

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

Before Commissioners:

Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Notice of Market-Dominant
Price Adjustment

Docket No. R2013-10R

ORDER RESOLVING ISSUES ON REMAND



Washington, DC 20268-0001

January 22, 2016

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I. EXECUTIVE SUMMARY

In this Order the Commission announces the standard it will apply to determine when a mail preparation requirement change will have rate effects implicating the price cap and also applies this standard to two mail preparation requirement changes: mandatory Full Service Intelligent Mail barcoding (IMb) and bundle height requirements for flat-shaped mailpieces processed through Flats Sequencing System (FSS) machinery. Under the Commission's standard, a mail preparation change will be considered a classification change with price cap effects requiring compliance with 39 C.F.R. § 3010.23(d) when the change results in either the deletion and/or redefinition of a rate cell. Deletion of a rate cell occurs when the mail preparation change causes the elimination of a rate, or the functional equivalent of an elimination of a rate, *e.g.*,

making the rate inaccessible. Redefinition of a rate cell occurs when the mail preparation change causes a significant change to a basic characteristic of the mailing.

In 2008, the Postal Service introduced IMb to facilitate tracking and enhance information about the mail's progress through the processing system. Recognizing that implementing IMb would impose significant costs and changes on mailers, the Postal Service offered two ways to qualify for automation rates, Basic and Full Service IMb. To incentivize mailer participation, the Postal Service offered a lower rate for Full Service IMb. The Postal Service adjusted its calculation of the price cap to reflect its proposal to offer a lower rate for Full Service IMb participation.

In 2013, the Postal Service planned to eliminate the Basic IMb option and require mailers to implement Full Service IMb to be eligible for any automation rate. The Postal Service adjusted its price cap analysis to account for this change in rates for only one of the four classes of affected market dominant mail. The Commission found that the Full Service IMb requirement constituted a classification change with rate implications pursuant to 39 U.S.C. § 3622(d)(1)(A) and 39 C.F.R. § 3010.23(d)(2). As a result, the Commission found that the Postal Service failed to make reasonable adjustments to the billing determinants to account for the resulting deletion, or redefinition of rate cells for three out of the four classes of mail. The Commission ordered the Postal Service to adjust its billing determinants to account for the price cap impact of the planned change to mail preparation requirements for the remaining three class of market dominant mail or to notify the Commission that it would not implement the change to the automation rate requirement. The Postal Service decided not to implement the change and appealed to the United States Court of Appeals for the District of Columbia Circuit.

The Court affirmed the Commission's authority to regulate mail preparation requirement changes and its finding that such changes may have rate effects implicating the price cap in its opinion in *United States Postal Service v. Postal Regulatory Commission*, 785 F.3d 740 (D.C. Cir. 2015) (*IMb Remand*). However, the Court concluded that the Commission did not adequately explain the standard used to determine when a mail preparation change would have a rate effect with price cap

implications under 39 U.S.C. § 3622(d) and the Commission's rules. The Court remanded the matter to the Commission in order to "enunciate an intelligible standard and then reconsider its decision in light of that standard."

The Commission established procedures on remand, proposing factors for the standard and requesting comments on the proposed standard. The Commission reviewed initial and reply comments. The majority of the commenters questioned the utility of the Commission's proposed multi-factor standard and urged the Commission to adopt proposed alternative standards of varying degrees of complexity. These alternative proposals included bright-line rules that would result in finding that all mail preparation requirement changes would have rate effects or alternatively, finding that virtually no mail preparation requirement changes would have rate effects.

The Commission concludes that the question of whether a mail preparation requirement change has a rate effect cannot be answered by a bright-line rule as suggested by the commenters. Applying a bright-line rule to a fact-driven complex scenario may cause rash and unintended results that are contrary to the purpose of the system of ratemaking implemented by the Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3198 (2006), including the price cap. In developing its standard, the Commission is mindful of the objectives of the PAEA with respect to rate regulation, which include "predictability and stability in rates," "[t]o reduce the administrative burden and increase the transparency of the ratemaking process," and to "establish and maintain a just and reasonable schedule for rates and classifications." As a result, the Commission has developed a standard that determines whether such changes result in the deletion and/or redefinition of a rate cell under 39 C.F.R. § 3010.23(d)(2). Applying this standard below, the Commission reaffirms its decision in Order No. 1890 finding that the Full Service IMb requirement has a rate effect with price cap implications and its finding that the FSS bundling requirement does not have a rate effect.

Finally, the Commission prescribes further proceedings to create a process and procedure for implementing the standard.

II. BACKGROUND

In early 2008, the Postal Service published notice of its intent to implement the IMb program.¹ Starting in 2009, mailers could qualify for one of two types of automation rates by using either Basic or Full Service IMb.² The United States Government Accountability Office (GAO) issued a report on the Postal Service's IMb program in May 2009.³ The GAO summarized the "significant changes to the way mailers prepare and submit their mail" as follows:

Mailers using Intelligent Mail will need to redesign their [mailpieces] by populating and applying the new barcode. Full Service mailers will also need to ensure that their barcodes contain a unique tracking number. This means that each [mailpiece] a mailer sends within a 45-day period must have a number imbedded in its barcode that is different from every other piece of mail that the mailer sends within that time frame. Full Service mailers must also apply unique barcodes to mail trays and containers, and document which [mailpieces] are contained in which tray and container. These changes may result in significant process changes for mailers and may require new software or staff training.

Id. at 8. Further, the GAO found that:

Mailers participating in Full Service Intelligent Mail must also make changes to their information systems in order to submit documentation electronically to [the Postal Service]. The electronic documentation must contain information on all of the Intelligent Mail barcodes used on the [mailpieces], trays, and containers; how the [mailpieces], trays, and containers fit together; and the identity of the mailer. While some mailers currently submit electronic documentation, many currently submit this information in hard copy format. Mailers must also provide advance notification of their mail drop-off to a postal facility by sending an electronic appointment and will need to ensure that their software systems are able to communicate effectively with [the Postal Service's systems]. This may involve purchasing or upgrading software or hardware. Mailers will also need to train their staff on how to use the new software and how to communicate with [the Postal Service] electronically.

¹ Implementation of Intelligent Mail Barcodes, 73 Fed. Reg. 1158 (January 7, 2008).

² Implementation of New Standards for Intelligent Mail Barcodes, 73 Fed. Reg. 49333 (August 21, 2008).

³ U.S. Gov't Accountability Office, GAO-09-599, U.S. Postal Service: *Intelligent Mail Benefits May Not Be Achieved If Key Risks Are Not Addressed* (May 2009) (GAO Report).

Id. at 8-9.

In its report, the GAO notes that the Postal Service expressed that Intelligent Mail was “the most complex program it has ever undertaken, involving changes to almost 30 different systems.” *Id.* at 1. The Postal Service “indicated that preparing for and implementing Intelligent Mail will involve considerable changes for both mailers and [the Postal Service], including significant changes to information and software systems used by both mailers and [the Postal Service].” *Id.* at 7. The GAO Report concluded that mailer nonparticipation posed a major risk to the successful implementation of the IMb program. *Id.* at 18.

In Docket No. R2009-2, the Postal Service introduced pricing incentives for mailers that chose to use Full Service IMb and acknowledged that these changes implicated the price cap.⁴ Mailers could take advantage of the price incentive if they prepared their mail meeting the “requirement that each piece have a unique Intelligent Mail barcode, be part of a mailing with unique container labels, and use electronic documentation.” *Id.* at 45-46. In that proceeding, the Commission determined that including an Intelligent Mail discount affects the price change calculations and that the Postal Service made “reasonable adjustments to the billing determinants to account for the effects of classification changes such as the introduction, deletion, or redefinition of rate cells.”⁵ At that time, mailers could qualify for automation rates using either Basic or Full Service IMb.

On April 18, 2013, the Postal Service revised its Domestic Mail Manual (DMM) to modify eligibility requirements for mailers to qualify for automation prices.⁶ This revision provided that mailers using Basic IMb would need to switch to Full Service IMb to

⁴ Docket No. R2009-2, United States Postal Service Notice of Market-Dominant Price Adjustment, February 10, 2009, at 14, 17, 20.

⁵ Docket No. R2009-2, Order No. 191, Order Reviewing Postal Service Market Dominant Price Adjustments, March 16, 2009, at 27.

⁶ Implementation of Full-Service Intelligent Mail Requirements for Automation Prices, 78 Fed. Reg. 23137 (April 18, 2013).

continue paying automation prices for First Class, Standard Mail, Periodicals, and Bound Printed Matter beginning on January 26, 2014. *Id.* Mailers that did not use Full Service IMb would no longer qualify for automation rates. After this change, there would be only one way to qualify for automation rates as the Basic IMb option would be eliminated. When previously there were two automation rates available, one for mailers using Basic IMb and one for mailers using Full Service IMb, after this change there would be only one with Basic IMb eliminated. The Postal Service did not file notice of this change with the Commission.

On September 26, 2013, the Postal Service filed its notice of market dominant price adjustment with the Commission.⁷ The notice was silent with respect to the changed IMb eligibility requirement for automation prices. The Postal Service adjusted billing determinants to account for the effects of the Full Service IMb requirement on the percentage change in rates for Package Services; however, the Postal Service did not adjust the billing determinants to account for the effects of the Full Service IMb requirement in the calculation of the percentage change in rates for First-Class Mail, Standard Mail, or Periodicals.⁸ Numerous comments were filed arguing that the Full Service IMb requirement would have rate effects under the price cap statute and rules.

A. Order No. 1890

On November 21, 2013, the Commission issued Order No. 1890 granting the Postal Service's planned rate adjustments, provided the Postal Service did not simultaneously implement the Full Service IMb requirement.⁹ In its Order, the

⁷ Docket No. R2013-10, United States Postal Service Notice of Market-Dominant Price Adjustment, September 26, 2013.

⁸ See Docket No. R2013-10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013, at 36 (Order No. 1890).

⁹ Order No. 1890 at 1-3. In the alternative, the Commission provided the Postal Service with the option to adjust the billing determinants to account for the effects of the Full Service IMb change and file an amended notice of rate adjustment. There was an additional exception related to unequal commercial and nonprofit discounts for Standard Mail 5-digit automation flats.

Commission analyzed whether the Full Service IMb requirement was a classification change that should be evaluated under the price cap rules. Order No. 1890 at 13-35. Based on this review, the Commission found that the Full Service IMb requirement was a classification change resulting in both the “redefinition and deletion of rate cells” and as a consequence, required the Postal Service “to make reasonable adjustments to billing determinants to account for the Full Service IMb requirement[.]” *Id.* at 35.

The Commission analyzed the purpose of the price cap rules and previous precedent and found that the statute and the Commission’s rules anticipated that “the Postal Service could make a change in mail preparation requirements that would have price cap implications.” *Id.* at 19. Applying Commission precedent in conjunction with the parties’ comments and the Commission’s statutory responsibilities, the Commission determined that the Full Service IMb requirement constituted a classification change resulting in the redefinition or deletion of rate cells. The Commission found that the Full Service IMb requirement redefined rate cells “because [Full Service IMb requires] mailers to alter a basic characteristic of a mailing in order for the mailing to qualify for the same rate category for which it was eligible before the change in requirements.” *Id.* at 18. In finding that the Full Service IMb requirement was a classification change with rate effects that implicated the price cap, the Commission rejected the Postal Service’s attempts to limit “classification changes” under 39 C.F.R. § 3010.23(d) to only when modifications are made to the Mail Classification Schedule (MCS). *Id.* at 22.

The Commission also found that the Full Service IMb requirement can be interpreted as a deletion of a rate cell because the non-Full Service (Basic) IMb automation rates would no longer be available to a mailer. *Id.* at 31-32. The Commission concluded:

[T]he Full Service IMb requirement[.] result[s] in the redefinition and deletion of rate cells. Because historical billing determinants concerning the use of Full Service IMb are available, it is possible for the Postal Service to make reasonable adjustments to billing determinants to account for the Full Service IMb requirement[.]. Consequently, as it did with Package Services, the Postal Service is required to make reasonable adjustments to billing determinants to account for the Full Service IMb requirement[.]

Id. at 35.

After concluding that the Full Service IMb requirement had rate effects with price cap implications, the Commission calculated the price cap impact of the Full Service IMb requirement and found that these conditions, if implemented simultaneously with the planned rates set forth in Docket No. R2013-10, would cause a combined rate increase that exceeded the price cap. *Id.* at 35-36. Accordingly, the Commission concluded that the Postal Service could not, simultaneously with its planned rate increase, implement the Full Service IMb requirement because the Postal Service did not account for the increase in rates. *Id.* at 36.

Having found that the Postal Service failed to adjust for the rate effects of the Full Service IMb requirement and the rates as proposed with the new requirements exceeded the price cap, the Commission proposed two options for the Postal Service. *Id.* at 35-37. The Postal Service could proceed and refile different rates that would offset the price cap room used by the Full Service IMb requirement. *Id.* at 36. Alternatively, if the Postal Service did not implement the Full Service IMb requirement, it could allow the rates planned in Docket No. R2013-10 to “take effect without further adjustment.” *Id.*

On November 29, 2013, the Postal Service filed notice with the Commission that it did not intend to implement the Full Service IMb requirement contemporaneously with the rates planned in Docket No. R2013-10.¹⁰

B. Appellate Proceeding and Court’s Opinion

On December 20, 2013, the Postal Service appealed Order No. 1890 to the United States Court of Appeals for the District of Columbia Circuit.¹¹ In its brief, the

¹⁰ Docket No. R2013-10, Response of the United States Postal Service to Order No. 1890, November 29, 2013.

¹¹ Petition for Review, *United States Postal Serv. v. Postal Regulatory Comm’n*, 785 F.3d 740 (D.C. Cir. 2015) (No. 13-1308).

Postal Service claimed that the Commission lacked the authority under the price cap statute and regulations to find that changes to mail preparation requirements could be changes in rates and that the Commission's order failed to apply a comprehensible standard to determine when mail preparation changes have rate effects with price cap implications.¹² The Commission maintained that it correctly applied the price cap statute and regulations to determine that the Full Service IMb requirement was a classification change with rate effects that implicated the price cap.¹³ A number of intervenors filed a joint brief supporting the Commission.¹⁴

On May 12, 2015, the Court granted in part and denied in part the Postal Service's petition for review, finding that although the Commission had the authority to find that some mail preparation requirements have rate effects, the Commission had failed to articulate a clear standard to evaluate those changes.¹⁵

The Court stated that "[t]he principal issue in this case is whether the Commission is correct in its view that its rate cap authority extends beyond the regulation of posted rates to regulation of Postal Service operational rules that have 'rate effects.'" *Id.* at 743. Specifically, the Court considered whether a change in mail preparation requirements is a "'classification' change within the meaning of the Commission's regulations, and whether such a classification change can result in a 'change in rates' within the meaning of the Act." *Id.* at 746. The Court resolved the principal issue in the Commission's favor, finding that both the price cap statute and regulations are ambiguous with respect to the definition of what constitutes a change in

¹² Revised Brief of the United States Postal Service, at 27, 42, *United States Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740 (D.C. Cir. 2015) (No. 13-1308).

¹³ Brief for the Postal Regulatory Commission, at 19, 26, *United States Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740 (D.C. Cir. 2015) (No. 13-1308).

¹⁴ Corrected Brief for Intervenors Alliance of Nonprofit Mailers, American Catalog Mailers Association, MPA—the Association of Magazine Media, National Postal Policy Council, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc., *United States Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740 (D.C. Cir. 2015) (No. 13-1308).

¹⁵ *United States Postal Service v. Postal Regulatory Commission*, 785 F.3d 740, 753 (D.C. Cir. 2015) (*IMb Remand*).

rates and that the Commission's interpretation that its authority to regulate rates extends to "changes to the prices actually applied to particular mailpieces" is reasonable. *Id.* at 751. The Court concluded that "[t]he Commission's interpretation of the statute prevents the Postal Service from evading the price cap by shifting mailpieces to higher rates through manipulation of its mail preparation requirements." *Id.*

The Court rejected the Postal Service's argument that the distinction between "rates" and "classifications" in the Act requires the finding that "a change in rates cannot be the same thing as a change in classification." *Id.* at 752. The Court found that:

This argument ignores the fact that the Commission is not stating that changes in classifications are themselves changes in rates; rather, the Commission merely points out the self-evident fact that changes in classifications can *cause* changes in the rates experienced by mailers, a point the Postal Service does not dispute. It is those changes in rates paid by mailers that the Commission seeks to regulate, whether they occur through the posting of new prices to a list or through changes in classification.

Id. (emphasis in original).

However, in finding that the Commission has the authority to characterize certain mail preparation requirements as rate changes, the Court found that the standard enunciated by the Commission was arbitrary and capricious. *Id.* at 744. Specifically, the Court stated that "the Commission's Order is arbitrary and capricious because it fails to articulate a comprehensible standard for the circumstances in which a change to mail preparation requirements such as the one in this case will be considered a 'change in rates.'" *Id.* at 753. The Court ordered the Commission to "enunciate an intelligible standard and then reconsider its decision in light of that standard." *Id.* at 756.

Specifically, the Court took issue with the Commission's finding that a mail preparation requirement change redefined a rate cell where it "require[d] mailers to alter a basic characteristic of a mailing in order for the mailing to qualify for the same rate category for which it was eligible before the change in requirements." *Id.* at 754. The Court found that this standard for redefining a rate cell lacked content and was "not accompanied by an adequate explanation of how the standard applies to the facts of this case." *Id.* Further, the Court found that the application of this standard "appears to

be inconsistent” with the Commission’s decision in the same order regarding the FSS requirement change. *Id.* The Court found that the “Commission never satisfactorily explains why one change in mailing practices alters ‘a basic characteristic of a mailing’ while the other does not.” *Id.*

Although the Court noted that on appeal the Commission belatedly distinguished the changes by indicating “one change is greater in magnitude than the other,” the Court found that the Commission failed to explain in its underlying decision why “the magnitude of the change determines whether the change affects ‘a basic characteristic of a mailing.’” *Id.* at 755. In conclusion, the Court contended that “[a]t the least, the Commission must explain this differential treatment of seemingly like cases,’ and ‘explain how it can read the same evidence differently when applied’ to apparently similar changes.” *Id.* (quoting *LePage’s 2000, Inc. v. Postal Regulatory Comm’n*, 642 F.3d 225, 232 (D.C. Cir. 2011)).

The Court denied the remaining issues presented in the Postal Service’s petition for lack of merit. *Id.* at 756.

C. Order No. 2586

On July 15, 2015, the Commission issued an order establishing procedures on remand and requesting comment from interested parties on the standard to be applied when considering whether mail preparation changes have rate effects under the price cap statute and rules.¹⁶ In Order No. 2586, the Commission stated that it “will proceed to enunciate the standard applied to determine when mail preparation changes have rate effects with price cap implications, based on its expertise and past decisions considering similar changes.” *Id.* at 3. Accordingly, the Commission proposed four factors that could be used when analyzing whether a mail preparation requirement change has a rate effect: whether the change alters a basic characteristic of a mailing,

¹⁶ Order Establishing Procedures on Remand and Requesting Public Comment, July 15, 2015 (Order No. 2586).

the effect of the change on mailers, the purpose of the change, and whether the change results in a shift in volume of mail from one rate category to another. *Id.* at 3-4.

Initial comments were filed on August 17, 2015.¹⁷ Reply comments were filed on August 31, 2015.

To provide context for each factor, the Commission provided a set of components and characteristics underlying each factor. The components of each factor were stated as follows:

In assessing the first factor, whether a mail preparation change alters a basic characteristic of a mailing, the Commission considers the following characteristics: (a) whether the change modifies the size, weight, or content of eligible mail, (b) whether the change alters the presentation and/or preparation of the mailing in a substantial way, (c) regularity of the change (periodic vs. one-time), (d) magnitude of the change, and (e) the complexity of the change relating to mailer behavior.

For the second factor, the Commission evaluates the following components to determine the effect of the mail preparation requirement on mailers: (a) whether the change imposes fixed or variable costs, (b) the effect on high volume and low volume mailers, (c) the number of mailers affected, (d) the volume of mail affected, (e) the benefits to mailers, and (f) the timeframe for mailers to comply with the change.

In considering the purpose of the change, the Commission examines whether the change: (a) improves the expeditious collection, transportation, and/or delivery of the mail, (b) aligns with changes in the Postal Service's network and/or equipment, and (c) is intended to increase a price.

For the final factor, the Commission takes into account whether the change in mail preparation requirements causes a shift in volume of mail from one rate category to another. This factor considers whether the changes result in the de facto elimination of a rate category or the deletion of a rate cell.

Order No. 2586 at 4.

The Commission stated that “[t]hese factors are intended to serve as a guide for a case-by-case analysis to determine whether a mail preparation change is a rate change with price cap implications.” *Id.* The Commission invited comments regarding

¹⁷ See Order No. 2621, Order Granting Extension of Time to File Comments, July 28, 2015.

whether the proposed four factors “adequately set forth the parameters of mail preparation requirement changes to be examined to determine whether a change in mail preparation requirements has rate effects with price cap implications.” *Id.* at 5.

III. COMMISSION STANDARD AND ANALYSIS

In the following section the Commission explains the standard used to determine when mail preparation changes will have rate effects under the price cap rules. The Commission then applies that standard to the IMb and FSS requirements. Finally, the Commission discusses the commenters’ proposals and their responses to the proposed factors in Order No. 2586.

The Commission provides the following discussion and analysis to explain its determination that mail preparation changes can constitute classification changes resulting in the redefinition and deletion of rate cells and believes that these definitions and guidance will likewise allow the Postal Service and other interested parties to determine which mail preparation requirement changes are significant enough to constitute a deletion or redefinition of a rate cell that has the effect of a rate change.

As the Commission has previously indicated, not all mail preparation changes have rate effects that implicate the price cap. The question then becomes *what* types of mail preparation requirement changes will have rate effects that require compliance with 39 U.S.C. § 3622(d) and the price cap rules. The disparate array of comments supporting, redefining, and disagreeing with the Commission’s proposed factors clearly demonstrates the difficult task before the Commission of defining a reasonable standard that will provide guidance for the Postal Service and all interested parties on interpreting the price cap rules. After considering comments received by interested parties in response to Order No. 2586, reviewing the language and intent of the price cap statute and rules, and the history of mail preparation changes, the Commission promulgates a reasonable, clear, and streamlined standard to determine when mail preparation changes have rate effects.

The PAEA limits price adjustments for each market dominant class of mail by the percentage change in consumer price index for all urban consumers (CPI-U), unadjusted for seasonal variation over the previous 12 months. 39 U.S.C. § 3622(d)(1)(A). This limitation (together with the provision allowing the Postal Service to use a certain amount of unused or “banked” rate adjustment authority leftover from previous rate adjustments) is commonly referred to as the “price cap.” Order No. 1890 at 16. The price cap is intended to protect mailers by promoting pricing stability and predictability, as well as to encourage the Postal Service to efficiently manage its resources.¹⁸

Section 3622 neither specifies the mechanics of the price cap calculations nor stipulates what constitutes a change in rates. Rather, the PAEA provides that the “annual limitation on the percentage changes in rates” [is] “to be set by the Postal Regulatory Commission.”¹⁹ Under this purview, the Commission has promulgated the price cap rules at 39 C.F.R. §§ 3010.20-30. The Commission’s rules carry out the intent of Congress with respect to the price cap: to protect mailers by providing predictable and stable rates that at the class level do not rise above the annual rate of inflation.²⁰

Pursuant to Commission rules, the Postal Service is required to include the effects of classification changes that result in the introduction, deletion or redefinition of rate cells in its calculation of the percentage change in rates. 39 C.F.R. § 3010.23(d)(2). For example, when a change to a mail preparation requirement would cause some mail to shift to another rate category and thereby pay different rates, the price cap rules require that the Postal Service identify the volume of mail sent in the previous year that would continue to pay the rate associated with the old rate category

¹⁸ See 39 U.S.C. § 3622(b); see also H.R. Rep. No. 109-66, pt. 1, at 46 (2005).

¹⁹ 39 U.S.C. § 3622(d)(1)(A); see also *U.S. Postal Service v. Postal Regulatory Commission*, 717 F.3d 209, 210 (D.C. Cir. 2013) (“[T]he Commission regulates the rates that the Postal Service may charge for mail.”).

²⁰ Docket No. R2010-4, Order No. 547, Order Denying Request for Exigent Rate Adjustments, September 30, 2010, at 12.

and the volume of mail sent in the previous year that would have to pay the rate associated with the new rate category if it were sent under the new mail preparation requirements.

Accordingly, in this Order the Commission sets forth the standard by which a mail preparation change will constitute a classification change that results in either the deletion or redefinition of a rate cell under 39 C.F.R. § 3010.23(d)(2). The Commission's standard does not define when a mail preparation change will be considered a rate change, rather, it defines when a mail preparation change will be considered a classification change that has rate effects requiring compliance with 39 C.F.R. § 3010.23(d)(2).

A. The Standard

The Commission applies a two-prong standard to determine when a mail preparation change will be considered a classification change that requires compliance with the price cap rule under 39 C.F.R. § 3010.23(d)(2). A mail preparation requirement change is a classification change with rate effects when the change either:

- Results in the deletion of a rate cell; and/or
- Results in the redefinition of a rate cell if the mail preparation change causes a significant change to a basic characteristic of a mailing.

For the first prong, deletion of a rate cell occurs when a mail preparation change causes the elimination of a previously available rate. Deletion also occurs when a mail preparation change results in the functional equivalent of a deletion; although the rate may still exist in the MCS, the rate is not available or accessible to any mailers. Therefore, deletion of a rate cell occurs whether the Postal Service changes the mail preparation requirements and formally removes the rate from the MCS or changes the eligibility rules for a rate so that it is functionally equivalent to a deletion.

The first prong of the Commission's standard requires a simple and objective inquiry. For example, where the Postal Service makes two different rate cells available

to qualify for a discounted rate, each rate cell will have different mail preparation requirements. Deletion will result where the Postal Service either eliminates one of the rates by removing it from the MCS or changes the eligibility rules for one of the rate cells so that no mailer may qualify for that rate, effectively rendering the rate obsolete. The Commission will find a mail preparation change to be a classification change resulting in the deletion of a rate cell where the change makes the rate unavailable, regardless of whether the Postal Service reflects that change in the MCS or the DMM. Accordingly, for these changes, the Postal Service must account for the rate effects of the deletion under the price cap rules. See 39 C.F.R. § 3010.23(d)(2).

For the second prong, a mail preparation change will have rate effects under the price cap rules when it results in the redefinition of a rate cell. In order to determine at what point in the spectrum of potential changes that a rate cell can be considered, “redefined,” the Commission will determine whether the mail preparation change has caused a *significant change* to a basic characteristic of the mailing. The basic characteristic of a mailing is a way to describe the individual features that define the parameters of the specific rate cell in question and inform a mailer how to qualify for the specific rate cell, *i.e.*, pay the rate associated with those requirements. The basic characteristics of a mailing reflect “what the mailer sends” and “how the mailer sends it.” For purposes of this analysis, a mailing can include both the individual mailpiece and a grouping of mailpieces. For example, the basic characteristics of a First-Class Mail automation letter would include the length, height, thickness, and weight requirement of the mailpiece (“what the mailer sends”), and the minimum volume and entry requirements for the mailing (“how the mailer sends it”). These basic characteristics are created by the mail preparation requirements set by the Postal Service to qualify for that specific rate cell.

All mail preparation changes affect the basic characteristics of a rate cell at some level, but the price cap rules only require that the Postal Service account for those mail preparation changes that result in the “redefinition” of a rate cell. 39 C.F.R. § 3010.23(d)(2). Therefore, the Commission applies a significance analysis to

determine at what point on the spectrum a change to a rate cell will constitute a “redefinition” under 39 C.F.R. § 3010.23(d)(2). Significant changes to a mailing indicate that the nature of the rate cell has changed. The Commission will analyze the significance of the change by assessing the operational adjustments and/or costs required by the mailer for compliance with the new mail preparation requirement. If the mailer’s operations must change in a significant manner in order to qualify for the same rate cell, then the rate cell will be found to have been “redefined” by the mail preparation change because the basic characteristics of the mailing will be significantly different. The greater the cost and operational adjustments required of the mailer to comply with the mail preparation requirement, the increased likelihood that the change will redefine the rate cell and have a measurable rate effect with price cap implications.

The operational thresholds by which a mail preparation requirement change is considered a significant change to a basic characteristic of a mailing cannot be pre-determined with absolute precision. As the Commission’s past experience demonstrates, however, changes made by the Postal Service have either been large magnitude changes that require the mailer to make substantial cost and operational adjustments to their mailings or smaller changes that impose minor costs and operational adjustments. Although the Postal Service has indicated it is difficult to obtain information on mailer’s costs, the significance analysis does not require knowing the exact cost to a mailer as a result of the mail preparation change. Changes that are large in magnitude will have substantial costs and operational adjustments that will be apparent to the Postal Service, the mailing community, and the Commission in light of the collective experience with mail preparation changes. The second prong of the Commission’s standard is meant to capture those mail preparation changes that are the type of rare large scale system changes that effectively redefine the rate cell. Therefore, with this standard, the Commission confines the scope of mail preparation requirement changes to those that are large in magnitude compared to the routine operational changes that the Postal Service has frequently implemented in the past. The Commission is uniquely situated in this regard both because it observes the Postal

Service's changes and receives input from both the Postal Service and mailers on the changes' impacts.

The Commission's standard clarifies that mail preparation changes will be considered classification changes under the price cap rule where they have the effect of introducing, deleting, or redefining a rate cell. 39 C.F.R. § 3010.23(d)(2). Because the price cap rule looks to the *effect of the change* on a rate cell, the Commission's standard sets forth the criteria used to determine when a rate cell has been deleted or redefined by a mail preparation change. The introduction of a rate cell is not part of the Commission's standard because introducing a rate cell creates a new rate that requires an update to the MCS with the Commission's approval. However, in the case of the change to the IMb requirement, the Postal Service has elected to make a change that results in the deletion and redefinition of a rate cell in the DMM without updating the MCS. The Commission reiterates its finding in Order No. 1890 that there is no logical basis to treat classification changes filed in the DMM differently than classification changes filed in the MCS where both changes may affect rates and sets forth a standard defining when such changes will constitute a deletion or redefinition of a rate cell. See Order No. 1890 at 25.²¹

In evaluating the Postal Service's proposed changes under the system for regulating rates and classes for market dominant products, the Commission shall consider specific statutory objectives that include maximizing the Postal Service's incentives to reduce costs and increase efficiency, creating predictability and stability in rates, allowing the Postal Service pricing flexibility, reducing administrative burden, and establishing a just and reasonable schedule for rates and classifications. 39 U.S.C. § 3622(b). The Commission concludes that these objectives support applying a standard that looks to whether the mail preparation change triggers compliance with the

²¹ The Court agreed with the Commission and found that "[t]he Postal Service has provided no principled reason, originating in the statute or regulations, for why the price cap should treat classification changes in the [DMM] differently than classification changes in the [MCS] when either change can cause a change in the rates paid by mailers." See *IMb Remand* at 753.

price cap rules by measuring whether the rate cell has been effectively eliminated or redefined by significant changes to a basic characteristic of the mailing. 39 C.F.R. § 3010.23(d)(2). The standard provides for a fair and reasonable assessment of preparation changes that will allow the Postal Service to continue improving the efficiency of its operations with minimal administrative burden yet will protect mailers from operational changes that impose significant costs and operational adjustments without regulation under the price cap statute.

Having observed the variety and scope of mail preparation changes implemented by the Postal Service, the Commission finds that it is in the best position to determine when a mail preparation change will redefine a rate cell. Redefinition requires use of the Commission's technical expertise and experience because the point at which a rate cell can be considered "redefined" cannot be set by a bright-line test. Redefinition requires a case-by-case analysis of the individual mail preparation changes based on carefully crafted standards that the Commission explains in this Order. The Commission occupies a unique position to do this analysis because it receives input about potential changes to mail preparation from both the Postal Service and members of the mailing community. The Commission's standard is informed by its years of experience and familiarity with the different types of mail preparation changes, the purpose and objectives of the price cap statute and regulations, and its technical expertise. As a result, the Commission determines that a "significance" factor is essential to the analysis of whether a rate cell has been redefined because it directly measures the amount of change that can occur to a rate cell before it can be considered "redefined."

As noted by the Postal Service, "[t]he definition of what constitutes a classification change has evolved over many years of sometimes contentious debate and litigation."²² The Postal Service stated that in considering these issues, "the

²² Docket No. R2013-10, Response of the United States Postal Service to Commission Information Request No. 1, November 5, 2013, at 6, n.4.

Commission has consistently attempted to evaluate the issues in light of the balance of authorities that Congress created in the statutory scheme, including the explicit procedures established for changing rates and classifications, and the practical needs and consequences associated with determining the proper scope and extent of the classification schedule.” *Id.* In adopting this standard, the Commission is balancing the practical needs of the Postal Service with the statutorily mandated price cap it is required to enforce.

Accordingly, a mail preparation requirement change will be found to be a classification change with rate effects under the price cap rules where it results in the deletion or redefinition of a rate cell. When the Commission makes a finding that a mail preparation requirement change is a classification change with rate effects, the Postal Service must adjust its billing determinants to reflect the resulting redefinition or deletion of rate cells under 39 C.F.R. § 3010.23(d)(2). This standard allows the Commission to monitor changes in rates that occur through operational rule changes, and prevent the Postal Service from “evading the price cap by shifting mailpieces to higher rates through manipulation of its mail preparation requirements.” *IMb Remand* at 751.

B. Procedure for Applying Standard

The Postal Service will have the affirmative burden to determine whether changes to mail preparation have a rate effect with price cap implications in accordance with the Commission’s standard and 39 C.F.R. § 3010.23(d)(2). The Postal Service must apply a good faith analysis to make the preliminary determination of whether a mail preparation requirement change will result in either the deletion or redefinition of a rate cell. If the Postal Service makes a preliminary determination that a change has deleted or redefined a rate cell then it must comply with the price cap rule under 39 C.F.R. 3010.23(d)(2) and account for the rate effects of the change. When analyzing its mail preparation requirement changes under this standard, the Postal Service should be guided by the preceding discussion and the Commission’s application of the standard to the IMb and FSS requirements below.

The Commission will institute a rulemaking proceeding to create rules for the process and timeframes for the regulation of mail preparation requirement changes. Although the Commission's rules currently provide a procedure by which the Postal Service will file a notice of rate adjustment where it determines that changes to mail preparation have a rate effect, the rules do not currently specify a procedure or timeframe for challenges to the Postal Service's determination that such changes do not have rate effects.

C. Full Service IMb Requirement

IMb is a global concept that "describes the integration of electronic mailing documentation that includes [uniquely identifying barcoding] on all mail and containers and scans to track mail at all points in the delivery process."²³ The Postal Service has stated that the Full Service IMb "proposal would require significant changes for mailers who currently benefit from automation discounts."²⁴ The Postal Service acknowledged that the IMb was the "the most complex program it has ever undertaken" and that "preparing for and implementing Intelligent Mail will involve considerable changes for both mailers and [the Postal Service]." GAO Report at 1, 7.

Applying the first prong of the standard to the Full Service IMb requirement, the Commission finds that the Full Service IMb requirement results in the deletion of a rate cell under 39 C.F.R. § 3010.23(d)(2). As set forth in Order No. 1890, the Postal Service previously provided two separate ways to qualify for automation rates, a rate for mailers who used Basic IMb and a discounted rate for mailers who used Full Service IMb. The Postal Service then changed the eligibility rules to qualify for the automation rates, making Full Service IMb mandatory. The effect of the Full Service IMb requirement was

²³ Office of Inspector General – United States Postal Service, *Effects of Compliance Rules on Mailers* – Audit Report, MS-AR-11-006, August 24, 2011, at 10.

²⁴ Implementation of Full-Service Intelligent Mail Requirements for Automation Prices, 77 Fed. Reg. 63771 (October 17, 2012).

that mailers who used Basic IMb could no longer qualify for automation pricing as there was no longer a Basic IMb rate. As mailers would only be eligible for automation rates if they used Full Service IMb, the mail sent using Basic IMb would experience a rate increase because the higher non-automation rates would have to be applied.

Therefore, the Postal Service's change to the Full Service IMb requirement was the functional equivalent of a deletion because the Basic IMb rate cell would not be available to any mailer.

Although the posted rates are subject to the Commission's approval and changes to the posted rates would have triggered price cap compliance, the Postal Service chose not to update the posted rates in the MCS to reflect the fact that the change in eligibility rules rendered the Basic IMb discounted rate obsolete. However, under the Commission's standard, all mail preparation changes that result in the deletion of a rate cell or the functional equivalent of a deletion fall under 39 C.F.R. § 3010.23(d)(2). Simply because the deletion of the Basic IMb rate did not necessitate making a change to the MCS, it does not render the effect of that change void. An eligibility change with price implications in the DMM is no different from an eligibility change with price implications in the MCS. If the Commission were to agree with the Postal Service that only effects of changes in the MCS should be considered under the price cap, the Commission would be ignoring its responsibility to enforce the price cap. Accordingly, in order to implement the Full Service IMb requirement, the Postal Service must comply with 39 C.F.R. § 3010.23(d)(2) and account for the rate effects resulting from the deletion of a rate cell.

This deletion analysis fully resolves the question of the price cap implications of this change. However, in order to provide further clarity to the parties regarding the second prong of the standard, the Commission will also consider whether a change from Basic to Full Service IMb would qualify as a redefinition of a rate cell under 39 C.F.R. § 3010.23(d)(2) in a situation in which no cell was deleted. The change from Basic to Full Service IMb is an uncommon change reaching impacts so far beyond the ordinary mail preparation change that it redefines the rate cell.

The Full Service IMb requirement necessitates significant changes to “how the mailer sends it” compared to the basic characteristics of a Basic IMb mailing; changes so extensive that they have redefined the Basic IMb rate cell. The operational adjustments required of a mailer to comply with the Full Service IMb requirement compared to the Basic IMb requirement are vast, elaborate, and costly. As recognized by the Postal Service, the IMb program was the most complex program ever undertaken. The barcoding requirements for Full Service IMb are inherently more complex than Basic IMb. Unlike Basic IMb, which does not include unique barcodes, Full Service IMb requires a mailer to “uniquely number each mailpiece in a mailing, and not reuse numbers for a period of 45 days from the date of induction.”²⁵ This means that the mailer must now separately identify every piece of mail by a unique designator.

In addition to the requirement to uniquely number each mailpiece, a mailer must use IMb barcoding on letter trays, flat trays, and sacks, “uniquely number each tray or sack in a mailing, and not reuse each number for a period of 45 days from the date of induction,” and link or nest each piece inside the tray to the IMb tray barcode. *Id.* The containers used to transport mail must also have a unique IMb barcode and trays within the container must be linked and nested to the IMb container barcode. *Id.* This requirement is a significant change for a mailer to make; not only is every mailpiece uniquely designated but every mailpiece must be linked to every tray and container and then the mailer is required to provide electronic documentation providing “all of the Intelligent Mail barcodes used on the [mailpieces], trays, and containers” and documentation explaining “how the [mailpieces], trays, and containers fit together.” GAO Report at 9. It must be possible to identify every tray and [mailpiece] inside a container from the barcode on the container. The GAO Report explains that these changes “may result in significant process changes and may require new software or staff training.” *Id.* at 8.

²⁵ Advance Notice of Implementation of Full-Service Intelligent Mail Requirements for Automation Prices, 77 Fed. Reg. 23643, 23645 (April 20, 2012).

Not only must a mailer significantly enhance its technology and operations in order to implement the complex barcoding changes described above, the mailer must comply with electronic documentation and scheduling requirements that will also require new technology and software. As described by the Postal Service, the Full Service IMb mailings must have specific electronic documentation in order to be accepted for automation rates. The mailer must use one of three specific methods to send the electronic mailing information, either “Mail.dat[supreg], Mail.XML, or Postal Wizard.”²⁶ This electronic documentation requires extensive information about the mailing as follows:

Mailer electronic documentation for Full-Service mailings contains information about Intelligent Mail barcodes applied to mailpieces, trays or sacks, and containers. Also, it identifies the unique Intelligent Mail barcodes applied to each mailpiece, tray or sack, and container; it describes how mailpieces are linked to handling units, such as trays and sacks, and how mailpieces and handling units are linked to containers. In addition, documentation provides linkage among containers, trays and sacks when mail is co-palletized, combined or comingled...[and] identifies spoilage or shortage of pieces in a mailing.

Id. at 23645-23646.

The mailer will need to “make changes to their information systems” in order to comply with the electronic documentation requirements. GAO Report at 8. The mailer must invest in new software or hardware and provide training to their staff in order to comply with the Full Service IMb requirement. *Id.* at 8-9. Transitioning from Basic IMb to Full Service will require the mailer to change the physical makeup of their mailing, change the way the mailing is prepared internally, and change the way the mailing is presented to the Postal Service. As described in the 2009 GAO Report, mailers need to “redesign their [mailpieces]” in order to comply with the Full Service IMb requirement. GAO Report at 8.

²⁶ Advance Notice of Implementation of Full-Service Intelligent Mail Requirements for Automation Prices, 77 Fed. Reg. 23645 (April 20, 2012).

The operational adjustments needed to comply with the Full Service IMb requirement greatly exceed the normal adjustments made by mailers to comply with routine and frequent mail preparation requirement changes. For example, scheme changes are a type of frequent mail preparation change which involve changes to elements of addresses and their distribution. There are many different types of schemes within the Postal Service's operations that the mailers follow. A carrier route is a type of scheme which consists of the identification of the street names and numbers that are assigned to a specific carrier route for delivery of mail. Because a carrier route scheme consists of street names and numbers, the carrier route scheme changes when addresses are added or deleted. When the Postal Service revises a carrier route, the adjustments to operations required of the mailer involve minor modifications to that specific scheme. For a bulk mailer, these types of changes generally involve a simple software update that allows their machines to automatically implement the new scheme sequence without further operational adjustments. These changes do not require mailers to make significant changes to "what the mailer sends" or "how the mailer sends it." The Commission, applying its experience in reviewing numerous mail preparation changes, determines that the Full Service IMb requirement change differs substantially from this type of routine and frequent mail preparation change. It requires "significant changes to the way mailers prepare and submit their mail." GAO Report at 8.

As set forth above, the basic characteristics of a Basic IMb mailing include a 31-digit barcode that is fairly easy to implement. In contrast, Full Service IMb is more rigorous and complicated to implement because it requires unique barcodes on pieces, trays, sacks, and containers and the use of Full Service IMb compatible software to transmit electronic documentation that describes the "nesting relationship," *i.e.*, how mailpieces are linked to trays, sacks, and containers. The difference between the basic characteristics of the Basic and Full Service IMb is significant, and requires a finding that the Full Service IMb requirement causes the redefinition of a rate cell under 39 C.F.R. § 3010.23(d)(2).

In addition to extensive operational adjustments, the Full Service IMb requirement imposes a significant cost on the mailers that is, in the Commission's experience, outside the norm of a mail preparation change, further demonstrating that this is a large scale system change that effectively redefines a rate cell. The Office of Inspector General (OIG) for the Postal Service cited mailers as stating that "investment in Full-Service Intelligent Mail for larger mailers ranged from \$400,000 to \$3.25 million. In addition, mailers estimated that recurring annual expenditures for Full-Service Intelligent Mail ranged from \$50,000 to \$500,000."²⁷ These large cost estimates are extraordinary for a change to a mail preparation requirement. After the audit from the OIG, the Postal Service received input from the mailers "about the possible challenges mailers perceive to moving to Full-Service, the operational changes they will have to make, the costs and benefits of those changes, and steps the Postal Service could take to assist mailers in moving to Full-Service."²⁸ Further, in Docket No. R2013-10, commenters from the mailing community reiterated the extensive costs involved to comply with Full Service IMb. In conclusion, the Postal Service had direct information from the mailing community regarding the extensive costs and burdens associated with implementing the Full Service IMb requirement.

In addition to being aware of the significant costs and operational adjustments necessary to comply with the Full Service IMb requirement, the Postal Service has previously acknowledged that the IMb program was subject to the price cap limitation. In the rate adjustment proceeding at issue in the present matter, the Postal Service properly accounted for the changes to the Full Service IMb requirement and adjusted the billing determinants to account for the effects on the price cap calculation for only the Package Services class. Order No. 1890 at 35. Information provided by the mailing

²⁷ Office of Inspector General – United States Postal Service, Effects of Compliance Rules on Mailers – Audit Report, MS-AR-11-006, August 24, 2011, at 3.

²⁸ Advance Notice of Implementation of Full-Service Intelligent Mail Required for Automation Prices, 77 Fed. Reg. 23643, April 20, 2012.

community through comments in the underlying Docket No. R2013-10 and the current proceeding support a finding that the Full Service IMb change has a rate effect. The Postal Service does not challenge the fact that Full Service IMb is a significant change required of mailers.

Accordingly, the Commission confirms its original holding in Order No. 1890 that the Full Service IMb requirement is subject to the price cap rules where it is a classification change that both deletes and redefines rate cells and is subject to compliance with the price cap rules. As a result, in order to implement the Full Service IMb requirement in the future the Postal Service must adjust its billing determinants to account for the effects of the price change calculation on the price cap limitation for all affected classes of mail.

D. FSS Preparation Requirement

In Docket No. R2013-10, the Postal Service introduced a new FSS preparation requirement along with new FSS pricing. The FSS preparation requirement that had been previously optional was now mandatory. Order No. 1890 at 69-70. However, despite the mandatory preparation requirement, the Postal Service set the new FSS pricing equal to the non-FSS pricing so that the FSS prices were the same as the rates currently charged for non-FSS preparation. *Id.* at 73-74.

The FSS preparation required mailers to create bundles of equal height. “These bundles can range in size from 3.0 inches to 6.0 inches, but all bundles must be of equal height, except for one residual bundle.” *Id.* at 70. The new FSS bundling requirement also permitted mailers to comingle within the bundles flats from multiple products within a class and eliminated the previous minimum piece requirements for bundles. For example, “FSS bundles on a pallet can include Standard Mail 5-digit Flats, Standard Mail Carrier Route Flats, and Standard Mail High Density Flats, and the piece minimums are eliminated.” *Id.* Previously, mailers would have to bundle these products separately and comply with a minimum piece requirement for each product bundle.

In Order No. 1890, the Commission found that the FSS requirement did not have a price effect as follows:

[The] FSS preparation requirement[] requires mailers to rearrange their current bundles to meet the new FSS preparation requirement[]. This is similar to the adjustments that are made when carrier route schemes change. It is also similar to changes made to accommodate findings that machine tolerances are greater or less than previously believed. Such changes are not viewed by the Commission as price changes.

Order No. 1890 at 71. The Commission also found that the FSS preparation requirement was “similar to the requirements regarding address placement,” explaining that the Commission is unlikely to consider shifts in address placement to be price changes. *Id.* at 72. The Commission found that the requirements “only require mailers to make minor modifications to their existing practices to meet the operational realities of the Postal Service” and accordingly, the “Commission does not consider these types of mail preparation changes classification changes.” *Id.*

Under the Commission’s standard articulated in this Order, the FSS requirement does not result in either the deletion or redefinition of a rate cell. Applying the first prong of the standard, the Commission analyzes whether the FSS requirement eliminates a previously available rate. The Commission finds that the FSS requirement does not result in the deletion of a rate cell, because unlike the Full Service IMb requirement, the FSS requirement did not eliminate a previously available rate. Here, the requirement added FSS pricing and kept non-FSS pricing readily available to mailers. The FSS and non-FSS rate for the product were identical. Although the FSS requirement was made mandatory, mailers who did not comply with the FSS requirement would still be able to access their previously available non-FSS rate cell because the Postal Service set equal prices for FSS and non-FSS.²⁹ Accordingly, in Order No. 1890, the Commission

²⁹ Even were the Commission to find the FSS preparation requirement was a deletion at that point in time, there would be no rate effect because the resulting percentage change in rates would have been zero because the FSS and non-FSS prices were identical.

held that the Postal Service must file information with the Commission when it proposed to differentiate between FSS and non-FSS prices. *Id.* at 73-74.³⁰

In addition to finding that the FSS preparation requirement does not delete a rate cell, the Commission reiterates its finding that the requirement does not redefine a rate cell under 39 C.F.R. § 3010.23(d)(2). Under the second prong of the standard, the FSS requirement does not have a significant effect on a basic characteristic of a mailing. The change does not have a significant effect on “what a mailer sends” or “how a mailer sends it,” rather the change is akin to the commonly anticipated mail preparation changes made by the Postal Service on a routine basis and does not involve significant operations adjustments or cost by the mailers. Rather, in the Commission’s experience, mailers are equipped to make this type of change to mail bundles without substantial cost or operational changes.

The operational adjustments required for compliance with the FSS preparation are limited and similar to a scheme change. “An FSS scheme is a scheduled run (sort-scheme) that includes one or more 5-digit ZIP Codes.”³¹ As set forth by the Postal Service, the FSS bundle preparation meant that “[f]lats that are required to follow FSS preparation will no longer be separated into Carrier Route, 5-digit, 3-digit, ADC or MADC bundles.” *Id.* at 3. As a result of this new requirement, “FSS scheme bundles will simplify both bundle preparation and pallet construction.” *Id.* Mailers previously sending carrier route specific bundles would now be required to send FSS bundles that could contain both carrier route and non-carrier route mail in the same bundle, so long as the bundle was of equal height. Although this changes “how mail is sent,” it is not a

³⁰ In Docket No. R2015-4, the Postal Service filed a notice with the Commission when it differentiated between FSS and non-FSS prices for certain classes of mail. Docket No. R2015-4, United States Postal Service Notice of Market-Dominant Price Adjustment, January 15, 2015, at 14-15. It was at that point in time that the Postal Service properly accounted for the rate effects of this change to the FSS pricing under the price cap rules.

³¹ United States Postal Service Flats Sequencing System (FSS) Frequently Asked Questions, January 2014, at 2; https://ribbs.usps.gov/flat/documents/FSS_FAQs/FSS_FAQs.pdf.

significant change because it would not require considerable operational adjustments from mailers.

The cost to mailers to comply with the FSS requirement is also minimal. Mailers are able to comply with the FSS requirement without the need to purchase new equipment or software to implement the change. The mailers are able to transition from one bundling scheme to another with minimal burden and training of staff. The Postal Service developed the FSS preparation requirement “working with members of the mailing industry, representing a wide spectrum of flat mail owners and preparers.”³² The working group concluded that the “preparation of bundles and pallets specifically for FSS processing could lead to greater efficiencies and cost savings for both the [Postal Service] and mailing industry.” *Id.* The mailers agreed that “the production of uniform bundle heights could reduce the costs associated with preparing bundles....” *Id.* The cost to mailers to implement the new FSS requirement was minimal. The Postal Service indicated that the required FSS “preparation actually would reduce their preparation costs, by allowing mailers to create fewer bundles.”³³ As expressed by the Public Representative in Docket No. R2013-10, he viewed the proposed FSS requirement as more akin to a carrier route scheme change than a price increase:

[T]here is an important distinction between the IMb mandate and the FSS mandate. The Postal Service regularly revises Carrier Route sort scheme to adjust for route redesigns. As such, mailers are currently required to update carrier route schemes every 90 days. The Commission should carefully review the implementation of the FSS scheme mandate to ensure that mailers will not have to pay higher rates due to the change in mail preparation requirements. The fact that mailers will be able to pay Carrier Route prices for FSS scheme bundles is also significant in this determination, because it is unclear how a Carrier Route bundle (which is sorted past the 5 digit level) materially differs from an FSS scheme bundle. It appears that the primary change

³² Optional Mail Preparation Standards for Flat-Size Mailpieces in FSS Zones, 75 Fed. Reg. 51668 (August 23, 2010).

³³ Docket No. R2013-10, Response of the United States Postal Service to Chairman’s Information Request No. 3, Question 3, October 28, 2013.

is the requirement that the mailer create 'uniform bundle height for (the) entire scheme pool'.³⁴

Accordingly, on the spectrum between minor changes and changes that result in the deletion of a rate cell, the FSS preparation requirement is a minor change in line with the routine scheme changes made by the Postal Service and far from the type of change that results in the deletion of a rate cell.

In contrast to the Full Service IMb requirement which requires a large scale and costly change to the mailer's software, hardware, and infrastructure, the cost to mailers to comply with the FSS requirement is small and potentially cost saving. Accordingly, as both the operational adjustment and cost to comply with the FSS requirement are minimal, the FSS requirement is not a significant change to a basic characteristic of a mailing.

Based on these facts, the Commission concludes that the FSS bundling requirement does not constitute a classification change that results in the deletion or redefinition of a rate cell under 39 C.F.R. § 3010.23(d)(2). Accordingly, the Commission declines to revise its finding in Order No. 1890 that "the new rates associated with the FSS preparation requirement[] [is] acceptable and have no impact on the price cap calculation." Order No. 1890 at 72.

IV. ALTERNATE PROPOSALS

In this section, the Commission addresses the commenter proposals and the Commission's proposed factors. In response to the Commission's notice, the Postal Service, PostCom, *et al.*, and the Public Representative set forth alternative proposals to be considered by the Commission. Each commenter urges the Commission to accept its recommendations.

³⁴ Docket No. R2013-10, Public Representative Comments, October 31, 2013, at 18 (internal citations omitted).

A. Postal Service Proposal

The Postal Service urges the Commission to “adopt a bright-line rule that provides the Postal Service, mailers, and other postal stakeholders with clear notice of when a proposal will be evaluated under 39 U.S.C. § 3622(d)(1).”³⁵ The Postal Service proposes a test that would “apply the price cap only to changes in posted rates.” *Id.* at 2. The Postal Service contends that “changes in rates” should be limited to the “changes to the numerical dollar values published in the [Mail Classification Schedule (MCS)]” leaving other changes, such as mail preparation requirements, to be dealt with “through regulatory measures other than the price cap.” *Id.* The Postal Service urges the Commission to adopt its interpretation of “changes in rates” because: “(1) such approach is consistent with the plain language of the statute; (2) it allows the Commission to employ other, more appropriate sources of authority to regulate changes to mailing rules; and (3) it is the most reasonable way to promote the statutory objectives for the system of regulating market-dominant rates and classes.” *Id.* at 23-24.

In the alternative, the Postal Service proposes adopting a test where “only changes to posted rates and to the size, weight, or minimum-volume thresholds that define products in the Mail Classification Schedule (MCS) would have price cap impact.” *Id.* at 2, 21. The Postal Service states that if the mail preparation change “does not affect posted prices or one of those three non-price criteria, then the change does not have a price cap effect, although it may be subject to other forms of regulation.” *Id.* at 24. The Postal Service continues to argue that the Commission should not apply the price cap to operational mail preparation changes as it asserts that the Commission’s complaint jurisdiction and regulatory ability under the Commission’s classification procedures provide alternative options. *Id.* at 19, 21. The Postal Service proposes a “modified version of proposed factor 1(a) that covers only size, weight, and minimum-

³⁵ Initial Comments of the United States Postal Service, August 17, 2015, at 1-2 (Postal Service Comments).

volume eligibility criteria that define products in the MCS (and not content-based criteria, as proposed in factor 1(a)).” *Id.* at 24 (internal citation omitted). As a result of this proposal, the Postal Service contends that:

[A] change can have a price cap effect only if it either changes a posted price or affects the product-defining weight, size, or minimum-volume thresholds in the MCS. If a change does not affect posted prices or one of those three non-price criteria, then the change does not have a price cap effect, although it may be subject to other forms of regulation.

Id. (emphasis in original).

The Postal Service distinguishes “product-defining weight, size, and volume criteria from other rate-determining criteria” by stating that the “former are the externally-verifiable, objective attributes of a mailing” as opposed to more subjective inquiries. *Id.* at 25. As an example of the application of its proposal, the Postal Service explains:

If the Postal Service seeks to raise a minimum-volume threshold in the MCS from 200 to 300 pieces per mailing, it would be expected to calculate how many mailpieces will be subject to different rates and what the cap impact is. If, on the other hand, the Postal Service changes a requirement about how an address or barcode must be printed, all parties would have a stable expectation that this would not be factored into the price cap, instead of having to guess how the Commission would apply each factor, and which factors it would deem to tip the balance for or against a cap impact.

Id. at 25 (emphasis in original).

In conclusion, the Postal Service argues that if the Commission intends to regulate classification changes through the price cap statute, it seeks a “bright-line distinction between the largely operational requirements in the DMM and the price-point-defining criteria in the MCS.” *Id.* at 26.

1. Responses to the Postal Service Proposal

PostCom, *et al.* note that the Postal Service’s approach “essentially argues for eliminating any standard” and “ignores the obvious principle, recognized by the Commission, the D.C. Circuit, and the Supreme Court, that changes in regulations

governing the use of rates can effectively [cause] changes in the rates mailers pay.”³⁶ PostCom, *et al.* argue that the Postal Service’s proposed standard would be useless because it ignores any rate effects from mail preparation requirement changes and allows the Postal Service to “impose whatever rule changes it wants, no matter how large their rate effects, so long as the changes do not affect the ‘posted rates.’” *Id.* at 2. Further, as the Postal Service has admitted that certain mail preparation requirements “play an important role in determining the rates mailers pay,” PostCom, *et al.* contend that the question left to the Commission is how to regulate those effects. *Id.* at 5.

In objecting to the Postal Service’s proposal, PostCom, *et al.* reaffirm that the Commission has a statutory duty to enforce the price cap and must “look ‘to the effect of a change on the rates paid by mailers.’” *Id.* at 6 (citing Order No. 1890 at 27). The Postal Service’s purported “need for ‘predictability and clarity,’ however, cannot justify the significant transfer of authority over price cap compliance from the Commission to the Postal Service that the Postal Service’s proposal represents.” *Id.* at 7. In addition, PostCom, *et al.* reject the Postal Service’s suggestion that mail preparation changes could be regulated under alternative procedures, including the complaint process, as those procedures would be inadequate to provide relief to mailers. *Id.* at 9.

Similar to PostCom, *et al.*, the Public Representative asserts that the Postal Service’s proposal fails to sufficiently address the issues on remand, and ignores the Court’s holding regarding the regulation of mail preparation changes in the DMM.³⁷ The Public Representative notes that both proposals set forth by the Postal Service would limit price cap review to MCS changes only. *Id.* at 3. The Public Representative urges the Commission to reject both proposals where they would “force mailers to bear the entire burden of the impact of mail preparation requirement changes.” *Id.* at 4. The

³⁶ Reply Comments of the Association for Postal Commerce, Alliance of Nonprofit Mailers, Major Mailers Association, MPA—The Association of Magazine Media, and National Postal Policy Council, August 31, 2015, at 1-2 (PostCom, *et al.* Reply Comments).

³⁷ Public Representative Reply Comments, August 31, 2015, at 2 (PR Reply Comments).

Public Representative explains that the Postal Service's rationale underlying the proposals was previously rejected by both the Commission and the Court. *Id.*

Additionally, the Public Representative notes that the Postal Service has acknowledged that changes to mail preparation requirements can have a rate impact on mailers, citing to the Postal Service's example of the 2010 "[droop] test"³⁸ which, resulted in a change in mailer behavior and price increase for some mailers. PR Reply Comments at 4. The Public Representative rejects the Postal Service's argument that mail preparation changes are too complex and uncertain to be subject to price cap review. *Id.* at 5. Rather, the Public Representative asserts that such uncertainty makes price cap review necessary to avoid a system where the Postal Service is allowed to achieve savings at the expense of all mailers. *Id.*

By putting forward a test that would apply the price cap only to changes to posted rates or limited MCS changes, the Public Representative warns that the "Postal Service seeks unilateral control over when the price cap is involved." *Id.* at 6. As an example, the Public Representative contends that the Postal Service could make DMM changes and choose not to update the MCS price. *Id.* The Public Representative does, however, agree with the Postal Service that the 45-day market dominant price change dockets do not allow sufficient time to review certain mail preparation requirement changes. *Id.* at 7-8.

Valpak, in line with PostCom, *et al.* and the Public Representative, points out that the Postal Service's alternative proposal is no more than an attempt "to relitigate issues that were decided and upheld on appeal."³⁹ Valpak notes that the Court clearly "upheld the Commission's exercise of authority over mandatory Full[Service IMb]" and both of

³⁸ The droop test refers to the deflection standards to qualify as automation-compatible flats. The Postal Service adjusted these standards because flats that are "droopy" are more likely to jam sorting equipment. The Postal Service adopted these standards despite mailer objections. See Postal Service Comments at 13.

³⁹ Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments in Response to Order No. 2586, August 31, 2015, at 1-2 (Valpak Reply Comments).

the Postal Service's proposals arguing to the contrary should be rejected by the Commission. *Id.* at 2. Valpak contends that the Postal Service's bright-line proposal would allow the Postal Service to circumvent the price cap through rule changes. *Id.* at 1-3.

2. Commission Analysis

The Postal Service's proposals, *supra* at 32, under any interpretation, would change the Commission's approach to reviewing mail preparation requirement changes that was upheld by the *IMb Remand* decision. Both alternative proposals are inconsistent with Commission precedent, the Court's remand, and the price cap statute. For the reasons detailed below, the Commission declines to adopt the Postal Service's proposals.

The Postal Service's first proposal contravenes the Commission's determination that certain mail preparation requirement changes have rate effects under 39 C.F.R. § 3010.23(d)(2) that impact the price cap. In Order No. 1890, the Commission determined that a mail preparation requirement change can be a "classification change with rate effects that must be recognized in calculating whether the proposed changes in rates comply with the annual limitation established in 39 U.S.C. § 3622(d)(1)(A)." Order No. 1890 at 15. The Court agreed with the Commission, finding that it was a "self-evident fact that changes in classifications can *cause* changes in the rates experienced by mailers, a point the Postal Service does not dispute." *See IMb Remand* at 752 (emphasis in original). The Court endorsed the Commission's interpretation of its regulations, stating that the Commission may reasonably assert authority "over some mail preparation requirement changes with rate effects." *See id.* at 753. Further, the Court held that "contrary to the Postal Service's arguments, [the price cap statute's and regulations'] 'plain language' does not forbid regulation of mail preparation requirement changes with rate effects." *Id.* at 750. The Postal Service's proposal is inconsistent with that holding and lacks grounds for the Commission to overturn its Court approved approach.

The Court confirmed that “Congress expressly delegated to the Commission responsibility to implement [the price cap statute].” *Id.* (alteration in original). The Postal Service’s proposal, however, would abdicate the Commission’s statutory duty to evaluate the price cap implications of changes in rates when those changes are made by modifying mail preparation requirements. The Postal Service’s choice of procedure—noticing a mail preparation change in the *Federal Register* rather than noticing a rate adjustment or requesting the Commission modify the MCS—may not supplant the Commission’s authority to determine whether a change affects rates. See PostCom, *et al.* Reply Comments at 6.

The Postal Service’s second proposal to regulate only mail preparation requirement changes affecting the “size, weight, and minimum-volume eligibility criteria that define products in the MCS” conflicts with the Postal Service’s previous acknowledgments that certain mail preparation requirement changes have rate effects. See Postal Service Comments at 24. The Commission agrees with the Public Representative’s observation that the Postal Service can apply (and has applied) the price cap to mail preparation requirement changes to its advantage.⁴⁰ Even the Postal Service concedes that it should not be permitted to “game the system through ... mail-preparation requirements that force mailers into paying more for service so that Postal Service revenue increases.”⁴¹

Although the Postal Service’s second proposal, regulating changes to the “size, weight, and minimum-volume” criteria in the MCS, would encompass certain mail preparation requirement changes outside of changes to posted rates, the proposal would be under-inclusive of changes that have rate effects and would in effect allow the Postal Service—not the Commission—to regulate changes under the price cap statute.

⁴⁰ See PR Reply Comments at 6. As an example, the Public Representative notes that the Postal Service gained price cap authority in Periodicals by appropriately accounting for a DMM change in Docket No. R2015-4.

⁴¹ See Reply Comments of the United States Postal Service, August 31, 2015, at 13 (Postal Service Reply Comments) (quoting PR Comments at 7 (omission in original)).

If a mail preparation requirement change causes a change in the rates mailers pay for a mailing, the Postal Service must comply with the price cap statute regardless of how the Postal Service characterizes the change. By restricting Commission review to changes in posted rates or the MCS, the Postal Service's bright-line rule would allow significant Postal Service discretion as to how each change is described, thus allowing the Postal Service to avoid regulatory compliance.

Furthermore, the Postal Service contends that alternative regulatory avenues, *i.e.*, complaints or mail classification change cases, would regulate the price cap sufficiently. Postal Service Reply Comments at 9-10. The Commission disagrees. Instead, the Commission concurs with PostCom, *et al.* and the Public Representative that other existing regulatory procedures are not well suited to address the price cap implications of mail preparation requirement changes that the Postal Service publishes without explicitly analyzing those implications. See PostCom, *et al.* Reply Comments at 8; PR Reply Comments at 4. Regardless of the regulatory procedure used, adopting the Postal Service's proposed standard would remove mail preparation requirement changes causing rate effects from the Commission's pre-implementation review. Consistent with the PAEA, any regulatory procedure must use a standard that "forbids the Postal Service from raising the rates on its market-dominant products faster than the rate of inflation." See *IMb Remand* at 743.

Using the current complaint procedures to employ the correct standard, however, would not enable the Postal Service to comply with and the Commission to enforce the price cap "before the implementation of any adjustment in rates." See 39 U.S.C. § 3622(d)(1)(C). Instead, complaints review Postal Service activities retroactively. See *id.* § 3662(a). Moreover, unwinding the effects of price cap non-compliance after-the-fact would disrupt the Postal Service's and mailers' expectations. Thus, guarding the price cap retroactively would contravene the price cap statute. The price cap rule requires the Postal Service to account for the rate effects of classification changes that result in the introduction, deletion, or redefinition of rate cells. 39 C.F.R. § 3010.23(d)(2). Neither of the Postal Service's proposals address this rule.

The Commission declines to adopt the Postal Service's approach because the Commission has a statutory duty to review and enforce the price cap. This approach would relinquish the Commission's statutory duty and allow the Postal Service to increase the prices paid by mailers irrespective of the price cap by shifting the burden and costs of mail preparation changes to mailers. See PR Reply Comments at 4-5. The Commission cannot permit the Postal Service to evade the price cap in this fashion. To ensure compliance with the price cap and maintain price stability, the Commission must review whether the planned mail preparation requirement change has a rate effect under the price cap statute.

B. PostCom, *et al.* Proposal

PostCom, *et al.*'s proposed standard focuses "on the key consideration of whether the change in preparation requirements imposes significant enough costs on mailers to maintain eligibility for a rate that the change should be considered a *de facto* rate increase."⁴² To implement this standard, PostCom, *et al.* submit that the Commission should measure the revenue impact of the change and use the *de minimis* rate change rules set forth in 39 C.F.R. § 3010.3 to determine its rate effect.

PostCom, *et al.* suggest that the Commission engage in a two-step analysis to implement their proposal. First, the Commission should find that "any change in mail preparation requirements that causes mail volume to shift from one rate category to another is a rate change." *Id.* at 9. After making this determination, the Commission should then inquire as to "whether the resulting rate change is significant enough to be accounted for in rate adjustment calculations." *Id.* PostCom, *et al.* contend the Commission could apply this two-part standard under the rules governing *de minimis* rate increases under 39 C.F.R. § 3010.30. *Id.* at 10. Therefore, according to PostCom,

⁴² Initial Comments of the Association for Postal Commerce, Alliance of Nonprofit Mailers, Major Mailers Association, MPA—The Association of Magazine Media, and National Postal Policy Council in Response to Order No. 2586, August 17, 2015, at 8-9 (Post Com, *et al.* Comments).

et al., “[i]f the total postage revenue increase for the class affected by the rule change is below the *de minimis* threshold, the change need not be accounted for in rate adjustment calculations, and the Postal Service need not file a notice of rate adjustment along with the change in mail preparation requirements.” *Id.* PostCom, *et al.* claim that the *de minimis* rule would also include consideration of the costs to mailers. *Id.*

PostCom, *et al.* argue that their proposed standard is both simple and objective. *Id.* at 11. Further, they contend that the impact of the standard would result in the majority of mail preparation requirement changes falling within the *de minimis* exception “and the implementation of this standard would not significantly intrude on the Postal Service’s prerogative to govern its operations.” *Id.* PostCom, *et al.* also filed a petition for rulemaking suggesting various changes to the Commission’s *de minimis* rules in order to implement their proposed standard.⁴³

In their reply comments, as additional support for their proposed standard, PostCom, *et al.* argue that it is clear from past Commission findings and the Court’s *IMb Remand* decision that discount eligibility requirement changes can cause changes in rates. PostCom, *et al.* Reply Comments at 4. PostCom, *et al.* provide examples of rate regulation in the telecommunications industry where similar classifications are linked to the rates charged. *Id.* PostCom, *et al.* assert that their proposal provides the optimal balance between the need for “clarity and predictability” and the Commission’s statutory responsibility. *Id.* at 7-8.

⁴³ *Id.*; see Docket No. RM2015-20, Petition of the Association for Postal Commerce and Alliance of Nonprofit Mailers to Initiate Rulemaking Proceeding, August 17, 2015. On September 10, 2015, the Commission issued an Order Holding Petition for Rulemaking in Abeyance pending a final decision in this docket. Docket No. RM2015-20, Order No. 2703, Order Holding Petition for Rulemaking in Abeyance, September 10, 2015.

1. Responses to the PostCom, et al. Proposal

The Postal Service asserts that the PostCom, *et al.* proposal is flawed, boundless, and burdensome.⁴⁴ The Postal Service explains that PostCom, *et al.*'s proposal hinges upon an improper assumption that mailer "costs" are synonymous with "rates" charged by the Postal Service. *Id.* at 8. The Postal Service characterizes the proposal as effectively treating an increase in mailer costs as a *per se* increase in the rates paid to the Postal Service. *Id.* at 10. The Postal Service asserts that PostCom, *et al.* improperly apply the price cap to mail preparation requirement changes that force mailers into higher rate categories. *Id.* The Postal Service opposes construing "changes in rates" to include compliance costs that mailers pay to third parties. *Id.* at 8.

The Postal Service rejects PostCom, *et al.*'s proposed application to such changes that impose "significant enough" costs on mailers. *Id.* (quoting PostCom Comments at 4, 9). The Postal Service contends that using the 0.001 *de minimis* percent as the threshold would ensnare virtually all changes to mail preparation requirements. *Id.* The Postal Service represents that this threshold is theoretically low enough to capture a change affecting a single mailing by a single bulk mailer. *Id.* at 11. The Postal Service contends that PostCom, *et al.* essentially propose that the price cap should cover all mail preparation requirement changes that impose compliance costs on mailers. *Id.* at 7.

The Postal Service asserts that the PostCom, *et al.* proposal is also burdensome. The Postal Service argues that the proposal would require the Postal Service to analyze and compute the price cap impact for all mail preparation requirement changes and require the Postal Service to file either a full rate case or a full Type I-A rate case before instituting a mail preparation requirement change. *Id.* at 27. The Postal Service explains that the timing of each proposed change would require it to "develop different historical billing determinant[s]" on which to base its price cap analysis. *Id.* at 29. The

⁴⁴ Postal Service Reply Comments at 5-38.

Postal Service states that it would use these billing determinant volumes to determine how many pieces would not comply with the proposed mail preparation requirement change and the prices paid for non-compliant pieces. *Id.* Overall, the Postal Service represents that estimating price cap usage for all mail preparation requirement changes, under the PostCom, *et al.* proposal, would overwhelm its resources and severely disrupt the Postal Service's ability to implement necessary mail preparation requirement changes. *Id.* at 28-29.

According to the Postal Service, the proposal's attempt to minimize the filing requirements for changes with *de minimis* impacts provides virtually no relief from the burden of analyzing all mail preparation changes because the Postal Service must complete its price cap analysis prior to implementing any changes. *Id.* at 29. The Postal Service warns that applying a *de minimis* analysis to mail preparation requirement changes would transform routine calculations using numbers previously approved by the Commission into complex analyses of price cap effects for each class of mail. *Id.* at 28-29. The Postal Service argues that such unpredictability would destroy the Postal Service's ability to know how much price cap space is available when preparing price changes. *Id.* at 28.

Finally, the Postal Service emphasizes that PostCom, *et al.*'s proposal adds to that burden by requiring the Postal Service to incorporate mailers' internal costs into its price cap analysis. *Id.* at 30. The Postal Service notes that the Commission has previously considered and declined suggestions to consider mailers' compliance costs in the price cap analysis because of the difficulty of obtaining information on mailers' costs. *Id.* Moreover, the Postal Service asserts that it would not be possible to precisely quantify any individual mailer's compliance costs, let alone to generate a meaningful comparison aggregating all mailers' compliance costs. *Id.* at 10. Thus, the Postal Service argues that the lack of reliable cost information renders PostCom, *et al.*'s proposal impractical because neither the Postal Service nor the Commission could undertake the calculations contemplated by PostCom, *et al.* *Id.* at 30-31.

The Public Representative states that PostCom, *et al.*'s alternative test based on the Commission's regulations governing *de minimis* rate increases "looks in the right direction," but explains that the test needs revision in order to become a workable bright-line standard. PR Reply Comments at 8-9. The Public Representative believes that the "current *de minimis* rules do not fulfill the requirements of the [C]ourt's remand." *Id.* at 9. The Public Representative states that "[n]owhere in the [*de minimis*] rules is a change in rates defined as including an increase in postal revenue due to mail preparation changes." *Id.* Further, the Public Representative contends that the "*de minimis* rules do not recognize that any change in mail preparation requirements forcing mail to shift from one rate category to another without a change of behavior is a rate change." *Id.*

Valpak asserts that if the Postal Service insists on a bright-line rule, PostCom, *et al.*'s proposal to regulate all mail preparation requirement changes as rate changes would support the Commission's price cap responsibility. Valpak Reply Comments at 3.

2. Commission Analysis

PostCom, *et al.* propose a test that focuses on "the key consideration of whether the change in preparation requirements imposes significant enough costs on mailers." PostCom, *et al.* Comments at 8-9. The PostCom, *et al.* proposal equates to finding that all mail preparation requirement changes have rate effects and requires an analysis under the *de minimis* rules to determine the price cap impact. The PAEA required the Commission to set forth a system for modern rate regulation that achieved various objectives, which include creating predictable and stable rates, and reducing administrative burden. See 39 U.S.C. §§ 3622(b)(2), 3622(b)(6). The Commission declines to adopt the PostCom, *et al.* proposal because doing so would result in a significant administrative burden on the Postal Service, increased uncertainty, and would be inconsistent with Commission precedent.

The Commission finds that the PostCom, *et al.* proposal sets a bright-line standard at such a low threshold as to inappropriately include "virtually all" changes to

mail preparation requirements. The Commission disagrees with PostCom, *et al.*'s assertion that using the existing *de minimis* rules as a bright-line test to determine when changes in mail preparation requirements have rate impacts would be both "objective and simple to administer." PostCom, *et al.* Comments at 11. To the contrary, measuring the *de minimis* threshold for every mail preparation requirement change made by the Postal Service would be highly subjective and burdensome for both the Postal Service and the Commission. Attempting to quantify the impact of the change at the *de minimis* threshold would require complex judgment calls at an operational level for each and every mail preparation change. As the Public Representative notes, the current *de minimis* rules require the Postal Service to file a notice of rate adjustment where the total increase for the class equals or exceeds 0.001 percent. 39 C.F.R. § 3010.30(e); see PR Reply Comments at 10. Strict adherence to the current *de minimis* rules as suggested by PostCom, *et al.*'s, proposal would require the Postal Service to file a notice of rate change and assume a price cap implication for every change in mail preparation that satisfied the 0.001 revenue threshold, without consideration of the particular impact on mailer behavior and costs.

Moreover, the PostCom, *et al.* proposal does not discuss how the revenue impact of the mail preparation changes would be determined in relation to the *de minimis* threshold. The Commission agrees with the Postal Service that it would be an extreme burden on the Postal Service to undertake a revenue impact and cost to mailers analysis for every single mail preparation change to determine if it is under the *de minimis* threshold. As the Postal Service is constantly changing mail preparation requirements, it is neither practical nor desirable for the Postal Service to file notices of rate change for all changes in the DMM and the Commission's price cap rules do not require such compliance. The Commission agrees that adopting the current *de minimis* rules as a standard to measure mail preparation requirement changes would create an overly burdensome and impracticable system of regulation. PostCom, *et al.*'s proposal, which would capture and regulate virtually all mail preparation requirement changes, is

too inflexible to allow for distinction between mail preparation changes that implicate the price cap, and those that do not.

The Commission has previously stated that it “has not and will not indiscriminately treat all new mail preparation requirements as rate adjustments.” Order No. 1890 at 25. PostCom, *et al.*’s proposal does not address the Commission’s price cap rules which require the Postal Service to account for the rate effects of classification changes in situations where they result in the introduction, deletion, and/or redefinition of a rate cell. 39 C.F.R. § 3010.23(d)(2). PostCom, *et al.*’s proposal inhibits the Commission from applying its expertise and judgment to distinguish between minor routine changes and the large magnitude changes that affect the rate the mailers pay for the mailing. Instead, the proposal would result in an over-inclusive standard that would regulate all mail preparation requirement changes.⁴⁵ The Commission agrees with Valpak’s comment that “the full panoply of possible changes to mail preparation requirements is too complex to be governed by a simple, bright-line test.”⁴⁶

C. Public Representative Proposal

The Public Representative recommends that the Commission “implement a structured process to require the Postal Service to identify and report in its [Annual Compliance Report (ACR)⁴⁷] required changes to mail preparations and for the Commission to review their revenue impact as part of the [Annual Compliance

⁴⁵ According to the Postal Service, the threshold rate impact amounts for FY 2014 would have been \$280,481 for First-Class Mail, \$170,464 for Standard Mail, \$15,640 for Periodicals, \$7,685 for Package Services, and \$21,101 for Special Services. The Postal Service argues that the thresholds could theoretically be satisfied by changes that affect only a single mailer. Postal Service Reply Comments 10-11.

⁴⁶ Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Initial Comments in Response to Order No. 2586, August 17, 2015, at 2 (Valpak Comments).

⁴⁷ The Postal Service must demonstrate that it complied with the statutory and regulatory requirements relating to market dominant products in annual reports to the Commission. 39 U.S.C. § 3652.

Determination (ACD)⁴⁸].” PR Comments at 2. He contends that the “appropriate standard for assessing if a mail preparation requirement change is a rate change is the size of the revenue impact.” *Id.* He proposes a standard that would evaluate the revenue impact of a mail preparation requirement change that would require the Commission to “revise rule 3010.30 to increase the *de minimis* maximum to at least 0.005 percent and add a minimum threshold below which a rate change filing is not required....” *Id.* at 14. To implement this standard, the Postal Service would also be required to file “reports in the ACR of Postal Service volume estimates that are subject to adjustment through revision of the price cap limitation.” *Id.*

The Public Representative views the question in this matter as follows: ... “[D]oes the mail preparation change force a mailer who does not change behavior to pay a different price for the same mailing?” *Id.* at 9. He notes the two different styles of mail preparation requirement changes: changes in mail preparation requirements that are filed with a notice of market dominant price change and are linked to changes in pricing structure (e.g., FSS bundling), and changes falling outside of the notice of market dominant price change and not linked to changes in pricing structure (e.g., IMb). *Id.* For the second style of mail preparation changes, he proposes that the “Commission should require the Postal Service to provide in its ACR a list of all mail preparation changes that introduce, delete or redefine rate cell(s) throughout the year under review.” *Id.* at 10. As a result of this process, the Public Representative contends that “[m]ost changes will have a *de minimis* impact on the price cap, and the Postal Service would be able to state that point.” *Id.*

The Public Representative proposes that “the lower end of the *de minimis* rule include a cut-off revenue change level below which even a rate notice under that rule is not required.” *Id.* He explains how the *de minimis* rules, enacted after Order No. 1890,

⁴⁸ The Commission must make an annual determination of whether the Postal Service has complied with the statutory and regulatory requirements relating to market dominant products. 39 U.S.C. § 3653.

recognize “the minimal impact that small changes in rates may have on revenues for a class” and how they “prescribe[] a limited rate filing for very small incremental changes in revenues.” *Id.* at 12. In order to apply these rules to mail preparation requirements changes and limit the number of rate filings, he proposes increasing the *de minimis* threshold to at least 0.005 percent and “insert a minimum revenue change below which no rate change filing is required, such as 0.001 percent.” *Id.* at 13. He believes that modifying the *de minimis* rules in this fashion would allow the Commission to establish a workable standard to apply to mail preparation requirement changes. *Id.*

In addition to revising the *de minimis* rules, the Public Representative also suggests requiring the Postal Service to conduct and file results of a “revenue impact study” with the Commission in conjunction for changes in volume resulting from mail preparation requirement changes in order to monitor compliance with the price cap. *Id.*

The Public Representative notes that “[w]hile the order does not request comments on the potential use of forward looking indices rather than backward looking historical volumes to measure rate change, the Commission has previously invited comments on the issue.” *Id.* at 5 (citing Order No. 1890 at 25 n.45). He suggests adding a second step to the review process for evaluating the price cap impact of a mail preparation requirement change which would “use after-the-fact information reported in the ACR...and [evaluate the] accuracy of those adjustments.” *Id.* at 15. He summarizes this proposal as follows:

The most recent price cap calculation workpapers should be used, and only the actual data revealing the impact of price changes due to mail preparation requirement changes should be used to update the calculation with more accurate information. The impact of the price change after the fact using actual volumes should be compared to the a *priori* estimate of such changes. The difference for each Class would be subtracted from the available price cap limitation. With this method, the Commission would ensure the fidelity of the price cap.

Id. at 16 (emphasis in original).

Finally, the Public Representative supports the Commission’s determination that the Full Service IMb mail preparation requirement was a change in rates affecting the

price cap. However, he concludes that the FSS mail preparation requirement was also a change in rates, albeit downward. *Id.* at 20-21. He argues that the FSS change would entitle the Postal Service to additional price cap space for Periodicals and provided an estimate of the price cap room created in workbook PR PER CAPCALC R13-10 FSS.xls. *Id.* at 21.

1. Responses to the Public Representative Proposal

The Postal Service contends that the Public Representative's proposal, similar to PostCom, *et al.*'s proposal, is boundless, burdensome, and analytically flawed. Postal Service Reply Comments at 5-38. For the same reasons provided in response to the PostCom, *et al.* proposal, the Postal Service asserts that the alternative proposed by the Public Representative fails to include a clear and predictable limiting principle and would create an overwhelming burden on the Postal Service. *Id.* at 6-7, 26-38.

The Postal Service characterizes the Public Representative's proposal as mistakenly interpreting the price cap to regulate revenues rather than prices. *Id.* at 11. The Postal Service argues that if it operated under a "revenue cap," then it would be entitled to "massive" price increases to make up for years of declining revenues since the enactment of the PAEA. *Id.* at 11-12. The Postal Service contends that the Public Representative's conception of the price cap is overly broad. *Id.* at 12. The Postal Service claims that the Public Representative proposes that the price cap should cover mailing changes designed to force mailers to change their behavior. *Id.* The Postal Service rejects this proposal and responds that the price cap should not encompass changes that do not force mailers to pay higher rates. *Id.*

The Postal Service contends that the Public Representative fails to address the methodology by which the Commission can determine the underlying shift in volumes. *Id.* at 12-13. The Postal Service observes that no reliable measure exists to determine whether particular mail preparation requirement changes caused shifts in volume among various services and rate changes. *Id.* at 13, 34-35. Thus, the Postal Service

concludes the Public Representative's revenue-based approach would be impossible to administer. *Id.* at 13.

The Postal Service criticizes the Public Representative's sole focus on volumes for two main reasons. *Id.* at 35. First, the Postal Service asserts that superimposing volumes from one time period onto another time period artificially reduces price cap space. *Id.* Because the price cap system relies on using volumes that are representative of the most recent available 12 months of Postal Service billing determinants, the Postal Service argues that the Public Representative's look-back proposal distorts the billing determinants snapshot. *Id.* Second, the Postal Service argues that the Public Representative fails to consider that the relationship between volumes alters the price cap analysis, rather than a single rate cell's volume standing alone. *Id.* The Postal Service explains that the price cap calculation uses volumes to establish the relative weights of the various rate cells in a class and the weighted average price change for that class. *Id.* The Postal Service argues that adjusting the price cap solely based on certain rate cells affected by a mail preparation requirement change fails to factor in other (and potentially countervailing) changes to a mail class's volume weighting. *Id.*

The Postal Service acknowledges that it should not be permitted to "game the system through ... mail[] preparation requirement[] that force mailers into paying more for service so that Postal Service revenue increases." *Id.* at 13 (quoting PR Comments at 7). However, the Postal Service replies that the Public Representative's proposal does not measure whether any "gaming" has occurred or distinguish between "gaming" and legitimate mail preparation requirement changes. *Id.* at 13-14. The Postal Service asserts that mail preparation requirement changes generate revenue for the Postal Service only if mailers decline to make the operational changes and decide to mail pieces at the new default rate. *Id.* at 15. Further, the Postal Service claims that additional revenues are offset by the increased costs of processing mail that does not meet the revised preparation requirements and lost revenue from decreased volume. *Id.*

The Postal Service also opposes the Public Representative's proposal to use the ACR to compute the revenue impact of mail preparation requirement changes after-the-fact. *Id.* at 12-13, 32-38. The Postal Service stresses that the Commission has rejected after-the-fact review of the price cap similar to the Public Representative's suggestion. *Id.* at 33. Moreover, the Postal Service contends that this look-back proposal contains analytical flaws. *Id.* at 34-38.

Finally, the Postal Service argues that the Public Representative miscalculates the price cap space used by Full Service IMb in FY 2010. *Id.* at 37-38. The Postal Service notes that the Commission's look-back analysis in the FY 2010 ACD revealed that the Postal Service had overestimated the price increase for the Standard Mail class by 0.207 percent. *Id.* at 38. The Postal Service asserts that it received at least \$10 million less in revenue than anticipated for Standard Mail. *Id.* Thus, the Postal Service contends that the Public Representative's analysis improperly penalizes the Postal Service for a \$10 million revenue discrepancy that likely was attributable to other causes. *Id.* at 37.

PostCom, *et al.* state the Public Representative's solution is "generally consistent with the views of PostCom, *et al.* to the extent it calls for the Commission 'to treat all changes [in mail preparation requirements] as having a potential [rate] impact, and measure the revenue impact' of those changes." PostCom, *et al.* Reply Comments at 10 (citing PR Comments at 3) (alterations in original). However, PostCom, *et al.* disagree with the Public Representative's suggestion that the Commission review the revenue impact of mail preparation changes in the ACD and provide price cap credit if the changes decrease revenue. *Id.* at 10-11. PostCom, *et al.* contend that mail preparation requirement changes need to be reviewed by the Commission prior to implementation and that allowing the Postal Service credit would undermine "the clarity of the CPI index...." *Id.* at 11.

Valpak believes that the retroactive aspect of the Public Representative's proposal would violate the Commission's statutory authority to only approve rate changes where they first comply with the price cap. Valpak Reply Comments at 3.

Valpak notes that were the Commission to adopt the PostCom, *et al.* or Public Representative proposals, it would need to reconsider its statement that it “has not and will not indiscriminately treat all new mail preparation requirements as rate adjustments.” *Id.* at 4 n.1 (citing Order No. 1890 at 25).

2. Commission Analysis

The Public Representative’s proposal seeks to review the revenue effects of all mail preparation requirement changes both before and after the changes are implemented by the Postal Service. This proposed standard analyzes the impact of the mail preparation change and suggests modifying the *de minimis* threshold, the backward-weighted index, and the Postal Service’s ACR reporting requirements. The Commission finds that the Public Representative’s standard presents the same problems as PostCom, *et al.*’s proposal in that it would increase uncertainty and is contrary to the price cap rules, as well as conflict with the Commission’s responsibility to enforce the price cap prior to approving a change in rates. 39 C.F.R. § 3010.23(d)(2) does not require an analysis of the revenue impact of the classification change, rather, it looks to the change impacts the rate cell in such a way that it causes it to be deleted or redefined.

The Public Representative’s proposal presents the same quantification issues as PostCom, *et al.*’s proposal. Setting a numerical threshold as a way to determine when mail preparation changes have price cap effects would require the Postal Service to perform a quantitative analysis on every mail preparation change, no matter how small or routine. The Commission does not believe that increasing the *de minimis* threshold to 0.005 percent would alleviate the difficulty in measuring the revenue impact of the majority of small routine mail preparation requirement changes. Attempting to isolate and quantify the degree to which a mail preparation change would affect mail volume at that level would be a complex and highly subjective task.

Further, using revenue as a measure by which mail preparation changes would be analyzed conflicts with Commission precedent and the price cap statute. Mail

preparation requirement changes may be significant enough to have an effect on the percentage change in rates. The price cap limits changes affecting the price a mailer pays for a mailing. The price cap does not necessarily limit changes that increase Postal Service revenue. While, the majority of changes affecting the price a mailer pays may also increase Postal Service revenue, revenue changes can be the result of numerous variables, not just changes in rates. The price cap rules look to the nature of the change, whether it results in the introduction, deletion, and/or redefinition of a rate cell; not to whether revenue is increased. See 39 C.F.R. § 3010.23(d)(2).

As discussed in the Commission's analysis of PostCom, *et al.*'s proposal, the Public Representative's proposal would also create an overly burdensome task. Requiring the Postal Service to engage in a price change analysis for every mail preparation change both pre- and post-implementation of the change would unreasonably increase the Postal Service's administrative burden. The Commission finds that the proposal to regulate all mail preparation changes is not administratively feasible in addition to being contrary to the price cap rules. Additionally, the Public Representative's proposal to review price cap compliance after-the-fact in the ACD would conflict with the Commission's statutory duty to review rates and enforce the price cap pre-implementation.

D. The Commission's Four Factor Test

This section discusses the comments received on the four factors proposed by the Commission. In Order No. 2586, the Commission issued a notice for comment proposing a standard and requesting input from interested parties on the utility of applying a four factor test to determine whether a mail preparation requirement change had a rate effect with price cap implications. Order No. 2586 at 3. The four factors suggested by the Commission were: whether the change altered a basic characteristic of a mailing, the effect on the mailers, the purpose of the change, and whether the change results in a shift in volume of mail from one rate category to another. *Id.* at 3-4. The Commission proposed this multi-factor standard to be applied on a case-by-case

basis to mail preparation requirement changes. In addition to setting forth the four factors to be considered, the Commission sought to provide context for those factors by describing various components of the factors. *Id.* at 4.

1. Responses to the Commission's Four Factor Test

The Postal Service disagrees with the Commission's multi-factor framework. Postal Service Comments at 5. In the Postal Service's view, the factors proposed by the Commission do "not comply with the court order, the statute, or the Commission's prior recognition of how the price cap should be applied." *Id.* To support its position, the Postal Service asserts that the factors proposed by the Commission are "open-ended [and] subjective" and leave the Postal Service "with no basis to determine, with any sense of confidence, whether operational changes will implicate the cap as the Postal Service considers such changes and plans its prices." *Id.* at 6. Further, the Postal Service contends that this proposed standard "unduly constrains the exercise of the Postal Service's authority over operational matters, and acts to inhibit the Postal Service's pursuit of greater efficiency in processing the mail while also greatly expanding the administrative burden of the ratemaking process." *Id.*

In its review of the framework provided by the Commission, the Postal Service questions how each factor would be applied, specifically, "how much weight each factor is to receive." *Id.* at 8 (emphasis in original). The Postal Service contends that "[c]ertain sub-factors are redundant and potentially conflicting" and claims that "[a]ny meaning that the standard could provide would only come, if at all, after many years of repeated application by the Commission." *Id.* at 8-9. Moreover, the Postal Service states that the framework conflicts with the "Postal Service and Commission's joint motion to remand [back to the Commission] Order No. 2322" dealing with the question of "whether the elimination of an entire service from the MCS should be treated as a rate change." *Id.* at 9.

In asserting the proposed standard would inhibit the Postal Service's operations, the Postal Service contends that the case-by-case application of the four factor

framework would render the Postal Service and mailers “unable to plan for future price changes.” *Id.* at 10. The Postal Service hypothesizes that “[u]nder the Commission’s framework, mail preparation changes might or might not be deemed to have a price cap impact, meaning that the Postal Service would be forced to file a precautionary rate case for any DMM change.” *Id.* at 11. The Postal Service contends that as a result of the Commission’s four factor standard, it would not implement mail preparation requirement changes that enhance efficiency to avoid disrupting regular rate cases, operational decisions, and DMM rulemaking proceedings. *Id.* at 11-14. The Postal Service gives examples of how the case-by-case application of the proposed framework would “undermine the collaborative relationship between the Postal Service and mailers.” *Id.* at 15.

Arguing that the proposed framework fails to satisfy the Commission’s statutory objectives for regulating rates, the Postal Service emphasizes the need for clear and predictable standards that maximize incentives to increase efficiency and promote pricing flexibility. *Id.* at 17. The Postal Service offers two hypothetical scenarios if the Commission’s four factor standard was implemented, stating first that it:

could file a pre-emptive price filing for each DMM change, asserting that there is no price cap impact, but requesting the Commission’s concurrence. Alternatively, the Postal Service could implement the DMM changes, and then face the option of withdrawing a change later if the Commission determines in a subsequent rate proceeding that the change results in a substantial price cap impact.

Id. at 18-19.

In the second instance, the Postal Service notes that “these risks would be manageable if review of mail preparation changes were limited to complaint cases. Mailers would file complaints only when mail preparation changes would actually have a substantial adverse impact, and only after conferring with the Postal Service.” *Id.* at 19 n.42.

PostCom, *et al.* argue that, although the Commission “has properly recognized that the Court of Appeals’ remand order can be satisfied by an appropriate standard for excluding consideration of rule changes with rate effects that are merely *de minimis*,” the proposed standard is too complex. PostCom, *et al.* Comments at 1. In reviewing

the Commission's task on remand, PostCom, *et al.* assert that the remand is limited to articulating an intelligible standard to apply to determine when mail preparation changes have rate effects with price cap implications and to apply that standard to Full Service IMb. *Id.* at 2. In PostCom, *et al.*'s view, the Commission's failure to "establish a reasonable limiting principle for its power to oversee mail preparation changes" was the main problem with Order No. 1890. *Id.* at 3.

PostCom, *et al.* outline various issues they contend render the Commission's proposed standard unworkable. PostCom, *et al.* contend that the central inquiry is "whether the change will impose significant enough costs on the mailers that the rate effect of the change should be evaluated as an increase in rates." *Id.* at 4. PostCom, *et al.* view the Commission's task as limited to drawing "the line between trivial changes to preparation requirements and those that impose costs significant enough to warrant evaluation as a change in rates." *Id.* Ultimately, PostCom, *et al.* claim that the first and third factors in the standard set forth by the Commission lack content and contain overlapping and irrelevant factors. *Id.* at 5-7.

PostCom, *et al.* submit that the "two remaining factors of the Commission's proposed test—the effect of the change on mailers (factor 2) and whether the change results in a shift in volume of mail from one rate category to another (factor 4)—are relevant considerations and can form the basis of a reasonable, objective test." *Id.* at 7. However, PostCom, *et al.* state that when evaluating factor 2, the effect of the change on mailers, the Commission should only look to the volume of mail affected and it should better define the fourth factor. *Id.* at 7-8.

Valpak summarizes the Commission's authority to regulate changes in mail preparation requirements with rate effects and asserts that Congress entrusted the Commission with the regulatory duty to ensure that the Postal Service does not circumvent the price cap through means other than rate increases, such as imposing costly mail preparation requirements on mailers. Valpak Comments at 1-2. Valpak observes that a simple, bright-line test cannot anticipate all possible changes to mail preparation requirements. *Id.* at 2. Valpak notes that the Commission corrected the

Court identified weakness of factor one by providing five component characteristics. *Id.* at 3. Valpak proposes to modify characteristic (b) of factor one, “whether the change alters the presentation and/or preparation of the mailing in a substantial way” to ask instead “how substantially does a change alter the presentation or preparation of a mailing?” *Id.* Valpak suggests revising or deleting characteristic (c) of factor one “regularity of the change (periodic vs. one-time)” because it is confusing. *Id.*

For the second factor, the effect of a change on mailers, Valpak proposes to modify component (a) of factor two to assess “whether the change imposes new costs’ on mailers” instead of “whether the change imposes fixed or variable costs.” *Id.* at 3-4. Valpak approves of the remaining components (b)–(f) of factor two. According to Valpak, although factor three may be relevant, it is not necessary for the Commission to inquire as to the actual purpose of the proposed mail preparation change because “[t]he effect of a change is much more important than the Postal Service’s subjective purpose.” *Id.* at 4. Finally, Valpak recommends that the Commission explain factor four to “clarify that it is important for the Commission to evaluate how mailers can be expected to respond to a change.” *Id.* Valpak explains that although factor four is an “important factor that is forward-looking, [it is] one that potentially is in conflict with the current requirement that the billing determinants be based on historic volume data.” *Id.* Valpak concludes by supporting the Commission’s conclusion in Order No. 1890 that the Postal Service’s proposal to require mailers to use Full Service IMb affects the price cap. *Id.* at 5.

Greeting Card Association (GCA) submits that the standard articulated by the Commission may “be general enough to affect single–piece mail as well” as bulk mail and focuses its comments on the effect on single–piece mailers.⁴⁹ GCA provides examples of how the Commission’s first factor, “whether the change alters a basic characteristic of a mailing,” would affect single–piece mailers compared to bulk mailers.

⁴⁹ Initial Comments of the Greeting Card Association, August 17, 2015, at 1 (GCA Comments).

Id. at 1-3. GCA continues to discuss the second factor, effect on mailers, and four of its components as related to the effects on single-piece mailers, specifically that the Commission should not attach “less significance to a change which mainly affects small volume mailers.” *Id.* at 3-4. GCA concludes by addressing the third and fourth factor’s relevance to single-piece mailers, noting that the fourth factor could be interpreted too narrowly as currently written. *Id.* at 4-5. GCA suggests that the sentence “[t]his factor considers whether the changes result in the de facto elimination of a rate category or the deletion of a rate cell” be changed to “[t]his factor considers whether a material amount of volume is affected by the shift, as well as whether the changes result in the de facto elimination of a rate category or the deletion of a rate cell.” *Id.* at 5 (alterations in original).

The Public Representative notes that the “postal community has yet to find a solution for reviewing a mail preparation change that balances operational flexibility for the Postal Service and protection from burdensome price increases for the mailers.” PR Comments at 1. He believes that the “four factors and sub-factors suggested by the Commission in the order initiating this proceeding would, in general, overly complicate the process of measuring revenue impact.” *Id.* at 2. He notes that the uncertainty in applying the factors, irrelevancy of certain sub-factors, and insufficiency of the data are problematic. *Id.* As he believes that the proper standard should look to the revenue impact of the change, he contends that the majority of the factors presented by the Commission are irrelevant. *Id.* at 17.

With respect to the second factor, the effect of the change on mailers, the Public Representative asserts that the “effects on mailer costs may only indirectly affect mailer volumes, and, in any case, the Postal Service would not have detailed information on whether and the extent costs of mailers, if any, might be affected.” *Id.* at 18. He objects to the third factor, purpose of the classification change, arguing that the Commission should not look to the subjective intent of the Postal Service, which is irrelevant to any rate impact. *Id.* He concludes by asserting that the fourth factor, whether there is a

shift in volume of mail from one rate category to another, should be the “key consideration” in any standard promulgated by the Commission. *Id.* at 20.

2. Commission Analysis

In response to the Commission’s notice for comment, the majority of the commenters found the four factor test and supporting components to be overly complex and unclear. Additionally, the commenters opined that the components of the factors served to further complicate and compound the four factor test set forth by the Commission. Although various commenters noted the utility of specific factors, namely, the effect of the change on mailers or whether the change results in a shift in volume of mail from one rate category to another, the majority consensus was that the multi-factor approach suggested by the Commission would be unworkable. The Commission’s decision in Order No. 1890 finding that the IMb requirement redefined a rate cell where it “altered a basic characteristic of a mailing” focused on one factor. In presenting three additional factors to be considered by the commenters, the Commission sought to more accurately and objectively measure the utility of applying different factors to this analysis. However, as is clear from the commenter responses, the Commission’s multi-factor framework is too complex and did not reflect the parameters of compliance with 39 C.F.R. § 3010.23(d)(2). Therefore, in light of the comments, the Commission has decided not to proceed with adoption of the proposed four factor test. Based upon the comments, the Commission moves forward instead with a more streamlined standard that fulfills the Court’s direction to provide additional explanation.

The standard ultimately adopted by the Commission and explained *supra* at section III appropriately balances the operational realities of mail preparation requirement changes with the considerations of the price cap statute when defining what constitutes a deletion and redefinition of a rate cell under 39 C.F.R. § 3010.23(d)(2). As discussed previously, the Commission is in the best position to design a process to ensure transparency and accountability of the Postal Service through regulation of the price cap statute. When faced with the task of providing a

reasonable standard by which changes to mail preparation can be determined to have rate effects with price cap implications, the Commission through this Order announces a standard that incorporates Commission expertise, judgment, and experience as opposed to a bright-line rule.

V. CONCLUSION

The Commission sets forth a standard to determine whether a change to a mail preparation requirement has rate effects requiring compliance with the price cap rules. Under that standard, a mail preparation change has rate effects where it results in either the deletion or the redefinition of a rate cell. A rate cell will be considered “redefined” where the mail preparation change results in a significant change to a basic characteristic of the mailing.

When reviewing mail preparation changes, parties should be guided by the foregoing Commission’s standard, explanation of that standard, and application of the standard to both the Full Service IMb and FSS preparation changes. The Commission intends to also issue a rulemaking to establish procedural rules setting forth the process governing mail preparation changes that require price cap compliance.

VI. ORDERING PARAGRAPH

It is ordered:

The Commission establishes the standard used to determine when mail preparation changes will have rate effects requiring compliance with 39 C.F.R. § 3010.23(d)(2) consistent with the body of this Order.

By the Commission.

Stacy L. Ruble
Secretary