

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Chairman;
Ashley E. Poling, Vice Chairwoman;
Mark Acton;
Ann C. Fisher; and
Michael Kubayanda

Statutory Review of the System
for Regulating Rates and Classes
for Market Dominant Products

Docket No. RM2017-3

ORDER DENYING STAY

(Issued January 19, 2021)

I. INTRODUCTION

On December 28, 2020, six parties jointly moved the Commission to stay the effective date of final rules recently promulgated by the Commission in this docket pending review by the United States Court of Appeals for the District of Columbia Circuit.¹ For the reasons discussed below, the Motion is denied.

¹ 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 (Motion).

II. BACKGROUND

Pursuant to 39 U.S.C. § 3622(d)(3), the Commission in December of 2016 initiated a review of the ratemaking system for Market Dominant postal products in order to determine if that system had achieved the 9 statutory objectives specified by the Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3198 (2006), taking into account the 14 statutory factors also specified in that statute.² On December 1, 2017, the Commission released its findings, in which it concluded that the Market Dominant ratemaking system had not achieved the PAEA's statutory objectives, taking into account the statutory factors.³ Accordingly, pursuant to 39 U.S.C. § 3622(d)(3), the Commission began the task of “by regulation[] mak[ing] modification[s] or adopt[ing] [an] alternative system . . . as necessary to achieve the objectives.”⁴ Following a Notice of Proposed Rulemaking⁵ and a Revised Notice of Proposed Rulemaking,⁶ that process ultimately culminated in a final order on November 30, 2020, in which the Commission adopted rule revisions that were designed to rectify the shortcomings of the existing ratemaking system identified in Order No. 4257 and to facilitate achievement of the PAEA's statutory objectives.⁷

² See 39 U.S.C. § 3622(d)(3) (“Ten years after the date of enactment of the Postal Accountability and Enhancement Act and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c).”)

³ Order on the Findings and Determination of the 39 U.S.C. § 3622 Review, December 1, 2017 (Order No. 4257).

⁴ See 39 U.S.C. § 3622(d)(3) (“If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.”).

⁵ Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products, December 1, 2017 (Order No. 4258).

⁶ Revised Notice of Proposed Rulemaking, December 5, 2019 (Order No. 5337).

⁷ Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products, November 30, 2020 (Order No. 5763).

Movants have sought review of Order Nos. 4257 and 5763 in the Court of Appeals.⁸ They argue that the Commission should stay the effective date of the final rules, which took effect on January 14, 2021.⁹ The Postal Service opposes the Motion.¹⁰

III. COMMISSION ANALYSIS

An agency may postpone the effective date of action taken by it, pending judicial review, when justice so requires. See 5 U.S.C. § 705. In analyzing such a motion, the Commission uses the four-part preliminary injunction test articulated in *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).¹¹ That test sets forth four factors to be considered: (1) the likelihood of success on the merits; (2) whether irreparable harm will occur to the requesting party if relief is not granted; (3) whether irreparable harm will occur to other parties if relief is granted; and (4) the public interest.¹² The Commission discusses each of these factors below.

A. The Likelihood of Success on the Merits

Courts place particular emphasis on the first *Jobbers* factor, the moving party's likelihood of success on the merits, often treating it as dispositive and declining to

⁸ Motion at 1-2. See Clerk's Order, No. 17-1276 (D.C. Cir. filed Dec. 29, 2020) (consolidating Case Nos. 17-1276, 20-1505, and 20-1510).

⁹ Order No. 5763 at 370 (stating that revised rules are to take effect 30 days after publication in the *Federal Register*); System for Regulating Market Dominant Rates and Classifications, 85 Fed. Reg. 81124 (December 15, 2020).

¹⁰ Opposition of the United States Postal Service to Motion for Stay Pending Judicial Review, January 4, 2021 (Postal Service Opposition).

¹¹ See Docket No. R2013-11, Order Denying Stay and Establishing Schedule for Reporting Requirements, May 2, 2014, at 7-8 (Order No. 2075) (adopting the *Jobbers* test as the standard for evaluating motions under 5 U.S.C. § 705).

¹² *Jobbers*, 259 F.2d at 925; see also *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009).

consider the other factors if it is not met.¹³ Movants argue that they are likely to prevail on the merits of their appeal for two reasons. First, they maintain that the Commission exceeded its statutory authority in promulgating the rule revisions it adopted in Order No. 5763. Motion at 2-5. Second, they maintain that the final rules adopted by the Commission are arbitrary and capricious. *Id.* at 5-7.

1. The Commission's Statutory Authority

With respect to the Commission's statutory authority, Movants characterize Order No. 5763 as having found that "the requirements of [paragraphs] (d)(1) and (d)(2) . . . may be discarded . . . because [paragraph] (d)(3) follows them sequentially." Motion at 3. They argue that this violates the plain language of 39 U.S.C. § 3622 and that there is "no authority holding that the third-in-order requirement in a statute somehow supersedes the prior two." *Id.*

Movants assert that the PAEA requires any ratemaking system established by the Commission under section 3622, whether promulgated under subsection (a) or under paragraph (d)(3), to limit price increases to no greater than CPI-U. *Id.* at 2-3. Movants argue that nothing in the PAEA expressly empowers the Commission to revoke specific provisions within section 3622, such as the price cap provisions contained in paragraphs (d)(1) and (d)(2). *Id.* at 3-4. Movants maintain that while paragraph (d)(3) requires the Commission to review its initial implementing regulations after 10 years, any revisions to those regulations are subject to the same requirements that applied when they were initially promulgated pursuant to subsection (a). *Id.* Movants argue that "Congress demonstrated that it knew precisely how to allow the

¹³ See, e.g., *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019) (citations omitted); *Greater New Orleans Fair Housing Action Center v. United States Dep't of Housing & Urban Development*, 639 F.3d 1078, 1083 (D.C. Cir. 2011) (citations omitted).

Commission to authorize above-CPI pricing authority” if it had been Congress’s intent to do so. *Id.* at 3.

Movants argue that the Commission’s interpretation of section 3622 is constitutionally impermissible because “Congress cannot grant an agency the ability to amend or repeal statutes.”¹⁴ Movants also argue that certain statements made by Senator Susan Collins as to the legislative intent behind section 3622(d)(3), which the Commission cited to in Order No. 5763 and in prior orders, cannot override the PAEA’s text, and, in any event, do not support the Commission’s interpretation of section 3622.¹⁵

The Postal Service responds that Movants misrepresent the Commission’s analysis of its statutory authority in Order No. 5763 by focusing solely on the sequencing of the paragraphs within subsection (d) and ignoring the Commission’s much more extensive analysis with respect to section 3622’s plain language and structure. Postal Service Opposition at 3-4. The Postal Service asserts that Movants’ statutory interpretation of section 3622 is incorrect, as are their arguments regarding the constitutionality of the Commission’s interpretation of section 3622 and the use of Senator Collins’ statements. *Id.* at 3-5.

Commission analysis. Movants’ arguments were all specifically addressed in Order No. 5763 and in prior orders. Movants misrepresent the Commission’s interpretation of section 3622 as having been based primarily on the sequencing of the paragraphs within subsection (d) of section 3622. In actuality, the Commission’s interpretation of section 3622 was grounded first and foremost in the statute’s plain language. Paragraph (d)(3) plainly states that:

Ten years after the date of enactment of the [PAEA] . . . the Commission shall review the [ratemaking] system . . . established under [section 3622]

¹⁴ Motion at 4-5 (citing *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)).

¹⁵ Motion at 4-5 (citing *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines . . . that the system is not achieving the objectives . . . , taking into account the factors . . . , the Commission may, by regulation, make such modification or adopt such alternative system . . . as necessary to achieve the objectives.

39 U.S.C. § 3622 (d)(3). Giving the words in this provision their ordinary and unambiguous meaning in the absence of specific statutory definitions, the Commission interpreted paragraph (d)(3) to say that if the Commission's required review of the ratemaking system determined that the ratemaking system was not achieving the PAEA's statutory objectives, taking into account the statutory factors, then the Commission had discretion to, by regulation, either make changes to the existing ratemaking system or replace the existing ratemaking system with a different ratemaking system. Order No. 5763 at 40-42. The Commission noted that the only limit paragraph (d)(3) placed on the Commission's ability to make such changes was that they must be "necessary" to achieve the statutory objectives. *Id.* at 42, 46.

Based on both the text and structure of section 3622, the Commission explained that paragraph (d)(3)'s scope unambiguously extends to all aspects of the existing ratemaking system under section 3622. *Id.* at 42. The Commission found that the consistent use of the word "system" throughout section 3622 indicated that all of the provisions of section 3622 formed part of the same "system" of ratemaking that was subject to modification or replacement under paragraph (d)(3). *Id.* at 42-43. The Commission found that this conclusion was *confirmed* by the structure of subsection (d), in which paragraph (d)(3)'s review provision follows the price cap provisions set out in paragraphs (d)(1) and (d)(2), but that was far from the only basis for the Commission's conclusion. *Id.* at 43. That conclusion was also based on textual differences between paragraph (d)(3) and subsection (a), as well as section 3622's overall structure, in which any regulatory action taken under paragraph (d)(3) is premised on a finding that the ratemaking system established under subsection (a)—which was required to include certain mandatory features including the price cap provisions that Movants are

particularly concerned with—has failed to achieve the statutory objectives, taking into account the statutory factors. *Id.* at 43-45.

The Commission also specifically addressed the argument that paragraphs (d)(1), (d)(2), and (d)(3) are *each* requirements of the ratemaking system, and that the scope of the Commission's authority under paragraph (d)(3) is limited to the scope of the Commission's authority under subsection (a). *Id.* at 48, 51-55. The Commission found that this argument ignored the actual text of section 3622, including the consistent use of the word "system" and the fact that paragraph (d)(3) does not place any limit on the Commission's authority to promulgate a modified or alternative ratemaking system other than that such changes must be necessary to achieve the statutory objectives. *Id.* at 48, 52-53. The Commission also found that this argument ignored textual and structural differences between paragraph (d)(3) and subsection (a), as well as the overall structural context of section 3622. *Id.* at 48, 54-55.

The Commission also specifically addressed the argument that if Congress had intended to permit the price cap to be abrogated, it would have done so explicitly. As the Commission has explained, it was unnecessary for paragraph (d)(3) to include a sunset provision with respect to the CPI-U price cap provisions or otherwise to explicitly reference them because paragraph (d)(3) does not automatically remove the CPI-U price cap (or any other feature of the existing ratemaking system). *Id.* at 49-50. Congress's provision that the Commission *may* make modifications to the existing ratemaking system or adopt an alternative ratemaking system *as necessary to achieve* the PAEA's statutory objectives is both permissive and highly dependent on the findings from the Commission's required review of the existing ratemaking system. If the Commission had found that the existing ratemaking system was achieving the PAEA's statutory objectives, taking into account the statutory factors, the Commission's authority under paragraph (d)(3) would not have been invoked and the existing ratemaking system would have remained unchanged. *Id.* Similarly, if the Commission had found that the ratemaking system was not achieving the statutory objectives, taking

into account the statutory factors, but that failure was not attributable to the CPI-U price cap provisions, then there would have been no need to address those provisions.

The Commission also specifically addressed Movants' constitutional arguments. With regard to the Presentment Clause, the Commission first noted that the promulgation of rules by an administrative agency does not constitute a legislative act. Order No. 5337 at 53-54. Paragraph (d)(3) does not repeal anything; it expressly *authorizes* the Commission to, by regulation, take action to execute the law by remedying a failure to achieve the PAEA's statutory objectives, including, if necessary, by adopting an alternative to the existing CPI-U price cap system. Order No. 5763 at 56-57. The Commission also found that cases such as *Clinton* are distinguishable from the instant case, particularly because under the PAEA, the Commission's discretion in promulgating regulations pursuant to paragraph (d)(3) is circumscribed by the 9 statutory objectives set out in section 3622(b).¹⁶

Finally, the Commission specifically addressed Movants' arguments concerning Senator Collins' statement in Order No. 5763 and prior orders. The Commission found that floor statements by key individuals, such as legislative sponsors, can help illuminate the purpose of a piece of legislation.¹⁷ The Commission also found that Senator Collins' statement confirmed that the congressional sponsors of the PAEA

¹⁶ Order No. 5337 at 54-55. *MCI*, which Movants cite in their Motion, is similarly distinguishable. In that case, the Supreme Court found that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI*, 512 U.S. at 229. That case, however, involved a statute that required regulated entities to file tariffs with a regulatory body, but authorized the regulatory body to "modify any requirement made by or under . . . this section . . ." *Id.* at 224. The question was whether the regulatory body's ability to make such "modifications" permitted it to dispense with the requirement that regulated entities file tariffs at all. *Id.* at 220. The Court found that it could not, because the tariff-filing requirement formed the "heart of" the statute in question. *Id.* at 229.

Unlike the statute at issue in *MCI*, which permitted modifications to a requirement but not abrogation of the requirement itself, the PAEA expressly contemplates that the requirements of the ratemaking system promulgated in its initial form under subsection (a) are subject to modification or replacement under paragraph (d)(3) if the Commission finds, after reviewing the ratemaking system 10 years after the PAEA's enactment, that the ratemaking system as promulgated under subsection (a) has failed to achieve the PAEA's statutory objectives, taking into account the statutory factors.

¹⁷ Order No. 5763 at 64-65; Order No. 5337 at 45 (citing *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976)).

contemplated that the Commission would have broad discretion following its statutory review of the ratemaking system—including deciding whether to maintain the price cap in its existing form, modify it, or replace it. Order No. 5763 at 62-64. Importantly, Senator Collins' statement was not the sole or even the primary basis for the Commission's interpretation; it merely served to confirm the reasonableness of the Commission's interpretation to the extent that section 3622 might be construed as ambiguous. Order No. 5763 at 61-65.

Throughout each step of this proceeding, the Commission has exhaustively responded to comments addressing its legal authority, including comments lodging the same objections that Movants raise in this Motion. See Order No. 4258 at 4-25; Order No. 5337 at 16-58; Order No. 5763 at 32-71. The Commission has comprehensively evaluated section 3622 pursuant to the framework set out in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and found that paragraph (d)(3) unambiguously grants the Commission the authority to modify or replace any part of the ratemaking system, including the CPI-U price cap provisions, as necessary to achieve the PAEA's statutory objectives. See Order No. 4258 at 14-25; Order No. 5337 at 33-44; Order No. 5763 at 32-59. Moreover, the Commission has found that even if paragraph (d)(3) were construed to be ambiguous, the Commission's interpretation of paragraph (d)(3) is reasonable and thus would be entitled to *Chevron* deference. See Order No. 4258 at 14-25; Order No. 5337 at 44-57; Order No. 5763 at 60-68. In light of the extensive analysis the Commission has already applied to this issue, especially given that Movants have not raised any arguments that have not already been addressed, the Commission finds it unlikely that Movants would prevail on the merits of their arguments on appeal.

2. The Alleged Arbitrariness of the Final Rules

With respect to the alleged arbitrariness of the final rules adopted by the Commission, Movants argue that "the Commission has failed to establish that the Postal

Service suffers from a revenue problem rather than a cost control problem.” Motion at 5. They assert that the Postal Service’s revenues have increased every year since FY 2017, but its operating expenses have increased by greater amounts. *Id.* They assert that the final rules provide multiple forms of additional rate authority for the Postal Service but no mechanisms or penalties to force the Postal Service to restrain its costs. *Id.* at 5-6.

In the same vein, they argue that the final rules weaken the existing ratemaking system’s incentives for efficiency. *Id.* at 6. In particular, they state that “[e]ven 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.” *Id.*

Movants also argue that “the density authority is . . . 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.” *Id.* They assert that “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[,]” but “the Commission’s rules would provide the Postal Service with additional rate authority to offset losses that . . . do not exist, and . . . would . . . provid[e] the Postal Service with far more rate authority than the Commission contemplated when it developed this proposal” *Id.* at 6-7. They maintain that “[t]he Commission’s failure to resolve this contradiction or modify its proposal in light of changes in the industry over the past year . . . render its final rule on density authority unlawful.” *Id.* at 7.

The Postal Service responds that cost reductions and efficiency gains are not the sole objective for the ratemaking system, but must be balanced against other statutory objectives such as the Postal Service’s financial stability and whether rates are just and reasonable. Postal Service Opposition at 6, 7. The Postal Service states that in identifying the cause of its net losses it is false to assume that there is a binary choice between “revenue” and “costs,” as opposed to both. *Id.* at 6. The Postal Service

argues that Movants are essentially trying to have it both ways by arguing that only a strict application of a CPI-based price cap is sufficient to incentivize efficiency and cost control, while arguing at the same time that the Postal Service's losses over the past 14 years, which all occurred under a strict CPI-based price cap, were due primarily to insufficient cost controls. *Id.* at 6-7. The Postal Service asserts that the record in this docket establishes that the cost-savings opportunities available to the Postal Service are limited, which undermines Movants' argument that the Postal Service's losses are attributable solely to insufficient cost controls. *Id.* at 7. The Postal Service states that Movants have not identified any cost-savings opportunities large enough to negate the need for additional revenue. *Id.* at 7-8. Finally, the Postal Service maintains that, contrary to Movants' argument, the density-based rate authority mechanism does account for differences between Market Dominant and Competitive products with respect to mail density. *Id.* at 8. It accomplishes this in two ways: first by calculating Market Dominant density and total density separately and using whichever produces less rate authority, which protects Market Dominant mailers from being harmed by negative volume changes in Competitive products; and second, by implicitly accounting for the relative cost elasticities of each cost segment. *See id.* at 8.

Commission analysis. As the Commission has explained, the modifications to the ratemaking system adopted in this docket were necessary to achieve the PAEA's statutory objectives pursuant to 39 U.S.C. § 3622(d)(3). Order No. 5337 at 70-71, 88-94, 153, 163-165; Order No. 5763 at 72-79, 100-107, 194-196, 269, 341-342. In Order No. 4257, the Commission identified deficiencies with the existing ratemaking system that prevented it from achieving the PAEA's statutory objectives. Of particular relevance with respect to Movants' allegations are the Commission findings with respect to Objectives 1, 5, and 8.

Objective 5 provides that the ratemaking system is to "assure adequate revenues, including retained earnings, to maintain financial stability." 39 U.S.C. § 3622(b)(5). The Commission found that while the existing ratemaking system had generally enabled the Postal Service to achieve short-term financial stability, medium-

and long-term financial stability had not been achieved because total revenue had been inadequate to cover total costs, resulting in the Postal Service suffering a net loss every year during the first decade of the PAEA era. Order No. 4257 at 165-169, 247-249. Over time, the accumulation of net losses resulted in accumulated deficits, which prevented the Postal Service from being able to achieve retained earnings. *Id.* at 169-171. The Commission determined that the Postal Service had not had any working capital (assets in excess of liabilities), its capital expenditure ratio had declined, and its debt ratio had steadily increased. *Id.* at 172-175.

Objective 1 provides that the ratemaking system is to “maximize incentives to reduce costs and increase efficiency.” 39 U.S.C. § 3622(b)(1). The Commission found that the Postal Service had been able to reduce costs and increase operational efficiency, but not by enough to achieve financial stability. Order No. 4257 at 184-198, 203-208, 216-219, 221-226. The Commission noted that the Postal Service’s unique cost structure constrained its ability to further reduce costs—specifically its pool of common costs; the labor-intensive nature of its business; its universal service obligation; and its limited ability due to binding arbitration requirements to set wage rates, adjust its employee complement, and/or reduce workhours. *Id.* at 198-200.

Objective 8 provides that the ratemaking system is to “establish and maintain a just and reasonable schedule for rates” 39 U.S.C. § 3622(b)(8). The Commission found that while rates had been just for mailers, in terms of not being excessive, rates had nevertheless not been reasonable because rates for certain products and mail classes had been insufficient to cover their attributable costs. Order No. 4257 at 142-145, 226-236. The Commission attributed this, at least in part, to the price cap limitation. *Id.* at 236.

The Commission made specific findings as to why the existing ratemaking system had been unable to achieve these objectives. Specifically, the Commission found that:

[t]he operating environment on which the PAEA was designed changed quickly and dramatically after the PAEA was passed, and this made it challenging for the ratemaking system under the PAEA to achieve the goals

it was designed to achieve. At the time it created the new PAEA system, Congress anticipated that the CPI-U price cap would enable the Postal Service to achieve sufficient revenues to cover all of its operating costs and statutorily mandated obligations while at the same time motivate the Postal Service to cut costs and become more efficient. This judgment was based on the appearance of the Postal Service's financial position being relatively stable in FY 2006 and the observable [pre-PAEA] correlation between increases in Postal Service expenses, Postal Service revenues, and the CPI. Generally, Market Dominant revenue had been increasing from FY 1997, reaching its peak in FY 2006.

However, after the enactment of the PAEA, a number of converging macro-level circumstances such as the Great Recession, a rare period of deflation post-Great Recession, and emergent technological trends contributed to the Postal Service's inability to adequately respond to Postal Service-specific challenges such as declining mail density, newly imposed statutory retirement obligations, and long-standing issues with non-compensatory rates. While the nature of Postal Service-specific challenges such as the longer-term diversion of mail to electronic forms of communication may have been somewhat foreseeable, their coincident impact was accelerated by circumstances occurring after the PAEA's enactment, rendering the speed and extent of their impact unforeseeable at the time of the PAEA's enactment. Therefore, [from FY 2007 to FY 2016] the correlation between the growth in Postal Service expenses and revenue and the growth in CPI began to diverge. This sudden divergence made it extremely challenging for the Postal Service to manage retained earnings through sustained net income.

The existing ratemaking system was unable to adequately respond to this confluence of circumstances. The Postal Service was unable to generate sufficient revenue to cover its total costs, thereby resulting in a net loss for each and every year of the PAEA era. The consecutive net losses resulted in an accumulated deficit. The Postal Service was unable to cover the revenue shortfall despite maximum use of its borrowing authority and a sharp decline in capital investments. While some cost reductions and efficiency gains were achieved post-PAEA, they were insufficient to achieve overall financial stability and/or retained earnings.

Order No. 5763 at 282-284 (citing Order No. 4257 (internal citations and marks omitted)). The breakdown in correlation between CPI-U and the Postal Service's costs

and revenue is consistent with Movants' observations concerning the Postal Service's operational expenses increasing by greater amounts than revenue.

Movants focus only on cost control and operational efficiency under Objective 1, but 39 U.S.C. § 3622(d)(3) requires a modified or alternative ratemaking system to be designed to balance *all* of the PAEA's objectives, including Objectives 5 and 8. Order No. 5763 at 269, 301, 303. Throughout this docket, the Commission has sought to tailor modifications to identified deficiencies with the existing ratemaking system in a way that strikes an appropriate balance between all the statutory objectives. *Id.* at 302. The evidence reviewed in this docket indicates that existing and future opportunities for cost reductions and efficiency gains by the Postal Service may be more limited than in the past, which supports the conclusion that cost reductions and/or efficiency gains alone are not enough to address the Postal Service's challenges. *Id.* at 340-341. As the Postal Service notes, Movants do not identify any cost-savings opportunities large enough to negate the need for additional revenue.

The Commission has therefore focused on providing the Postal Service with additional revenue to address discrete sources of costs over which the Postal Service does not have direct control, and thus cannot address through cost reductions or efficiency improvements. Forcing the Postal Service to internalize costs which it has no ability to control undermines its ability to achieve medium- and long-term financial stability. Order No. 5337 at 77. Financial pressure due to such costs inhibits the Postal Service's ability to make needed capital investments in order to reduce costs and improve efficiency. Order No. 5763 at 301, 303.

The density-based rate authority and retirement-based rate authority mechanisms that the Commission has adopted are both directed at cost drivers outside the Postal Service's direct control. With respect to the density-based rate authority mechanism, the Commission determined that the Postal Service does not have direct control over exogenous increases in per-unit costs caused by declines in mail density. Order No. 5763 at 77, 87-88. Furthermore, because the portion of overall cost increases caused by such declines are not linked to the inflation rate, the existing CPI-

based ratemaking system does not provide adequate rate authority to offset them. *Id.* The Commission also determined that density-driven per-unit cost increases cannot be offset through operational changes, as these increases are the result of the costs of servicing the growing network (and other costs that only indirectly depend on volume) being spread over fewer pieces of mail. *Id.* at 90. With respect to the retirement-based rate authority mechanism, the Commission likewise determined that the Postal Service does not have direct control over such costs, and there are no meaningful cost control measures that the Postal Service could take to reduce them. *Id.* at 111, 118. With respect to the additional rate authority the Commission approved for non-compensatory mail classes, the Commission balanced the need for cost reductions and efficiency improvements against the failure of the existing ratemaking system to achieve compensatory rates and determined that, to date, cost reductions and efficiency improvements have not been sufficient in and of themselves to mitigate the Postal Service's growing revenue problem with respect to non-compensatory mail classes. *Id.* at 194-195.

Despite these targeted sources of additional revenue, however, under the modifications the Commission has adopted the Postal Service will not be able to rely on rate increases alone, because the additional revenue sources are not enough in and of themselves to enable the Postal Service to achieve financial health. Order No. 5763 at 270, 302, 341-342. The Postal Service will still have to pursue cost reductions and efficiency improvements. *Id.* The Commission determined that inclusion of the density-based rate authority mechanism in the ratemaking system should not reduce the Postal Service's incentives for efficiency because it is designed to calculate the *expected* amount of cost increase due to density declines, not the actual increase. *Id.* at 73, 85-87, 93-94, 303-304. If the Postal Service is able to offset some of that expected increase through cost reductions and/or efficiency improvements, then it will be able to retain the associated savings. *Id.* The Commission likewise determined that inclusion of the retirement-based rate authority mechanism in the ratemaking system should not

reduce the Postal Service's incentives for efficiency because all such authority must be remitted towards the corresponding statutory liabilities. *Id.* at 111, 118, 305.

Additionally, in recognition of the fact that the final rules authorize new sources of rate authority for the Postal Service, the Commission adopted new reporting requirements with respect to the Postal Service's costs and cost control efforts. Order No. 5763 at 226-241. These are designed to increase transparency for both the Commission and postal stakeholders with respect to the Postal Service's costs and cost control efforts; incentivize the Postal Service to improve the robustness of its cost-benefit analyses; and drive the Postal Service to identify the underlying causes of cost increases, which should enable it to undertake targeted responses. *Id.* at 238. The Commission also committed to exploring in a separate docket potential further incentive-based modifications to the ratemaking system in order to, *inter alia*, maximize incentives for cost reductions and efficiency gains.¹⁸

Movants' argument that the density-based rate authority mechanism would provide additional rate authority to offset losses that did not exist during FY 2020 (due to the high level of Competitive package volume during that period) misunderstands the purpose of the density-based rate authority mechanism. As the Commission has explained, the density-based rate authority mechanism is designed to offset the unavoidable increase in per-unit costs as fewer mailpieces are delivered to more delivery points; it is not designed to offset specific losses or generate a specific amount of revenue. Order No. 5763 at 28-29. Basing the density mechanism on foregone revenue or contribution, as opposed to the *expected* unavoidable increase in per-unit costs due to loss of density, would weaken the Postal Service's incentives to pursue cost reductions and increased operational efficiency by guaranteeing it compensation for foregone revenue resulting from decreases in density. *Id.* at 95.

¹⁸ *Id.* at 132-180. The Commission initiated this docket on January 15, 2021. See Docket No. RM2021-2, Advance Notice of Proposed Rulemaking Regarding Performance Incentive Mechanism, January 15, 2021 (Order No. 5816).

Because the density mechanism is designed to offset the particular, unavoidable increase in per-unit costs caused by declining density, as opposed to compensating for the losses in density themselves, it fundamentally does not matter if due to large density declines the resulting authority is higher in a particular year than the historical data would have suggested, nor does it matter if Competitive product revenue in a particular year is sufficient to offset some portion of the expected cost increases caused by the decline in density. Increases in Competitive product volume increase the number of mailpieces across which such costs are spread, and to account for this, the density formula limits the amount of rate authority generated when Competitive product volume trends are more favorable than Market Dominant volume trends. As a result, the amount of available density-based rate authority generated from loss of volume is necessarily lower when Competitive product volume is increasing. In addition, the density formula also implicitly accounts for the relative cost elasticities of each cost segment, which captures changes in the mail mix. Order No. 5763 at 94-95, App'x A at 10.

Throughout this docket, the Commission has been open and transparent. At each stage of the process, the Commission solicited and considered public comments—over 500 sets of them, spanning thousands of pages. The Commission's initial findings with respect to reviewing the initial 10 years of the existing ratemaking system spanned nearly 300 pages, *see generally* Order No. 4257, and its 3 rule proposals averaged over 250 pages each, not counting appendices and attachments, and reports by experts retained by the Commission. *See generally* Order Nos. 4258, 5337, 5763. At multiple points, the Commission has been persuaded to change its proposals based on comments received. *See, e.g.,* Order No. 5337 at 62, 64-70, 105, 132-180, 172, 193, 201, 212-231. In other instances, the Commission has thoroughly explained its reasons for declining to change its proposals in light of comments received, including comments addressing the very same issues Movants now raise. The voluminous record that has been compiled in this docket reflects that the Commission has approached it carefully and thoughtfully and has based its conclusions on substantial evidence. In the end, the

Commission was required to balance the statutory objectives using its experience and judgment. The Commission has provided justifications for all of the findings and rule revisions in this docket that are both reasonable and reasonably explained.¹⁹ Therefore, the Commission does not find that a reviewing court would find the rules adopted in this docket to be arbitrary or capricious.

B. Irreparable Harm to Movants

Movants argue that if a stay is not granted, their member organizations will be forced to pay higher postage rates with no recourse to obtain a refund if those rates are later found to be unlawful. Motion at 7-8. They argue that this will cause them to suffer “devastating” financial harm due to “severe price spikes.” *Id.* at 8. They argue that “[t]his is particularly true given the extent of the increase . . . and the total lack of predictability as to when the increase will be in effect.” *Id.*

The Postal Service responds that Movants’ concerns with respect to damaging price increases are purely speculative—first because Movants have not provided any quantitative evidence of the effect of price increases; and second because the provision of additional rate authority by the Commission does not automatically translate into price increases. Postal Service Opposition at 9-10. The Postal Service argues that Movants are once again trying to have it both ways by arguing that the Postal Service will not suffer any financial harm if the final rules are stayed during the period that appellate litigation is pending, but Movants will be financially devastated if the final rules are in effect during that same period. *Id.* at 10.

¹⁹ *Northwestern Corp. v. FERC*, 884 F.3d 1176, 1181 (D.C. Cir. 2018) (Under the Administrative Procedure Act’s arbitrary and capricious standard an agency’s decision must be reasonable and reasonably explained).

Commission analysis. As the moving party, Movants bear the burden of persuasion with respect to their claims.²⁰ Movants must offer more than bare allegations to substantiate the harm they allege that they will incur.

Movants' allegations of harm are speculative and conclusory. As the Commission has repeatedly explained, it is the Postal Service as the operator, not the Commission as the regulator, that sets prices. Order No. 5763 at 81, 270, 346. The provision of additional rate authority to the Postal Service does not automatically or necessarily translate into price increases. The ratemaking system sets the outer parameters of rates that the Postal Service may charge, but the Postal Service's Board of Governors must exercise its business judgment in proposing rates within those parameters that are attuned to what the market will bear. Furthermore, the price cap is applied at the class level, which means that the Postal Service is able to exercise its pricing flexibility independently within each mail class and raise, decrease, or hold steady prices for individual products and categories of mail within a class as long as the class complies with the class's overall price cap. The additional sources of rate authority that the Commission has approved are designed to afford the Postal Service more flexibility in setting rates that are compensatory and that address cost drivers outside of the Postal Service's direct control, but it is speculative to presume what the actual rates proposed by the Postal Service will be. And for that same reason, it is speculative to assert that any such rates would be "devastating" to Movants. Furthermore, as the Postal Service notes, even if it were known what the future rates will be, Movants do not offer any quantitative evidence that would enable an evaluation of the impact that rates under the final rules would have on their member organizations' finances.

In addition, the injury Movants allege is not imminent. The Postal Service must give 90 days' notice of its intention to increase rates before implementation, and the

²⁰ *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014).

Commission must favorably review proposed rates before they can go into effect. See final 39 CFR §§ 3030.121, 124, 125, 126, Order No. 5763 Att. A at 7-8, 12-15. Once the Postal Service proposes actual rates, the rates will be subject to Commission review in a further proceeding that utilizes notice and comment procedures, and that proceeding will be subject to judicial review. *Id.*; see also 39 U.S.C. § 3663. Movants concede that this process could not be completed before the summer of 2021, at the earliest. Motion at 11.

For these reasons, Movants have not established that they will suffer irreparable harm in the absence of a stay.

C. Irreparable Harm to Other Parties

Movants argue that granting a stay would simply preserve the status quo and would not pose a significant financial risk to the Postal Service. Motion at 9. They cite the Commission's finding from Order No. 4257 that the Postal Service has maintained short-term financial stability under the existing ratemaking system, and they assert that since Order No. 4257 was issued the Postal Service has improved both its revenues and its cash reserves. *Id.* at 9-10. They also assert that the Postal Service's liquidity has improved dramatically since Order No. 4257 was issued, largely as a result of recent legislation directed at COVID-19 relief. *Id.* at 10. They maintain that as a result of this liquidity "the Postal Service is well positioned from a cash perspective to weather any temporary setbacks that might occur while the appeal is pending[.]" as well as to "fund major improvements." *Id.* at 10. Finally, they argue that even if the Commission were to prevail on appeal, the additional rate authority approved in Order No. 5763 "would only be delayed by several months[.]" because "[t]he earliest prices [under the modified ratemaking system] could take effect would be some time in the summer of 2021, at which point the appellate proceedings will already be well underway." *Id.* at 11. They argue that such a "limited delay . . . 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." *Id.*

The Postal Service responds that Movants exaggerate the state of its liquidity. Postal Service Opposition at 10. It states that while the recent legislation Movants refer to permits the Postal Service to borrow up to \$10 billion from the U.S. Department of the Treasury, that funding is limited to covering operating expenses, and it is only available upon terms and conditions agreed to by the U.S. Department of the Treasury, with respect to which the Postal Service and the U.S. Department of the Treasury have not yet come to an agreement. *Id.* at 10-11. As a result, the Postal Service maintains that even if it were able to access that funding, it could not be used for anything other than operating expenses. *Id.* at 11.

The Postal Service asserts that the cash reserves Movants refer to “amount[] to little more than two months of operating expenses, an amount far below the level that . . . should provide a reasonable cushion for an organization like the Postal Service.” *Id.* (footnote omitted) (citation omitted). The Postal Service argues that:

The inadequacy of current liquidity is all the more palpable in light of the Postal Service’s comparably distressed financial state and outlook, its cost-control and revenue constraints, and the fact that it has preserved even this scant liquidity only by accumulating a far greater backlog of unpaid bills[,] [a]nd the cushion would only become smaller if the Postal Service were to accelerate capital spending, as [Movants] suggest.

Id. (citation omitted).

The Postal Service also states that there is no way of knowing how long appellate litigation will take, and a stay could cause real, lasting harm to it. *Id.* at 12. The Postal Service asserts that if the revised rules do not take effect for another year it could miss out on a whole year of additional rate authority, which would be particularly damaging because without density-based rate authority based on FY 2020, the acceleration in density-based cost increases stemming from volume declines associated with the COVID-19 pandemic will go uncompensated. *Id.* at 12-13. The Postal Service asserts that it has been approximately 4 years since the Commission initially determined in Order No. 4257 that the Postal Service lacked medium- and long-

term financial stability, and there is no reason to further delay remediating those deficiencies in the ratemaking system. *Id.* at 13.

Commission analysis. With respect to the Postal Service's finances, the Commission found in Order No. 5763 that they remain unstable.²¹ The Commission found that the Postal Service's liabilities far exceed its assets, and its liquidity has been maintained only by defaulting on statutorily-mandated payments.²² The Postal Service's working capital has declined since Order No. 4257 was issued in 2017, its debt ratio has increased, and it still has very limited capacity for capital expenditure.²³

The CARES Act, Pub. L. 116-636 (March 27, 2020), provided the Postal Service with \$10 billion in additional borrowing authority above and beyond the \$15 billion ordinarily available to it pursuant to 39 U.S.C. § 2005(a).²⁴ However, as the Postal Service notes, funds may only be borrowed pursuant to the CARES Act if "the Postal Service will not be able to fund operating expenses without borrowing money," and any funds so borrowed can only be used for operating expenses; they cannot be used for capital investments or to service the Postal Service's debt. *Id.* Appropriations legislation enacted on December 27, 2020 removed the requirement that the Postal Service repay funds borrowed pursuant to the CARES Act, but it did not remove the requirement that such funds can only be borrowed if necessary to fund operating expenses, and can then only be used for operating expenses. Pub. L. 116-260 § 801

²¹ Order No. 5763 at 26 (citing Docket No. ACR2019, Postal Regulatory Commission, Financial Analysis of the United States Postal Service Financial Results and 10-K Statement, Fiscal Year 2019, May 7, 2020, at 2-6 (FY 2019 Financial Analysis) (discussing the Postal Service's continuing financial instability)).

²² *Id.* (citing FY 2019 Financial Analysis at 4, 27-38 (explaining that the Postal Service has defaulted on most of the statutorily-mandated payments for Retiree Health Benefits since FY 2008, and, beginning in FY 2017, has defaulted on statutorily-mandated payments for the amortization of unfunded retirement benefits to the Federal Employee Retirement System (FERS) and the Civil Service Retirement System (CSRS)).

²³ *Id.* (citing FY 2019 Financial Analysis at 31-34).

²⁴ Pub. L. No. 116-636 § 6001(b). Only \$1 billion of the Postal Service's \$15 billion in standing borrowing authority is currently available to it. See United States Postal Service, 2020 Report on Form 10-K, November 13, 2020 (FY 2020 10-K Report).

(December 27, 2020). As a result, access to this additional borrowing authority and any associated temporary increase in liquidity would at most improve the Postal Service's short-term financial stability, meaning its ability to meet its immediate day-to-day operational needs. Order No. 4257 at 159-165. Borrowing more money to cover operating expenses, however, would do nothing to address the net losses and accumulated deficits that undermine the Postal Service's medium- and long-term financial stability, which the Commission identified in Order No. 4257 as a primary deficiency in the existing ratemaking system. *Id.* at 247-249. It is these net losses that the density-based rate authority, retirement-based rate authority, and non-compensatory class modifications to the ratemaking system adopted in Order No. 5763 were designed to address.

As the Postal Service notes, there is no way of knowing how long appellate litigation might take. Order No. 4257 identified clear deficiencies in the existing ratemaking system that have only become more acute since Order No. 4257 was issued. The final rules the Commission adopted are targeted at giving the Postal Service the tools necessary to begin remediating those deficiencies. Those tools include increased rate authority to address non-compensatory mail classes and sources of costs that are outside the Postal Service's direct control. The Postal Service's liquidity remains low and the Postal Service continues to struggle meeting its statutorily-required obligations.²⁵ Delaying the implementation and use of those tools would only make the Postal Service's immediate problems worse and its medium- and long-term financial stability more difficult to achieve. As the Postal Service asserts, if the final rules do not take effect for another year (or more), then it will be deprived of rate authority that the Commission has determined it needs to begin remediating its financial problems. Therefore, the Commission finds that staying the effective date of its final rules would have negative financial consequences for the Postal Service.

²⁵ See United States Postal Service, FY 2021 Integrated Financial Plan, November 24, 2020, at 9-10.

D. The Public Interest

Movants once again assert that the financial consequences to their members of denying a stay would be “dire,” and they assert that “[their] interests are part and parcel with the public interest” because “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[,]” resulting in “[a] wide swath of American consumers, businesses, and tax-exempt organizations . . . be[ing] harmed” Motion at 13. They also argue that the public interest supports a stay because the Commission exceeded its statutory authority in promulgating the rules adopted in Order No. 5763. *Id.*

The Postal Service responds that Movants’ claims about price increases are speculative because the provision of additional rate authority by the Commission does not automatically translate into price increases, and it is unclear whether, when, and by what amounts postal prices would actually increase under the final rules. Postal Service Opposition at 14. The Postal Service argues that Congress intended for the ratemaking system to be reasonably compensatory to provide for the postal system’s current and future needs, and as a result “the public is not harmed by correcting unlawfully and unfairly low rates.” *Id.* The Postal Service argues that “failing to do so would harm the mailing and taxpaying public by prolonging the Postal Service’s financial instability, and it would continue to unfairly privilege current ratepayers at the expense of future postal users who would benefit from the sort of investments that a more stable Postal Service could make.” *Id.* Therefore, the Postal Service maintains that “a stay would perpetuate and deepen the harm that the American public has already suffered from a financially troubled postal system and would continue to put the future financial stability of the Postal Service at risk.” *Id.*

Commission analysis. The Commission finds that the public interest favors a ratemaking system that appropriately balances all of the statutory objectives Congress established for it. The PAEA’s statutory objectives are in many respects cross-cutting and they require tradeoffs between different aspects of the public interest. Movants and

other mailers certainly have an interest in keeping postage rates as low as possible, but the Postal Service and the general public also have an interest in the Postal Service being able to generate enough revenue to remain viable as a public service. Congress charged the Commission with balancing the statutory objectives using its experience and judgment, and the revised rules the Commission has adopted in this docket are designed to achieve that end.

The Commission has found that the range of prices produced by the modified ratemaking system will be just and reasonable to both the Postal Service and to mailers. Order No. 5763 at 352-359. Moreover, given the serious financial constraints that the Commission has identified the Postal Service as operating under, implementation of the modified ratemaking system is consistent with the public's strong interest in having a viable and strong Postal Service that is capable of fulfilling its statutory and Constitutional duties as a fundamental service to the American public. See U.S. Const. art. I, § 8, cl. 7; 39 U.S.C. § 403. Therefore, the Commission does not find that staying the final rules would be in the public interest. Movants' argument with respect to the Commission's statutory authority is addressed *supra* at 4-9.

IV. CONCLUSION

The Commission finds that Movants have failed to carry their burden of persuasion with respect to the most significant *Jobbers* factor—their likelihood of prevailing on the merits on appeal. Movants have also failed to present convincing evidence to show that they would be irreparably harmed in the absence of a stay. Movants have not provided sufficient evidence to demonstrate that either the process or the ultimate substantive approaches implemented by the Commission are arbitrary or capricious. At the same time, the Commission finds that delaying implementation of the final rules adopted in this docket would prolong the Postal Service's financial difficulties and would not be in the public interest. Based on these findings, the Commission does not find good cause to stay the effective date of the final rules.

It is ordered:

The 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, filed December 28, 2020, is denied.

By the Commission.

Erica A. Barker
Secretary