

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RATE ADJUSTMENT DUE TO)
EXTRAORDINARY OR EXCEPTIONAL) Docket No. R2013-11R
CIRCUMSTANCES)

**REPLY COMMENTS OF
ASSOCIATION FOR POSTAL COMMERCE,
MPA—THE ASSOCIATION OF MAGAZINE MEDIA,
ALLIANCE OF NONPROFIT MAILERS,
DIRECT MARKETING ASSOCIATION, INC.,
AMERICAN CATALOG MAILERS ASSOCIATION,
ENVELOPE MANUFACTURERS ASSOCIATION,
EPICOMM,
MAJOR MAILERS ASSOCIATION,
NATIONAL NEWSPAPER ASSOCIATION,
AND SATURATION MAILERS COALITION
ON REMAND**

(July 6, 2015)

The undersigned mailer parties submit these reply comments pursuant to Order No. 2540. The mailers reply here to the initial comments of the United States Postal Service.

INTRODUCTION AND SUMMARY

In Order No. 1926, the Commission held that the Postal Service was entitled to an exigent rate increase to compensate for mail volume losses that were due to the 2007-2009 recession. The Commission also held, however, that at some point in time, known as the “new normal,” mail volume losses could no longer be reasonably regarded as “due to” the recession. The Commission set forth four factors for determining when this “new

normal” had occurred and the USPS could no longer recover lost contribution through an exigent surcharge: (1) whether macroeconomic indicators had returned to near historic positive trends; (2) the ability of these macroeconomic variables accurately to project change in mail volumes, and whether the predicted rate of change in mail volumes is positive; (3) whether the Postal Service had regained its ability to predict mail volumes; and (4) whether the Postal Service had demonstrated an ability to adjust operations to lower volumes. Order No. 1926 at 86. The Commission, evaluating these factors for each class of mail, found that the “new normal” was achieved by the beginning of FY 2011 for First Class Mail, the beginning of FY 2010 for Standard Mail and Package Services, and the beginning of FY 2012 for Periodicals. Order No. 1926 at 94.

The Postal Service vigorously opposed this approach in the initial phase of this docket, arguing that the effects of the 2007-2009 recession persisted well past these dates, if not forever. In Order No. 1926, the Commission rejected these arguments. The Postal Service challenged the Commission’s decision in the Court of Appeals on the theory that the Commission acted arbitrarily and capriciously in establishing its “new normal” standard as a cutoff for treating mail volume losses as due to the recession. In *Alliance of Nonprofit Mailers, et al. v. PRC*, 2015 WL 3513394 (D.C. Cir. June 5, 2015) (“*ANM*”), the Court rejected these arguments. It held that “the Commission acted well within its discretion in starting the date of the new normal separately for each class of mail,” *ANM*, Slip Op. at 14, and that “the ‘new normal’ rule was well reasoned and grounded in evidence before the Commission.” *Id.* at 17. Ultimately, the court ruled, the “new normal” standard “comfortably passes deferential APA review.” *Id.*

Having twice had its arguments rejected, the USPS returns to the well a third time in its Initial Comments. It again seeks to relitigate the “new normal” standard, putting forth many of the same arguments that were raised before and rejected by the Commission in the decision upheld by the D.C. Circuit. Introducing a novel and substantially revised definition of the “new normal,” the USPS proposes that the Commission extend the advent of the “new normal” until the beginning of Fiscal Year 2013. This would allow the USPS to recover more than \$11.4 billion through the exigent surcharge—more than four times the amount the Commission attributed to the 2007-2009 recession. Alternatively, the USPS proposes that the Commission extend the recognized onset of the “new normal” for Standard Mail by one year—from the beginning of Fiscal Year 2010 to the beginning of Fiscal Year 2011. This would allow the USPS to recover a total of \$5.8 billion from the exigent surcharge. As the mailers urged in their initial comments, the Commission should refrain from even entertaining these arguments.¹

¹ APWU and NALC take positions even more extreme than the Postal Service’s proposals. NALC urges the Commission to vacate the CPI cap imposed by 39 U.S.C. § 3622(d)(1)(E) *permanently* on the theory that the long-run decline in mail volume caused by electronic diversion, and institutional constraints on the Postal Service’s ability to cut costs, prevent the USPS from covering its costs without above-CPI rate increases. APWU asserts that, because the USPS is regulated as a species of public utility, “fairness” dictates that the Commission keep the exigent surcharge in place to promote the “long-term health of the Postal Service,” the “main criterion in an exigent rate review.” Both the APWU and NALC proposals are unlawful on their face. While Congress indeed decreed that market-dominant postal rates be subject to a form of public utility regulation, the primary regulatory constraint adopted by Congress is the CPI cap, and the exigency exception allowed by Congress is limited to the exigent circumstances defined in 39 U.S.C. § 3622(d)(1)(E), as subsequently construed by the Commission and the Court of Appeals. The exigency exception may not be used to recover losses resulting from electronic diversion, institutional constraints, or other long-term or structural causes. Order No. 864 at 25-51; Order No. 1926 at 18-19, 61, *aff’d*, *ANM*, slip op. at 6-7.

The court has provided the Commission with clear direction. The Commission need only determine how to account for volume lost to the 2007-2009 recession in the absence of the “count once” rule. Both the Postal Service and the undersigned mailers have presented simple methods for doing so, the only difference between the two being the per-piece contribution figures to be used in the math. With the court’s clear blessing, the Commission can conclude this proceeding quickly and simply by calculating the contribution lost from each class of mail until the already-determined “new normal,” announcing the new exigent authority, and revising the term of the surcharge appropriately. It would be in the best interests of the entire industry, including the Postal Service itself, for the Commission to do so and allow the industry to put its resources towards growth and innovation instead of litigation.

The Postal Service’s latest proposals should be rejected, however, even if the Commission decides to reach their merits. The USPS provides no new information that would warrant revisiting the Commission’s existing definition of the “new normal” standard.

With respect to the appropriate legal standard, the USPS, in the guise of reapplying the Commission’s “new normal” standard, would distort it beyond recognition. First, the USPS would effectively discard three of the four elements of the “new normal” standard, leaving only a one-factor standard based solely on the Postal Service’s ability to adjust to its losses. Second, the USPS would jettison the Commission’s definition of this remaining factor--the point at which the USPS has “**begun to** adjust to the extraordinary circumstances” (Order No. 1926 at 94 (emphasis added))—in favor of a more amorphous and expansive definition, which the USPS states variously as the point at which the USPS

“demonstrated the ability to *effectively* adjust in response to the level shift” (USPS Comments at 11-12), “could reasonably be expected to show effective results” (*id.* at 12), or “began to meaningfully improve” the Postal Service’s “fiscal position” (*id.* at 12-13). Third, the USPS would benchmark the effectiveness of its “response,” “results,” or “improvement” against the Postal Service’s losses from *all* causes in FY 2008-2012, not just the subset of those losses that were due to the 2007-2009 recession. USPS Initial Comments at 13, 14-17.

The USPS has offered no justification for redefining the “new normal” standard in this fashion. The Commission’s existing definition of the “new normal” reflects a careful balancing of the underlying factual and policy concerns, and has been upheld by the court. And the supposedly “irreconcilable conflict” between the Commission’s definitions of the “due to” and “necessary” clauses of the statute is a Postal Service invention. USPS Comments at 8-9. There is no conflict. The Commission has repeatedly held that the “necessary” standard is subordinate to the “due to” standard, and that losses which satisfy the former but not the latter may not be recovered by the USPS through an exigent rate surcharge. Order No. 1926 at 28-30, *aff’d*, *ANM*, slip op. at 13 (the “‘reasonable and equitable and necessary’ test . . . applies only *after* exigent causation for a loss has been established”) (emphasis in original).

With respect to the facts, the USPS does little more than rehash well known information about its fiscal situation between 2008 and 2013—information the Commission already considered in reaching its conclusions in Order No. 1926. The USPS refers to Commission statements about the Postal Service’s overall financial condition in Financial Analysis Reports—without acknowledging the distinction between

the Postal Service's overall financial condition and the extent to which that condition is "due to" the 2007-2009 recession. And the USPS admits that its finances have seen sustained improvement, even disregarding the effects of the exigent surcharge.

For similar reasons, the Commission should likewise reject the Postal Service's fallback proposal to double the total allowed exigent recovery to \$5.8 billion by delaying the recognized advent of the "new normal" for Standard Mail by one year, until Fiscal Year 2011. The Commission specifically found in Order No. 1926 that the new normal for Standard Mail began at the beginning of Fiscal Year 2010. This finding was amply supported by the record, including the testimony of USPS witness Thress, and was explicitly upheld by the Court of Appeals. The USPS has offered no cogent justification for a different outcome now.

ARGUMENT

I. THE COMMISSION SHOULD LEAVE ITS "NEW NORMAL" FINDINGS UNDISTURBED.

The purpose of the Postal Service's initial comments is clear: to persuade the Commission to revisit the "new normal" standard and allow the Postal Service to recover a staggering additional amount through the exigent surcharge. The Postal Service's preferred proposal would generate \$11.431 billion in contribution through the exigent surcharge—more than four times the total losses that the Commission initially determined were due to the 2007-2009 recession. The Postal Service's fallback proposal would generate \$5.8 billion, more than twice the total losses attributed by the Commission to the recession in Order No. 1926. The Commission should reject these extravagant demands and limit this docket to the evaluation of the financial effect of eliminating the "count once"

constraint, the only aspect of Order No. 1926 that the court overturned. The Court of Appeals explicitly upheld the Commission's definition and application of the "new normal" standard. Allowing the USPS to relitigate the standard would needlessly invite further judicial review. This would frustrate the goals of judicial economy, conservation of agency resources, and certainty throughout the industry.

In its Initial Comments, the Postal Service acknowledges that "[t]he court upheld the Commission's 'new normal' framework against the Postal Service's argument, concluding that the 'due to' provision is ambiguous and need not 'woodenly' refer to simple causation." USPS Comments at 4 (quoting Decision at 11, 13). The USPS argues, however, that the Commission should reopen the "new normal" standard for reconsideration because the Commission's formulation of the standard in Order No. 1926 creates an "irreconcilable conflict" between that standard and the Commission's interpretation of the "necessary" standard of Section 3622(d)(1)(E) in Section V (pp. 107-146) of Order No. 1926, or within the "new normal" standard itself. USPS Comments at 8-13.

To resolve this supposed conflict, the USPS would modify the Commission's "new normal" standard in three ways. First, the USPS would discard three of the four elements of the "new normal" standard upheld by the court, leaving only a one-factor standard based solely on the Postal Service's ability to adjust to its losses. Second, the USPS would replace the Commission's definition of the minimum required adjustment—the point at which the USPS has "***begun to*** adjust to the extraordinary circumstances" (Order No. 1926 at 94 (emphasis added))—with a more subjective and expansive test stated variously as the point at which the USPS "demonstrated the ability to *effectively* adjust in

response to the level shift” (USPS Comments at 11-12), “could reasonably be expected to show effective results” (*id.* at 12), or “began to meaningfully improve” the Postal Service’s “fiscal position” (*id.* at 12-13). Third, the USPS would benchmark the effectiveness of its “response,” “results,” or “improvement” against its losses from *all* causes in FY 2008-2012, not just the losses that were due to the 2007-2009 recession. USPS Comments at 13, 14-17. The USPS calculates that its proposed redefinition of the “new normal” standard warrants deferring the advent of the “new normal” for all market dominant mail to the beginning of Fiscal Year 2012 (USPS Comments at 13-21), or at least until the beginning of Fiscal Year 2011 (*id.* at 21-26).

Every link in this chain of argument was considered and rejected by the Commission in the portions of Order No. 1926 that the Court of Appeals upheld in *ANM*. First, the Commission defined the “new normal” as a balance of four distinct factors, not the fourth factor alone. Order No. 1926 at 86-94, *aff’d*, *ANM*, slip op. at 8, 11-15. The court, in upholding the four-part definition, explained, “the Commission’s ‘new normal’ test is designed to capture precisely the time when the exigent character of a circumstance dissipates—when its effects lose their exceptional character—even though the effects in some literal, but-for causal sense linger.” *ANM*, slip op. at 12. Hence, to define the “new normal” in the one-dimensional sense of the point “when the Postal Service in fact had such an ability to adjust its operations” is to ignore the underlying purpose of the standard. The Commission’s task was to determine when the effects of the 2007-2009 recession lost “their exceptional character.” The Commission made this determination through the four-factor “new normal” test.

Second, the Commission defined the fourth element of the test as the point at which the USPS has “***begun to*** adjust to the extraordinary circumstances” (Order No. 1926 at 94 (emphasis added))—not the more demanding standard now proposed by the USPS. Nothing in the Court of Appeals decision suggests any disagreement with this definition.

Third, as noted above, the Commission and the court also rejected any notion that the “new normal” encompassed the ability to recover from volume losses during 2008-2013 that were due to causes *other than* the recession. Order No. 1926 at 18-19, 28-30, 61, *aff’d*, ANM, slip op. at 6-7, 13; *accord*, USPS v. PRC, 640 F.3d 1263, 1267 (D.C. Cir. 2011); Order No. 864 at 25-51.

Fourth, the Commission also considered and rejected the Postal Service’s contention that the fourth element of the “new normal” standard is somehow inconsistent with the Commission’s analysis of the Postal Service’s ability to reduce its costs under the “necessary” standard of 39 U.S.C. § 3622(d)(1)(E). *Cf.* USPS Comments at 4-5, 8-10. There is no conflict. The Commission has repeatedly held that the “necessary” standard is subordinate to the “due to” standard, and that losses which satisfy the former but not the latter may not be recovered by the USPS through an exigent rate surcharge:

If the proposed adjustments fail to meet the “due to” test, they are prohibited even if they might otherwise be considered “reasonable and equitable and necessary.” In other words, the “reasonable and equitable and necessary” clause is subordinate to the “due to” clause and can only be applied to justify rate adjustments that have first been shown to be “due to” “extraordinary or exceptional” circumstances.

Order No. 1926 at 28-30; *accord*, USPS v. PRC, 640 F.3d 1263, 1267 (D.C. Cir. 2011); Order No. 864 at 25-51.

The USPS tries to avoid these adverse holdings by arguing that the court “explicitly invited the Commission to revisit the issue in light of the inconsistency in Order No. 1926 that the Postal Service identified at oral argument.” USPS Comments at 7 (citing *ANM*, slip op. at 17 n. 3). The USPS is grasping at straws. It acknowledges, as it must, that “the court did not require the Commission” to “revisit” the issue at all. *Id.* As in its June 8 motion, the Postal Service misreads the last sentence of footnote 3, which was dictum (“The Commission, of course, is free to consider that argument on remand.”). The USPS has misrepresented the court’s polite “stop by any time” as a formal invitation to dinner. Because the court’s *holding* upheld the Commission’s “new normal” findings in their entirety, there is no reason for the Commission to revisit these findings, whether it has been invited to or not.

Further, as the mailers explained in their initial comments, the Postal Service’s reading of footnote 3 is at odds with the main text of the court’s opinion, which disagreed with the implicit premise of the Postal Service’s argument, that the “new normal” standard must allow the Postal Service to recover any costs whose recovery is “necessary” within the meaning of 39 U.S.C. § 3622(d)(1)(E). As the court properly recognized, the “new normal” constraint implements the “due to” or causation prong of 39 U.S.C. § 3622(d)(1)(E), not the “reasonable and equitable and necessary” prong. Slip op. at 12-13. The “due to” prong is backwards-looking and assesses the amount of loss incurred by the Postal Service as a result of the Great Recession. *ANM*, slip op. at 13. The “reasonable and equitable and necessary” prong, by contrast, “applies only *after* exigent causation for a loss has been established and turns on the Postal Service’s *current* need to get back on its feet in the wake of the now-defined exigency.” *Id.* There is no need for the analyses under these prongs to be consistent because they are addressing

different statutory standards. By contrast, the “count once” and “new normal” standards must be consistent, as they both address how much lost volume was due to the recession.

The Postal Service’s *factual* arguments for resetting the advent of the “new normal” for all market-dominant mail products to Fiscal Year 2013 (or, in the alternative, resetting the advent of the new normal for Standard Mail to Fiscal Year 2011) also run headlong into the specific findings of the Commission and the court. Order No. 1926 confirms that the Commission engaged in exactly the factual inquiry the USPS claims remains open. Order No. 1926 at 86-94. The court agreed, expressly recognizing that the Commission had performed this evaluation. *ANM*, slip op. at 17 (noting that the Commission had considered and relied on macroeconomic variables in support of a finding that the Postal “Service regained its ability to adjust in 2010.”). Absolutely nothing in the court’s opinion suggests that any question remains about when the USPS could adjust to the new economic circumstances existing after the 2007-2009 recession. The Commission made findings on this issue as part of its “new normal” analysis, and the court upheld those findings as “well-reasoned and grounded in the evidence before the Commission.” Slip Op. at 17. The Postal Service grossly distorts the court’s opinion by suggesting there is more work for the Commission to do to resolve when the “new normal” arrived.

Several details of the Commission findings upheld by the court are especially telling. In particular, the Postal Service’s request that the Commission find that the “new normal” did not occur until FY 2013 directly contradicts the court’s endorsement of the Commission’s findings that the Postal Service could begin accurately projecting volumes in 2011 (*ANM*, Slip Op. at 16 (citing Order No. 1926 at 93)) and that the Postal Service regained its ability to adjust to the changing circumstances in 2010. Slip Op. at 17 (citing

Order No. 1926 at 94). Likewise, the Postal Service's request that the Commission "harmonize the cutoffs for First-Class Mail and Standard Mail," Initial Comments at 35, is incongruent with the court's express finding that "the Commission acted well within its discretion in starting the date of the new normal separately for each class of mail." Slip Op. at 14. As the court noted, the Commission reached its conclusions on this issue by relying on the Postal Service's own witness. *Id.*; *see also* PRC Hearing Tr. 117-119 (November 19, 2013) (Thress).

Because the Commission already evaluated the issue of when the "new normal" occurred for each class of mail, and as the Court upheld the Commission's findings on this topic in their entirety, nothing remains for the Commission to decide on this topic and no reason exists to take the topic up on remand. Moreover, by failing to raise its supposedly new arguments before the D.C. Circuit, the Postal Service waived its right to bring those arguments before the Commission now. A legal decision "made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). The "sound public policy that litigation should come to an end" is eminently sensible, particularly in light of the Postal Service's request in this case, which would lead to expensive and protracted proceedings that the Court did not find necessary. *See United States v. Singleton*, 759 F.2d 176, 178 (D.C. Cir. 1985); *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (recognizing that the law of the case doctrine has been applied to administrative agency proceedings and noting that the doctrine "protects parties from the expense and vexation attending multiple lawsuits, conserves judicial resources, and

fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”)
(internal citation omitted).

Consistent with this principle, courts have rejected agencies’ expansion of issues on remand to those that were already determined and not reversed by the reviewing court. See *Key*, 925 F.2d at 1060 (holding that an agency’s decision on remand could not stand where the agency exceeded the scope of the remand order by expanding its inquiry to issues already determined); see also *Calderon v. Astrue*, 683 F. Supp. 2d 273, 277 (E.D.N.Y. 2010) (holding that an administrative law judge violated the law of the case doctrine on remand by reopening and rendering a subsequent inconsistent determination on an issue beyond the scope of the original remand order).

Further, even if the law of the case doctrine did not foreclose consideration of the Postal Service’s “new normal” arguments, considering those arguments now would be needless and imprudent. Section 3663 of Title 39 requires any person adversely affected by a Commission decision to petition for review of that decision within 30 days after the decision becomes final. Under established D.C. Circuit precedent, a party may not circumvent this statute of limitations by seeking judicial review of a new decision that uses the previously adopted rule. See, e.g., *Nat’l Mining Ass’n v. U.S. Dept. of Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995); accord, *P&V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1023 (D.C. Cir. 2008); *American Road & Transp. Builders Ass’n v. EPA*, 588 F.3d 1109, 1114-16 (D.C. Cir. 2009); *Alliance for Safe and Competitive Transportation v. FMCSA*, 755 F.3d 947, 953-54 (D.C. Cir. 2014). Hence, the Postal Service’s failure to raise its arguments regarding the “new normal” standard in its briefs to the D.C. Circuit means that, if the Commission declines to re-open the “new normal”

issue on remand, that decision will be unreviewable. Thus, limiting consideration on remand to the “count once” rule will not only expedite the instant proceedings, but it will serve to limit the risk that the industry must wait another year and a half to reach closure on this issue.

II. IF THE COMMISSION REACHES THE MERITS OF THE POSTAL SERVICE’S “NEW NORMAL” ARGUMENT, IT SHOULD REJECT THOSE ARGUMENTS ON THE MERITS.

A. The Postal Service’s Proposal To Delay The Advent Of The New Normal Until FY2013

As explained above, the simplest and most efficient way to resolve this docket is to ignore the Postal Service’s arguments about the “new normal” standard altogether. If the Commission were nonetheless to consider the Postal Service’s arguments in support of its new “new normal,” however, those arguments are meritless.

The preferred form of relief proposed by the USPS in its initial comments is to extend the advent of the “new normal” until the beginning of Fiscal Year 2013, more than three years after the end of the recession. National Bureau of Economic Research, U.S. Business Cycle Expansions and Contractions (downloaded July 3, 2015, from <http://nber.org/cycles/cyclesmain.html>). The Postal Service’s case for this relief founders on several grounds.

(1) The Postal Service’s interpretation of the “new normal” standard is grossly reductionist. The “new normal” test adopted by the Commission in Order No. 1926 weighs four distinct factors, with the “new normal” occurring once “all or most” of the factors have occurred:

(1) the disruption to a sufficient number of relevant macroeconomic indicators demonstrate a return to near historic positive trends; (2) application of the macroeconomic variables accurately project[s] change, and the rate of change on Postal Service mail volumes is positive; (3) the Postal Service regains its ability to predict or project mail volumes following an extraordinary or exceptional event; and (4) the Postal Service demonstrates an ability to adjust operations to the lower volumes.

Id. at 86. The Commission stated that the new normal arrives “when all or most” of these factors occur. *Id.* Thus, it declined to place any one factor in a position of prominence. Additionally, relying on the suggestion of the Postal Service’s own witness, it concluded that “the new normal may be different for each class of mail.” *Id.*

The USPS, however, focuses on only one of these factors: the ability to adjust to lower volumes. Even if the USPS were correct that adjusting to post-recession conditions took longer than the Commission concluded, the Postal Service’s argument would fail under the other prongs of the “new normal” test. In response to the Postal Service’s insistence that the impact of the 2007-2009 recession would continue “indefinitely,” the Commission held in Order No. 1926 that “at some point there is a new economic normal that effectively ends the impact of the Great Recession on the Postal Service. At that point, any continuing volume losses are no longer due to the Great Recession, but rather are due to the interplay of other factors.” Order No. 1926 at 84, 85.

Review of the record confirms the reasonableness of the Commission’s application of the four factors. For the first factor, the Commission looked at multiple macroeconomic variables: the employment index, GDP, the Potential GDP output gap, private investment, and retail sales. All of these variables showed that the “new normal” began sometime between the second quarter of 2009 and the second quarter of 2010. *Id.* at 87-

92. This fact is unsurprising: the recession ended in June 2009. National Bureau of Economic Research, *supra*.

The Commission then “evaluated when the influence of macroeconomic variables on mail volume changes from negative to positive.” Order No. 1926 at 92-93. The Commission determined that this change occurred between 2009 and 2010 for First Class Mail, between 2009 and 2010 for Standard Mail and Package Services, and between 2011 and 2012 for Periodicals. *Id.* at 93. For Standard Mail, the Commission noted that this finding was consistent with Postal Service witness Thress’ statements at hearing that it would be “fair to call maybe 2010 through 2013 the new normal for Standard Mail.” *Id.* (internal quotations omitted).

As for the Postal Service’s ability to predict its volumes, the Commission again relied on Thress’ statements to conclude that the new normal, under this measure, “occurred between 2010 and 2011.” Order No. 1926 at 93 (quoting Tr. 1/119-20 (Thress)).

Finally, the Commission evaluated the Postal Service’s ability to adjust to the lower mail volumes that existed in the wake of the recession. Importantly, the Commission did not treat this factor as any more important than the other three factors, explaining that it only “has a bearing on when the new normal occurs.” Order No. 1926 at 94. The Commission looked Total Factor Productivity as a “good measure of the Postal Service’s ability to adjust to changing circumstances.” *Id.* Noting that the Postal Service had experienced four consecutive years of positive TFP growth despite the loss in volume,

the Commission concluded “that the new normal began in 2010, when TFP growth turned positive.”² *Id.*

(2) Equally flawed is the Postal Service’s proposal to abandon the Commission’s definition of the fourth factor—the point at which the USPS has “*begun to adjust to the extraordinary circumstances*” (Order No. 1926 at 94 (emphasis added))—in favor of a much more ambitious and amorphous definition. The Postal Service asserts that the ability to adjust to lower volumes should entail a higher degree of accomplishment than merely beginning the adjustment, and perhaps could even approach the ability to adjust *completely*. See USPS Comments at 8 (“[T]he Commission’s holding is essentially that the ‘new normal’ is the point at which Postal Service *was able* to adjust its operations in response to the shift in the level of mail volume.”) (emphasis added); see also *id.* at 10-13, 14-17 (offering variant formulations). The proposed redefinition founders on several grounds.

First, the Postal Service ignores both the language and the underlying purpose of the “new normal” standard, which implements the “due to” prong of Section 3622(d)(1)(E),

² Notably, the court endorsed the Commission’s use of Total Factor Productivity to reach the conclusion that the “new normal” began in 2010; in fact, the court suggested that the Commission could have used the same method to determine when to stop counting lost volume “due to” the recession instead of the vacated “count once” rule. Slip Op. at 17. The Postal Service’s contention in its comments that TFP “is not a good indicator” of the Postal Service’s ability to adjust (USPS Comments at 13) is in direct conflict with the court’s view. The contention is also at odds with the Postal Service’s own acknowledgement to Congress that TFP is an appropriate measure of operational efficiency, and that TFP growth shows that the USPS has been able to adjust its operations despite its institutional constraints. USPS FY 2014 Annual Report to Congress at 53. As the USPS has acknowledged, “FY2014 marks the fifth consecutive year of positive TFP growth” for the USPS. *Id.*

not the “necessary” prong. The Commission was clearly examining when the Postal Service could *begin* adjusting to the new circumstances. Notably, the Commission used the present progressive tense in describing the rationale behind this fourth factor, indicating that required adjustment is a process, not a finished achievement: “if the Postal Service *is adjusting* to the circumstances, then the circumstances are in the realm of predictability and thus, more normal than extraordinary or exceptional.” Order No. 1926 at 94 (emphasis added). The Commission then expanded on this point, explaining that losses can no longer be considered “due to” an exigent circumstance once “the Postal Service *has begun* to adjust to it.” *Id.* (emphasis added).

Second, the Postal Service’s proposed redefinition of the ability-to-adjust test is hopelessly subjective and impractical to administer. The USPS, while insisting that the standard of “beginning” to adjust is inadequate, concedes that a standard defined as “completely” adjusting to reduced volume would be unattainable. USPS Comments at 11. This raises the obvious question of what intermediate standard should apply instead—i.e., what share of the exigent volume losses should the USPS be allowed to recover before the ability-to-adjust standard is satisfied. The USPS offers no answer beyond such glittering generalities as “meaningful,” “meaningfully” and “effective.” *Id.* at 11-13.

(3) The Postal Service’s proposed redefinition of the ability-to-adjust standard suffers from a third, independent flaw: implicit in the definition is an overbroad definition of what losses the USPS must adjust to before the “new normal” can be deemed to have arrived. The USPS implicitly defines the relevant losses as all net losses, regardless of cause. USPS Comments at 13-18. As discussed above, however, the Commission has made clear that the losses relevant to this inquiry are limited to losses stemming from the

recession. Volume losses due to causes *other than* the exigent circumstance, and financial losses unrelated to volume losses, are excluded. See pp. 5, 9, *supra*. This is a crucial distinction: even the USPS has conceded that the recession accounted for only a minority of the total volume losses suffered by the USPS during 2008-2012. USPS Initial Comments (June 26, 2015) at 31 (calculating that the recession caused only about 38 percent of the Postal Service’s total volume losses during 2008-2012).³

(4) The preceding discussion also demonstrates the lack of merit in the Postal Service’s primary argument for re-opening the “new normal” issue—the supposed internal contradictions in the Commission’s standard. The gist of the USPS argument is that an inconsistency exists between the Commission’s discussions of when the USPS could adjust to changed circumstances in the contexts of (1) the Commission’s “new normal” analysis under the “due to” prong of the statute, and (2) the Commission’s analysis under the “necessary” prong of the statute.

While the USPS referenced this argument in its June 8 motion, a full explanation of the argument emerged for the first time only in the Postal Service’s June 26 initial comments. The USPS now identifies the root of the inconsistency as a supposed internal conflict within the “new normal” standard itself. The USPS claims that the “new normal” test has been used not, as the court held, solely to determine when the circumstances of the recession lost “their exceptional character,” ANM, slip op. at 12, and financial losses were no longer “due to” the Great Recession, but instead “to refer to two discrete

³ Elsewhere in the same comments, the USPS attributes smaller volume losses to the recession. *Id.* at 27 (claiming that the recession caused volume losses totaling 35 million pieces); *id.* at 35 (claiming that the recession caused volume losses totaling 56 billion pieces during the same period). Accepting these figures would reduce the 38 percent ratio considerably.

inquiries.” USPS Comments at 7. The first is when the year-over-year decline in mail volume has stopped, and volumes “settled at a level that is permanently lower than its pre-recession level.” *Id.* at 8. The second use of “new normal,” according to the USPS, is “to denote the point in time that the Postal Service should have been able to adjust its operations” to the environment described by the first sense of “new normal.” *Id.* The USPS claims that “taken together,” the Commission “essentially” held “that the ‘new normal’ is the point at which the Postal Service was able to adjust its operations in response to the shift in the level of mail volume.” *Id.* The USPS then argues that the Commission’s alleged determination that “the Postal Service was able to adjust to the lower level of Standard Mail in October 2009 and First-Class Mail in October 2010,” reached in determining what volume was lost “due to” exigent circumstances, is inconsistent with its finding, reached in analyzing the “necessary” clause, that external constraints “inhibit[ed] the Postal Service’s ability to adjust its operations immediately” to lower volumes. *Id.* at 9.

The supposed internal contradiction is merely an artifact of the Postal Service’s misreading of the Commission’s interpretation of the “new normal” standard. As explained above, the Commission did not “essentially,” or even plausibly, hold that the “new normal” occurs when the Postal Service “was able” to adjust its operations. Rather, the Commission held that the “new normal” occurred when “most or all” of four distinct conditions arose, each of which the Commission examined separately. Even with respect to the fourth factor—the Postal Service’s ability to adjust—the Commission plainly evaluated whether the Postal Service could *begin* adjusting to volumes, not whether it already had adjusted. The Commission’s definition of the “new normal,” properly

understood, is entirely consistent with the Commission’s analysis under the “necessary” prong of the statute.

In fact, the Postal Service unwittingly admits the internal consistency of the Commission’s holdings in Order No. 1926 by pointing to the Commission’s findings under the “necessary” clause that “the Postal Service responded appropriately at that time (and beyond) to the shift in volume.” USPS Comments at 9. The Postal Service’s ability to “respond appropriately” is exactly what the Commission evaluated under the fourth prong of the “new normal” test. There is, therefore, no internal conflict in the “new normal” test itself or in Order No. 1926 generally. The Commission should reject the Postal Service’s arguments on this issue.

With the Postal Service’s sole basis for re-opening the “new normal” issue shown to be erroneous, there is no reason for the Commission to entertain any of the consequences the Postal Service claims should flow from reevaluating the new normal standard. The “new normal” dates established for each class of mail should remain in place, as determined in Order No. 1926.

B. The Postal Service’s Fallback Proposal To Delay The Advent Of The “New Normal” For Standard Mail Until Fiscal Year 2011.

The Postal Service’s fallback proposal—to push back the onset of the “new normal” for Standard Mail from the beginning of Fiscal Year 2010 to the beginning of Fiscal Year 2011 (USPS Comments at 21-26)—is equally without merit. Like the Postal Service’s primary proposal, this proposal is an attempt to relitigate issues that the USPS raised (or could have raised) in its petition for review of Order No. 1926 in the D.C. Circuit.

ANM, slip op. at 14 (“the Commission acted well within its discretion in starting the date of the new normal separately for each class of mail”).

Moreover, the notion that the Commission should have adopted the same “new normal” starting date for each mail class is flatly inconsistent with the testimony of USPS witness Thress. As the Court of Appeals noted, Mr. Thress “himself suggested that the new normal arrived at different times for different classes of mail.” *ANM*, Slip Op. at 14. Indeed, he specifically recommended that the “new normal” for Standard Mail be deemed to begin in 2010:

There was a major bottoming out in 2008-2009, but that bottom -- but we sort of reached the bottom there. And so to some extent I think it's fair to call maybe 2010 through 2013 the new normal for Standard Mail.

PRC Tr. 119 (November 19, 2013) (Thress).

Finally, the Postal Service’s assumption that, if the Commission adopted a single uniform starting year for the “new normal,” the most appropriate year would be Fiscal Year 2011, is also unwarranted. In fact, if the Commission were to adopt the same cutover year for the start of the “new normal” for all market dominant mail (an approach that the undersigned mailers do not endorse), the most reasonable cutoff point would be the beginning of Fiscal Year 2010, not Fiscal Year 2011. Nearly all the macroeconomic variables examined by the Commission began to recover in mid-2009 to mid-2010. See Order No. 1926 at 86-92 (finding employment shifted in 2Q 2010; GDP turned in 2Q 2009; private investment rates turned positive in Q1 2010; and retail sales turned in Q4 2009). Likewise, the Commission’s calculations show that incremental recession-related volume losses dropped from 17.8 billion in 2009 to 1.4 billion in 2010. Library Reference PRC-

LR-R2013-11/2, PRC_LR_R2013_11_2 Final.xls, "PRC Volume Losses." The small amount of recession-related volume losses in 2010 is by no means extraordinary.

CONCLUSION

The Commission issued Order No. 1926 and established an exigent surcharge on Christmas Eve 2013. For the year and a half since then, the industry has operated under a cloud of uncertainty. The pendency of judicial review, and the Postal Service's filings before the Commission to suspend its obligation to remove the surcharge, left mailers in the dark about how long the exigent surcharge would persist. As each month passed without a decision from the court, mailers became increasingly nervous, wondering whether they would ever again experience the "predictability and stability in rates" promised by the Postal Accountability and Enhancement Act. With the issuance of the court's opinion, the prospect of a return to stable, CPI-based ratemaking appeared imminent. The Commission's order on exigency was upheld almost entirely, with only one narrow issue left to be decided. The industry was heartened by the prospect of a final and definite resolution in the near future. It is time for the Commission to grant that certainty by rejecting, quickly and definitively, the Postal Service's desperate attempt to relitigate its case.

Respectfully submitted,

David M. Levy
Matthew D. Field
Ian D. Volner
VENABLE LLP
575 7th Street NW
Washington DC 20005
(202) 3/44-4800
dlevy@venable.com
mfield@venable.com
*Counsel for Association for Postal
Commerce, MPA—The Association of
Magazine Media, Alliance of Nonprofit
Mailers, and Direct Marketing Association,
Inc.*

Maynard H. Benjamin, CAE
President & CEO
ENVELOPE MANUFACTURERS ASSOCIATION
500 Montgomery Street, Suite 550
Alexandria VA 22314
(703) 739-2200

Mury Salls
President
MAJOR MAILERS ASSOCIATION
11448 Chateaubriand Ave
Orlando, FL 32836
(407) 413-8535

Hamilton Davison
President & Executive Director
AMERICAN CATALOG MAILERS ASSOCIATION
P.O. Box 41211
Providence, RI 02940-1211

Ken Garner
President & CEO
EPICOMM
1800 Diagonal Road, Ste. 320
Alexandria, VA 22314
(703) 972-2730
KGargner@Epicomm.org

Tonda F Rush
CNLC, LLC
PO Box 50301
Arlington VA 22205
(703) 237-9801
Tonda@nna.org
*Counsel to National Newspaper
Association*

Donna Hanbery
HANBERY & TURNER, P.A.
33 South 6th Street, Suite 4160
Minneapolis MN 55402
(612) 340-9350
hanbery@hnclaw.com
Counsel for Saturation Mailers Coalition

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