of the harm that the pandemic has wrought upon mailers and the ruinous impact the density proposal would have if it were implemented in the current environment. We also do so because reasoned decisionmaking requires the Commission to consider and account for the changed circumstances brought about by the pandemic, which represent a radical and unforeseen change in the factual premises underlying the Commission's rulemaking.

An administrative agency "must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citation omitted). Regulatory agencies have "ample latitude to adapt their rules and policies to the demands of changing circumstances." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut.*

Auto. Ins. Co., 463 U.S. 29, 42 (1983) (internal citation omitted); *see also Investment Co. Institute v. Commodity Futures Trading Commission*, 720 F.3d 370, 377 (D.C. Cir. 2013) (approving as "reasoned decisionmaking" the CFTC's amendment of a rule in response to, and in order to account for, "changed circumstances" in the marketplace).

As the Administrative Conference of the United States recognizes, "agencies should closely monitor their rulemaking dockets, and, where an agency believes the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale, consider the use of available mechanisms such as supplemental notices of proposed rulemaking to refresh the rulemaking record." *See* https://www.acus.gov/recommendation/rulemaking-comments.

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For these reasons, as well as those contained in our Phase III initial and reply comments, we urge the Commission to rescind its density-based proposal. That proposal was arbitrary and capricious prior to the COVID pandemic; it is even more so during the pandemic.

Respectfully submitted,

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