Postal Regulatory Commission
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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	)	

MOTION FOR STAY PENDING JUDICIAL REVIEW BY THE ALLIANCE OF NONPROFIT MAILERS, THE ASSOCIATION FOR POSTAL COMMERCE, MPA – THE ASSOCIATION OF MAGAZINE MEDIA, NATIONAL POSTAL POLICY COUNCIL, MAJOR MAILERS ASSOCIATION, AND THE AMERICAN CATALOG MAILERS ASSOCIATION

December 28, 2020

I. INTRODUCTION

Pursuant to 5 U.S.C. § 706, 28 U.S.C. § 2344, 39 U.S.C. § 3663, and Federal Rule of Appellate Procedure 15(a), MPA – the Association of Magazine Media ("MPA"), the Alliance of Nonprofit Mailers ("ANM"), the Association for Postal Commerce ("PostCom"), the American Catalog Mailers Association ("ACMA"), the National Postal Policy Council ("NPPC"), and the Major Mailers Association ("MMA") (collectively, "Movants") have sought review in the United States Court of Appeals for the D.C. Circuit of a rulemaking order and of a prior related order of the Commission. *See Alliance of Nonprofit Mailers v. Postal Regulatory Comm'n*, Case No. 20-1510 (filed Dec. 18, 2020) (seeking review of *Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 5763 (released Nov. 30, 2020) ("Order No. 5763") and *Order on the Findings and Determination of the 39 U.S.C. § 3622 Review*, Docket No. RM2017-3, Order No. 4257 (released December 1, 2017) ("Order 4257," and with Order 5763, the "Orders")); *National Postal Policy Council v. Postal Regulatory Comm'n*, Case No. 20-1505 (filed Dec. 18, 2020) (seeking review of Order No.

5763).[1] Movants hereby request that the Commission stay the effective date of the Orders and related regulations until the petitions for review are resolved by the Court of Appeals.

Under 5 U.S.C. § 705, the Commission "may postpone the effective date of action taken by it, pending judicial review, when justice so requires." *Order Granting Stay Pending Judicial Review*, Docket No. ACR2018, Order No. 5178 at 3 (Aug. 2, 2019). The Commission has found that the preliminary injunction test in *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958), "is consistent and overlaps with the factors the Commission has historically considered when determining whether a stay is appropriate pursuant to 5 U.S.C. § 706." *Id.* at 3. Under the *Jobbers* test, a party seeking a stay must show (1) that the party is likely to prevail on the merits of its challenge; (2) that without a stay, the party will be irreparably injured; (3) that the balance of harms favors maintaining the status quo; and (4) that the public interest favors a stay. *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925. Movants meet all four factors here.

II. MOVANTS ARE LIKELY TO PREVAIL ON THE MERITS

A. The Commission has exceeded its statutory authority.

Movants are likely to prevail on the merits of their appeal because the Commission has exceeded its statutory authority under the PAEA. As explained in comments previously submitted to the Commission, the PAEA requires any system of market dominant regulation established by the Commission to include a CPI-based price cap applied at the class level.[2] This requirement applies to an "alternative" or "modified" system established after the review required by section

[1] NPPC and MMA previously filed for review of Order No. 4257; they have moved to consolidate that appeal with Case No. 20-1505. *See Nat'l Postal Policy Council v. Postal Regulatory Comm'n*, Case No. 17-1276 (Motion to Govern Further Proceedings filed Dec. 22, 2020).
[2] *See generally* ANM *et al.* Comments (Feb. 3, 2020) at 91–104; ANM *et al.* Comments (Mar. 1, 2018) at 9–29; ANM *et al.* Comments (Mar. 20, 2017) at 9–10, n.2; ANM *et al.* White Paper (Oct. 28, 2014) (attached as Appendix A to March 1, 2018 comments).

3622(d)(3) just as much as it applies to the system initially established pursuant to section 3622(a). By acting contrary to this requirement, the Commission has exceeded its statutory authority.

The Commission attempts to justify its actions by interpreting section (d)(3) as allowing the Commission to jettison *all* of the other provisions within section 3622 as a result of its ten-year review. Order No. 5763 at 43. Per the Commission, the requirements of sections (d)(1) and (d)(2), in particular, may be discarded simply because section (d)(3) follows them sequentially. *Id.* at 42–43.

The Commission's interpretation violates the plain language of the statute and finds no support in any canon of statutory construction. The Commission cites to no authority holding that the third-in-order requirement in a statute somehow supersedes the prior two. Nor does the language of the statute require or countenance such an interpretation, especially when Congress demonstrated that it knew precisely how to allow the Commission to authorize above-CPI pricing authority despite section (d)(1)(A)'s requirement, *see* 39 U.S.C. 3622(d)(1)(E), but failed to in section (d)(3).

There is also no support in the language of the statute for the Commission's distinction between the requirements for the initial rate system and the modified or alternative rate system. Rather, the statute directs the Commission to comply with all requirements, including those in sections (d)(1) and (d)(2); section (d)(3) simply establishes that the Commission *must* review its system of ratemaking after ten years and may modify or replace the system, in keeping with the other requirements, if the statutory objectives are not being met.

In further support of its interpretation, the Commission also claims the statute "expressly" allows the Commission to revoke the requirement of a CPI cap. *See* Order 5763 at 40, 48. But this claim, too, is in error. There is no language, "express" or otherwise, that provides the

Commission with this authority. The statute nowhere states that the CPI-cap requirement sunsets at any point or that the Commission may abrogate the provision of the statute that requires a CPI-cap.

Moreover, and beyond abrogating the CPI-cap requirement, the Commission further contends that section (d)(3) gives it the authority to ignore every other requirement and provision in the statute other than the objectives listed in 3622(b). *Id.* at 37. For example, the Commission claims that it can ignore the workshare requirements in subsection (e) and that it need no longer consider the factors in subsection (c). *Id.* Again, there is nothing in the statute that provides the Commission with this expansive authority.

The Commission's argument amounts to an unsupportable conclusion that Congress gave the Commission the authority to completely rewrite the statute after ten years—and that it did so without expressly referencing any of the sections the Commission claims it can ignore. The language of the statute is contrary to this interpretation, as is a wealth of legal precedent finding that Congress does not grant agencies such expansive power. *See Clinton v. State of New York*, 524 U.S. 417, 438–99 (1998); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). In response to the clear language of the statute, the Commission relies heavily on a statement by Senator Collins in the Congressional Record to support its contention. But statements by individual legislators cannot override the statutory text, *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)), and, even if they could, the Commission stretches Senator Collins' statement well beyond her words. Senator Collins did not claim that section (d)(3) could abrogate other parts of the statute or that sections (c) or (e) would not survive the ten-year review. The Commission's conclusion demands that result, but there is no evidence in the Congressional

Record that Congress intended it. Congress does not silently render pages of the United States Code moot, and Congress cannot grant an agency the ability to amend or repeal statutes. *Clinton*, 524 U.S. at 438–99. Yet that is exactly the result of the Commission's reasoning.

The plain language and the structure of the statute conclusively demonstrate that any system of market dominant rate regulation the Commission establishes must contain a CPI-based price cap. Since that is the case, the Commission's final rules, which omit a CPI-based price cap, are unlikely to survive judicial review. Movants are therefore likely to prevail on the merits on this issue.

B. The Orders are arbitrary and capricious.

Even if the Commission were to prevail on its statutory interpretation arguments, the court would likely find the final rules arbitrary, capricious, and not supported by substantial evidence in the record.

At a basic level, the Commission has failed to establish that the Postal Service suffers from a revenue problem rather than a cost control problem. While the Postal Service's revenues have increased every year from Fiscal Year 2017 through Fiscal Year 2020, its operating expenses have increased by greater amounts over that same period. USPS FY2020 10-K Annual Report at 19.[3] Yet the final rules are plainly designed to increase postal revenues. They contain no mechanisms to force the Postal Service to restrain its costs, relying solely on additional reporting requirements. While the "Commission aims to ensure that the ratemaking system does not incentivize the Postal Service to *solely* raise rates to respond to its challenges," the final rules provide multiple forms of additional rate authority and no penalties for failing to restrain costs. Order No. 5763 at 347. They

[3] Excluding additional revenue received from the exigent surcharge, USPS revenues have increased every year since Fiscal Year 2016. USPS FY2020 10-K Annual Report at 19.

would allow the Postal Service to raise rates significantly above inflation—perhaps approaching eight percent above inflation for certain products—while imposing no additional cost discipline.

The Commission supports its approach with little more than the conclusory statement that its rules "are intended to encourage prudent pricing and operational decision-making by the Postal Service." *Id.* The existing system, with its CPI-based price cap, was designed to encourage these actions as well, and the strict price cap provided greater incentives for the Postal Service to manage its costs than the less restrictive rules the Commission has promulgated. The Commission never explains how reducing incentives for efficiency will encourage the Postal Service to more aggressively control its costs. At best, it suggests that "[c]ontinued financial pressure . . . may hinder the Postal Service's ability to make investments that would increase efficiency, reduce costs, maintain high-quality service standards, and assure adequate revenues." *Id.* at 301. But with the Postal Service now sitting on nearly $25 billion in liquidity, there is no reason it could not make those investments now.

The final rules, moreover, indubitably weaken the current system's incentives for efficiency. Even if the Commission were correct that the density and retirement authority address costs outside of the Postal Service's direct control, providing rate authority to cover these costs reduces the incentive to reduce costs within the Postal Service's control. It's a simple matter of arithmetic—the Postal Service will be able to achieve the same profit level with fewer cost reductions under the final rules. Because the Commission never reconciles its rules with this fundamental principle, its decision is arbitrary and capricious.

In addition, the density authority is itself arbitrary and capricious because it provides additional authority based on supposed unit cost increases in market dominant products without concern for the Postal Service's overall financial condition. As discussed further below, increases

in package volume have offset revenue losses resulting from COVID-related volume declines over the past year, allowing the Postal Service to increase revenue in FY 2020 by nearly $2 billion over FY 2019 levels. USPS FY2020 10-K Annual Report at 19. This trend has continued; the Postal Service's preliminary financial results for November 2020 show that total revenue has increased 10.9 percent year-to-date over the same period last year, and the Postal Service has year-to-date net income of $132 million, approximately $1.1 billion better than its planned loss of $973 million. USPS Preliminary Financial Information, Unaudited, November 2020, Nov 2020 Monthly Financial Report to the PRC at 1 (Dec. 28, 2020). Yet the Commission's rules would provide the Postal Service with additional rate authority to offset losses that simply do not exist, and it would do so by providing the Postal Service with far more rate authority than the Commission contemplated when it developed this proposal in Order No. 5337. *See Revised Notice of Proposed Rulemaking*, Docket No. RM2017-3, Order 5337 at 80, Table IV-3 (released December 5, 2019). An agency's decision is arbitrary and capricious when it "entirely fail[s] to consider an important aspect of the problem" and "offer[s] an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins., Co.*, 463 U.S. 29, 43 (1983). The Commission's failure to resolve this contradiction or modify its proposal in light of changes in the industry over the past year thus render its final rule on density authority unlawful.

III. MOVANTS WILL SUFFER IRREPERABLE HARM ABSENT A STAY

Absent a stay, Movants will suffer irreparable harm because they will be forced to pay postage rates that are likely unlawful. Should the Postal Service raise postage rates in accordance with the regulations promulgated under the challenged Orders and the court later vacate those Orders or deem them otherwise unenforceable, Movants would have no recourse to obtain a refund of the money paid for postage under the vacated rate system. The applicable statute does not

permit a recoupment. *See* 39 U.S.C. § 3681 (specifically barring the retroactive refund or reimbursement of "any amount paid under any rate or fee" which is later found on judicial or administrative review to have been unlawfully high). Thus, any payments made in excess of the legally permitted rate are irreparably lost and will not be subject to "adequate compensatory or other corrective relief . . . at a later date." *Compare Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925 (rejecting harm stemming from the ordinary costs of bringing litigation); *see also Robertson v. Cartinhour*, 429 F. App'x 1, 3 (D.C. Cir. 2011) (holding that economic injury was irreparable when there was a risk the defendant would "dissipate the only assets available for relief"); *Smoking Everywhere, Inc. v. U.S. Food & Drug Admin.*, 680 F. Supp. 2d 62, 77 (D.D.C.) (noting that a party's harm was irreparable "because plaintiffs cannot recover money damages against [the agency]"), *aff'd sub nom. Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891 (D.C. Cir. 2010).

Nor is the likely harm limited to overpayment. As postage rates increase, both nonprofit and commercial mailers of market dominant products will suffer devastating harm to their businesses and organizations. The record before the Commission already evidences that severe price spikes will weaken the nonprofit sector's ability to deliver beneficial services to the public, cause periodicals mailers to cut circulation frequency (or leave the print market altogether), and cause commercial mailers to curtail marketing campaigns and consumer services. *See, e.g.*, ANM *et al.* Comments (Mar. 1, 2018) at 68–70; *see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (holding that a business faces irreparable harm when, absent a stay, its business would be destroyed). This is particularly true given the extent of the increase (potentially seven percent or more above CPI, depending on the density and retirement calculations) and the total lack of predictability as to when the increase will be in effect. At a time when the Postal Service is already having well-documented difficulties meeting its

service requirements, the additional uncertainty added by the Orders will be too much for some parties to bear. And once these parties leave the mail, they will be unlikely to return.

IV. A STAY PRESENTS NO SUBSTANTIAL HARM TO OTHERS

In contrast to the significant and irreparable harm postal customers will suffer under the new rules, no other party, including the Postal Service, will be substantially harmed by a stay. A stay of the final rules simply preserves the status quo, and despite the Commission's warnings in Order No. 5763 of "imminent peril," there is no danger that the Postal Service will be put at significant financial risk before the court issues a decision. *See, e.g.*, Order No. 5763 at 298 (characterizing the "near-term financial instability of the Postal Service" as "a source of imminent peril").

The Commission found in Order No. 4257 that the Postal Service has achieved short-term financial stability under the existing system. Order No. 4257 at 166. The Commission defines short-term financial stability as the Postal Service's ability "to meet its operational needs using mail revenue, unused borrowing authority, and accumulated cash reserves." *Id.* at 161. The Commission found that the Postal Service was able to pay all of its operating expenses from these sources every fiscal year from 2007 through 2016 except for 2012. *Id.* at 165. It reached this conclusion even though the Postal Service had no available borrowing authority for the fiscal years 2012 through 2016. *Id*. The Postal Service's cash reserves at the end of Fiscal Year 2016 stood at $8.077 billion.

By the end of Fiscal Year 2020, the Postal Service had nearly doubled its cash reserves to $14.358 billion. USPS FY2020 10-K Annual Report at 19. Its revenue has increased every year since FY 2017. *Id*. Even during 2020, in the midst of a global pandemic and economic downturn, the Postal Service just reported revenue increases of more than $1 billion over the same period last

year. *See* National Trial Balance, Statement of Revenue and Expenses Reports for Nov 2020, Statement of Revenue and Expenses, November 2020 FY21.xls, line 215. The Postal Service had $1 billion available under its standard $15 billion borrowing authority, and an additional $10 billion in borrowing authority available to it through the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. Law 116-136.[4] *See also* USPS FY2020 10-K Annual Report at 19, 21. The COVID relief bill passed by Congress on December 21, 2020 and signed by the President on December 27, 2020 effectively converts this loan to a grant by removing any obligation to repay the funds disbursed by the Treasury. *See* Consolidated Appropriations Act, H.R. 133, sec. 801. The result is that the Postal Service now has over $25 billion in liquidity—a far better short-term position than when Order No. 4257 was issued, achieved under the status quo of the existing system of regulation. There is no reason to believe these trends will not continue, and even if they do not, the Postal Service is well positioned from a cash perspective to weather any temporary setbacks that might occur while the appeal is pending.

Nor can it be argued that a delay in providing the Postal Service with additional rate authority will unduly inhibit its ability to fund projects necessary for allowing it to achieve longer-term financial stability. While neither the Postal Service nor the Commission have identified the amount of capital investment necessary to improve Postal Service performance, the nearly $25 billion in liquidity the Postal Service now holds could certainly fund major improvements. From Fiscal Years 2011 through 2015, the Postal Service spent a total of $4.3 billion on 48 investment projects, including at least $2 billion on non-facility related "generative" investment projects

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[4] The CARES Act authorized the Postal Service to borrow these funds if it determines that it will not be able to fund operating expenses without borrowing money due to the COVID-19 emergency. Pub. Law 116-136, § 6001(b). The fact that the Postal Service has not made such a determination and availed itself of these funds is further evidence that the Postal Service is able to cover its operating expenses and maintain short-term financial stability under the status quo.

designed to enhance operations and provide economic benefits. *See* USPS Office of the Inspector General, *Audit Report: Projected Savings and Returns on Capital Investment Projects*, Report No. 20-194-R21, at 4–5 (Dec. 21, 2021). With its existing cash reserves and $1 billion in available unrestricted borrowing authority, the Postal Service could easily increase its capital investment above these historical levels without additional funding. Of course, it is a matter of pure speculation as to whether further capital spending would improve the Postal Service's financial position, and the Postal Service has not tracked actual savings and return on investment data in a way that would allow outside parties to assess whether prior investments achieved expected results. *See id.* at 1.

Finally, even if the Postal Service were to prevail in its appeal, its use of the additional rate authority authorized by the final rules would only be delayed by several months. The Commission states that additional rate authority will be available to the Postal Service in March of 2021, assuming the Commission makes its determinations of the available density and retirement rate authority no later than the issuance of the Annual Compliance Determination. Order No. 5763 at 276. The Governors would then need to approve prices using this authority, and the Postal Service would need to provide 90 days' notice before implementing the prices. The earliest prices could take effect would be some time in the summer of 2021, at which point the appellate proceedings will already be well underway. The limited delay the Postal Service would experience in implementing rates while awaiting the court's decision would not have a material impact on the Postal Service's finances or the ability of the rules to fulfill their stated purpose once fully implemented.

V. THE PUBLIC INTEREST STRONGLY FAVORS A STAY

The public interest factor assumes particular importance in this case. The Commission's actions implicate issues such as government policy, incentive regulation over a public service, and statutory interpretation – matters of substantial public concern. The Commission's final rules govern the pricing authority that the Postal Service commands over roughly 130 billion pieces of mail. This mail volume accounts for nearly three-fifths of the operating revenues of an organization with the mandate to offer a "fundamental service" to the nation "at fair and reasonable rates." *See* USPS FY2020 10-K Annual Report at 1, 4. Thus, in assessing the stay application, the Commission "should pay particular regard for the public consequences" when weighing Movants' request for equitable relief. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (quoted in *Bauer v. DeVos*, 325 F. Supp. 3d 74, 106 (D.D.C. 2018) (administrative agency must weigh the same equities as would a court in determining whether a stay is required).

Here, the public consequences of denying Movants' application would be dire. As explained above, if the Postal Service were to implement significantly above-CPI rate increases on market dominant mail pending judicial review, Movants would suffer irreparable harm. This harm is not merely a private concern, given the nature of Movants' members: Movants' interests are part and parcel with the public interest.

Movants represent large-volume mailers of magazines, charitable fundraising appeals, educational campaigns, and calls to action. This mail matter has long been recognized by Congress and by the Commission for its educational, cultural, scientific, and informational (ECSI) value. Indeed, Periodicals mail has had preferred status since the earliest days of the Postal Service because of its intrinsic societal value, as Congress recognized when it enacted the PAEA and retained statutory provisions for recognizing the ECSI value of certain mail matter. *See* 39 U.S.C.

§ 3622(c)(11). Nonprofit mailers have a statutory right to mail certain products at reduced rates, *see* 39 U.S.C. § 3626, indicating a policy determination that nonprofit mailers provide a public good. *See* Postal Rate Comm'n, Docket No. SS86-1, *Report to the Congress: Preferred Rate Study*, at 9 (June 18, 1986) ("Postal rates have reflected public policy from the earliest days of the republic."). A denial of Movants' stay application would therefore negatively impact the public interest.

The Commission must also remain mindful that "[t]he public interest inquiry primarily addresses impact on non-parties rather than parties." *CTIA – The Wireless Association v. City of Berkeley, California*, 928 F.3d 832, 852 (9th Cir. 2019). Here, volume loss caused by above-CPI price increases will negatively impact readers of print magazines, newspapers, and newsletters, catalog shoppers, nonprofit organizations, donors, and printers. A wide swath of American consumers, businesses, and tax-exempt organizations would be harmed by the denial of a stay.

Finally, the public interest supports a stay for the reasons explained in Section II(A), *supra*: in granting the Postal Service the power to impose annual price increases in excess of the CPI, the Commission has exceeded its statutory authority. The unambiguous language of the PAEA mandates that the CPI cap be a "requirement" of the system for regulating market dominant rates and classes. Congress spoke clearly on this issue, and abrogation of the price-cap violates Congress' will. "When the alleged action by the government violates federal law, the public interest factor generally weighs in favor of the plaintiff." *Western Watersheds Project v. Bernhardt*, 391 F. Supp. 3d 1002, 1026 (D. Or. 2019); *see also Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 33 (D.D.C. 2018) ("there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate.").

V. **CONCLUSION**

If implemented, the final rules will cause irreparable harm to mailers. Even if Movants succeed in their appeal, mailers will never recover the postage they have paid while illegal rates were in effect. Worse, some mailers and related businesses and organizations will be forced to shutter their operations. The Postal Service, by contrast, will suffer minimal direct impact if it must refrain from raising rates above inflation while the appeal is pending. Thus, even if the Commission is confident it will prevail before the court, equity and prudence counsel for staying the final rules until the appeal is resolved. Movants therefore respectfully request the Commission grant this motion.

Respectfully submitted,

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