

ORDER NO. 3441

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 MOTION FOR RECONSIDERATION  
OF COMMISSION ORDER NO. 3047

(Issued July 20, 2016)

On February 22, 2016, the Postal Service filed a motion for reconsideration of Commission Order No. 3047, which set forth a standard to determine when mail preparation changes will have rate effects under the Commission's regulations.<sup>1</sup>

I. BACKGROUND

The Commission incorporates by reference the extensive record in this docket and in Docket No. R2013-10, including the factual background and procedural history as described in Order No. 3047.<sup>2</sup> In summary, this matter arose when the Postal

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<sup>1</sup> Motion for Reconsideration of Order No. 3047, February 22, 2016 (Motion for Reconsideration); see Order Resolving Issues on Remand, January 22, 2016 (Order No. 3047).

<sup>2</sup> See Order No. 3047.

Service sought to require mailers to use Full Service Intelligent Mail barcodes (IMb) in order to qualify for any automation rate. 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. By making Full Service IMb mandatory, mailers who used Basic IMb could no longer qualify for automation pricing, as there was no longer a Basic IMb rate. Since 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. In evaluating the proposed change, the Commission found that the Full Service IMb requirement constituted a classification change with rate effects pursuant to 39 U.S.C. § 3622 and 39 C.F.R. § 3010.23(d)(2).

The Postal Service objected to the Commission's finding that it could not implement the change without first making reasonable adjustments to the billing determinants to account for the resulting deletion or redefinition of rate cells as required by 39 C.F.R. § 3010.23(d)(2) and appealed to the United States Court of Appeals for the District of Columbia Circuit. In its opinion in *United States Postal Service v. Postal Regulatory Commission*, 785 F.3d 740 (D.C. Cir. 2015) (*IMb Remand*), the Court found that although the Commission had the authority to regulate certain mail preparation changes when they implicated the price cap, the standard applied by the Commission to determine that the Full Service IMb requirement required compliance with the price cap rules was not adequately explained. *IMb Remand* at 754. 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." *Id.* at 756.

In response to the remand from the United States Court of Appeals for the District of Columbia Circuit, the Commission set forth various factors for a standard to evaluate which mail preparation changes would constitute a change in rates and therefore be subject to the price cap. The Commission received and considered comments on the Commission-proposed factors and proposed alternative standards. See Order No. 3047 at 11-12, 31-52.

After careful consideration of the objectives of the Postal Accountability and Enhancement Act (PAEA) with respect to rate regulation, past Commission precedent, the regulatory scheme, and guidance from the Court, the Commission set forth a detailed standard to evaluate when mail preparation changes will have rate effects under 39 C.F.R. § 3010.23(d)(2). *Id.* at 13-20. Under the Commission's standard, a mail preparation change will be considered a classification change with rate effects under the price cap when the change results in the deletion and/or redefinition of a rate cell under 39 C.F.R. § 3010.23(d)(2). *Id.* at 15. 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 to mailers. *Id.* at 15-16. Redefinition of a rate cell occurs when the mail preparation change causes a significant change to a basic characteristic of the mailing, effectively changing the nature of the rate cell to such an extent that is more akin to a constructive deletion. *Id.* at 16. Significant changes to a mailing indicate that the nature of the rate cell has changed to something fundamentally different, while technically still accessible. *Id.* at 16-17. 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)." *Id.* at 17. Accordingly, when a mail preparation change causes either a rate cell to be deleted or redefined, the Postal Service must account for the rate effects of the change under the price cap.

Applying this standard, the Commission reaffirmed its decision in Order No. 1890, finding that the Full Service IMb requirement has a rate effect with price cap implications and that the Postal Service must account for the change under the price cap rules as it does with any classification change.<sup>3</sup> The Commission also provided analysis of its application of the standard to both its decision on the Full Service IMb requirement and its finding that the Flats Sequencing System (FSS) bundling requirement does not have a rate effect. Order No. 3047 at 13-31. The Commission

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<sup>3</sup> *Id.* at 21-27; see Docket No. R2013-10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013 (Order No. 1890).

concluded with an analysis of the various commenter-proposed standards and provided a detailed explanation for the rejection of each proposal.

## II. PROCEDURAL HISTORY

### A. Postal Service's Motion for Reconsideration

On February 22, 2016, the Postal Service filed its Motion for Reconsideration of Order No. 3047. In its Motion for Reconsideration, the Postal Service requests that the Commission reconsider its standard articulated in Order No. 3047 and its decision to regulate the Full Service IMb requirement under the price cap, or provide additional clarity regarding the standard's application. Motion for Reconsideration at 1-3. For the reasons set forth in its motion, the Postal Service asserts that the Commission did not adequately respond to the Court's remand and that the Commission's standard would "penalize the Postal Service for implementing operational requirements that enhance efficiency or serve other important purposes." *Id.* at 2. The Postal Service also calls upon the Commission to reconsider its standard in light of the Postal Service's financial troubles and "the adverse financial consequences that Order No. 3047 would impose on the Postal Service." *Id.* at 3.

The specific arguments made by the Postal Service in support of its Motion for Reconsideration will be set forth in more detail in section III.

### B. Response to Postal Service Motion for Reconsideration

On April 11, 2016, the Association for Postal Commerce, the Alliance of Nonprofit Mailers, the Major Mailers Association, MPA—the Association of Magazine Media, and the National Postal Policy Council (collectively "Respondents") filed a response to the Postal Service's Motion for Reconsideration.<sup>4</sup> In their Response to Motion for

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<sup>4</sup> Response of the Association for Postal Commerce, Alliance of Nonprofit Mailers, Major Mailers Association, MPA—the Association of Magazine Media, and National Postal Policy Council to Request for Reconsideration of the United States Postal Service, April 11, 2016 (Response to Motion for Reconsideration).

Reconsideration, Respondents conclude that “the Commission should decline to reconsider its decision in Order No. 3047.” Response to Motion for Reconsideration at 1.

First, the Respondents assert that the Postal Service failed to show that the Commission’s standard does not comply with the *IMb Remand*. *Id.* Second, the Respondents contend that although “the Commission’s solution in Order No. 3047 may not be perfect, it is reasonable.” *Id.* Respondents assert two main arguments against reconsideration of Order No. 3047: 1) that the Postal Service’s arguments for reconsideration are no more than a refusal to accept the Commission’s determination that certain mail preparation changes have rate effects and must comply with the price cap; and 2) that the standard articulated in Order No. 3047 is reasonable and can be refined over time. *Id.* at 2-4, 5-8.

Respondents argue that the Postal Service fails to accept the premise, upheld by the Court, that “the Commission has the authority ‘to consider mail preparation requirement changes in the [Domestic Mail Manual (DMM)] as “changes in rates” that count against the price cap.” *Id.* at 2 (citing *IMb Remand* at 751). The Respondents point to the Postal Service’s rejection of this premise where the Postal Service argues that “‘the Commission cannot repeatedly point to a purported “statutory duty” to enforce the price cap as a basis to avoid’ the policy considerations the Postal Service claims argue for reconsideration because the court determined that the statute was ambiguous.” *Id.* (citing Motion for Reconsideration at 1). In response to this argument, Respondents contend that:

[T]he Postal Service misses the point. While the court held that the statute did not speak directly to the issue of whether the Commission could regulate changes in preparation requirements as changes in rates, and was therefore ambiguous, it unequivocally affirmed the Commission’s authority to conclude that changes in mail preparation requirements can amount to changes in rates and then regulate these changes...See [*IMb Remand*] at 753. Once the Commission has made this determination, the statute is no longer ambiguous: the Commission must ensure that

those changes in rates comply with the price cap. The Postal Service's argument is essentially that the Commission should disavow this determination and, relying on the ambiguity of the statute, ignore the rate effects of changes in mail preparation requirements.

*Id.* at 2-3.

Respondents state that, contrary to the Postal Service's arguments, "Order No. 3047 provides as much certainty as can be expected when addressing this fact-intensive inquiry." *Id.* at 8. Further, Respondents contend that the proposed process in the rulemaking instituted by Docket No. RM2016-6 would resolve numerous concerns raised by the Postal Service allowing for "the introduction of mailer-specific cost information, as necessary, as well as provide time for the Commission to resolve disputes as to the application of the test on a case-by-case basis." *Id.* at 6. Respondents conclude that "the Commission should decline to reconsider its test on the grounds that it fails to provide sufficient certainty going forward." *Id.* at 8.

### III. COMMISSION ANALYSIS

#### A. Introduction

The arguments raised by the Postal Service mainly fall under several broad categories. In this section, the Commission addresses the Postal Service's arguments relating to each category and provides its analysis in light of these arguments to correct various misapprehensions and provide additional clarity where possible. First, the Commission addresses the Postal Service's contention that the standard fails to comply with the Court's remand. Second, the Commission responds to the Postal Service's claim that the Commission does not include an analysis of the statutory objectives or respond to the Postal Service's comments. Finally, the Commission responds to the Postal Service's contention that the standard fails to provide clear guidance and to other individual arguments concerning the application of the standard.

As a preliminary matter, the Commission notes that the Postal Service's arguments raised in its Motion for Reconsideration reargue issues considered by the Commission both in Order No. 1890, in which the Commission found that the Full Service IMb requirement constituted a classification change under 39 C.F.R. § 3010.23(d)(2), and in Order No. 3047, which articulated a comprehensive standard to regulate mail preparation changes that delete or redefine rate cells under 39 C.F.R. § 3010.23(d)(2).<sup>5</sup> The majority of the Postal Service's arguments stem from its position that changes to mail preparation requirements should not be regulated under the price cap rules. Despite the fact that the Court determined that the Commission has the authority to regulate certain mail preparation changes under the price cap rules, the Postal Service attempts to reargue this settled point and ignores the Commission's authority to determine that certain mail preparation changes could constitute a change in rates.

The Court's remand did not require the Commission to reconsider its position that certain mail preparation changes could have rate effects under the price cap rules. The Court's remand ordered the Commission to articulate and explain an intelligible standard to be used to determine when mail preparation changes have rate effects. Further, despite the Postal Service's arguments, the Court's remand did not require the Commission to reconsider the Postal Service's proposed alternative standards, which the Postal Service set forth in Docket No. R2013-10, nor did it require the Commission to reconsider its application of the backward-weighted index. As the Court stated, "[w]e find no merit in the Postal Service's other arguments, including its objection to the Commission's application of the historical-volume rule in this case, so we deny the petition for review with respect to these matters." *IMb Remand* at 756. The fact that the Postal Service disagrees with the Commission's standards, and again seeks for the Commission to reconsider and adopt its proposed alternative standard, does not merit revising the Commission's order. As explained in more detail below, the Commission is

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<sup>5</sup> See Docket No. R2013-10, Order No. 1890 at 2, 15; Order No. 3047 at 13-31.

unpersuaded by the Postal Service's arguments and maintains the standard articulated in Order No. 3047, with the additional explanation provided in this Order.

B. Standard Set Forth in Order No. 3047 Complies with Court's Remand

This section addresses the Postal Service's arguments that the Commission's standard set forth in Order No. 3047 does not comply with the Court's remand. The Postal Service makes two main arguments: first, that the Commission's standard is inconsistent with the Court's remand because it regulates all mail preparation changes contrary to the *IMb Remand*; and second, that the Commission failed to set forth a standard that was different from the standard set forth in Order No. 1890.

With respect to its first argument, the Postal Service argues that the Court found 39 U.S.C. § 3622(d)(1)(A) to be ambiguous with respect to the terms "rate effects" and that "it could be read expansively to encompass some changes to mail preparation requirements with so-called 'rate effects,' it cannot encompass all such changes." Motion for Reconsideration at 3 (emphasis in original). The Postal Service contends that "if the Commission chooses to interpret the phrase as meaning something beyond literal changes in rates, it must articulate a 'comprehensible' standard that provides both clear limits on the types of mail preparation changes that are subject to the cap and meaningful guidance about which mail preparation changes would be covered." *Id.* The Postal Service contends that the Commission's Order No. 3047 is inconsistent with the Court's holding on this issue. *Id.* at 4.

In response to the Postal Service's first argument, the Commission agrees that the Court found the Commission has the authority to regulate certain mail preparation changes that had "rate effects" due to the ambiguity of the term under the statute and articulate an intelligible standard to that effect. Order No. 3047 addressed this issue in detail as follows:

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.'" [*IMb Remand*] 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 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.*

Order No. 3047 at 9-10.

However, the Commission disagrees with the Postal Service's conclusion that the standard set forth in Order No. 3047 regulates all mail preparation changes and does not have limits.

In Order No. 3047, the Commission provided its interpretation of the meaning of 39 C.F.R. § 3010.23(d)(2) in the context of mail preparation changes. Section 3010.23(d)(2) requires the Postal Service to comply with the price cap and account for the rate effects of classification changes that result in either the introduction, deletion, or redefinition of a rate cell. 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 to have caused the deletion or redefinition of a rate cell requiring compliance with section 3010.23(d)(2). Contrary to the Postal Service's argument, this standard does not encompass all mail preparation changes, and accordingly, the Commission did not err in its interpretation of the Court's holding on this issue as further explained below. *See id.* at 13, 16-17, 22.

As the Commission determined that only certain mail preparation changes amount to classification changes with rate effects where they cause the deletion or redefinition of rate cells, those changes must be regulated under the price cap statute.

The Postal Service's repeated argument that "the whole point of [its] proposal is that mail preparation changes are better regulated through means other than the price cap" simply fails to recognize the Commission's determination and the Court's confirmation of the Commission's authority on this issue. See Motion for Reconsideration at 9 n.21. Further, the Postal Service's argument that "non-rate changes that could force mailers into different rate categories would be assessed through other regulatory tools, such as the complaint process or the Commission's rules concerning classification changes" ignores the fact that mailers who are shifted to higher rate categories through rule changes would be unable to seek retroactive compensation through the complaint process for any overpayment of a rate. See *id.* at 7; 39 U.S.C. § 3681. Section 3681 provides that "[n]o mailer may be reimbursed for any amount paid under any rate or fee which, after such payment, is determined to have been unlawful after proceedings in accordance with the provisions of sections 3662 through 3664 of this title, or is superseded by a lower rate or fee established under subchapter II of this chapter." Despite the Postal Service's continued insistence that alternative regulatory avenues would resolve any issues with mail preparation changes that have rate effects, the Commission reiterates its finding in Order No. 3047 that those alternative mechanisms would contravene the price cap statute and leave the affected mailers without adequate redress through those alternate mechanisms. See Order No. 3047 at 38.

The Postal Service also contends that the Commission failed to comply with the Court's remand by failing to set limits on its standard. The Postal Service uses an excerpt from Order No. 3047 to support its claim that the Commission itself suggested "that it cannot articulate a standard containing both clear limits and meaningful guidance...." Motion for Reconsideration at 7. Taken in context, the Commission's full statement that 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" does not mean that the standard is limitless and without guidance. See Order No. 3047 at 17. Contrary to the Postal Service's position, the Commission's standard provides boundaries by which changes to mail

preparation will be evaluated under 39 C.F.R. § 3010.23(d), and Order No. 3047 set forth guidance in line with the Court's direction by which interested parties can evaluate future changes to mail preparation rules. See *id.* at 13-30. In addition to the guidance and limitations set forth in Order No. 3047, the Commission instituted a rulemaking to further clarify the process and procedure to be used when challenging or evaluating mail preparation changes under the price cap rules.<sup>6</sup> Despite the Postal Service's protests, the Commission cannot proceed to apply its standard to every hypothetical case and instead provided an explanation of the range of cases that would likely fall under this standard in Order No. 3047.

The Postal Service argues that the Commission "fail[ed] to respond to the court's instruction that the standard must provide clear guidance to the Postal Service on how to treat future cases." Motion for Reconsideration at 6. Although the Postal Service claims that the Commission "fail[ed] to respond" to the Court's holding that the Commission must explain its standard, the Commission provided a detailed explanation of the standard, parameters of the standard, and application of the standard. Order No. 3047 at 13-31. The Commission cannot provide explanation of abstract hypothetical changes the Postal Service may make in the future, as those issues and facts are not currently before the Commission. However, despite the fact that this standard is to be applied on a case-by-case basis, the Commission provided an explanation of how the standard would be applied, and set forth the parameters of such application so that the Postal Service and interested parties would have sufficient guidance in the future. See *id.* at 15-31.

In addition to arguing that the standard fails to comply with the Court's remand based on the Postal Service's claim that it would cover all mail preparation changes, the

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<sup>6</sup> See Docket No. RM2016-6, Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, January 22, 2016 (Order No. 3048). The proposed rule was intended to provide better structure and certainty to the process. See Docket No. RM2016-6, Order No. 3048 at 1-2. The Postal Service requested the Commission hold this rulemaking in abeyance pending the outcome of its Motion for Reconsideration. Docket No. RM2016-6, Motion of the United States Postal Service to Suspend Proceedings, February 22, 2016. The Commission granted the request. Docket No. RM2016-6, Order No. 3096, Order Holding Rulemaking in Abeyance, February 23, 2016.

Postal Service argues that the Court's remand required the Commission to set forth a new and different standard from the standard set forth in Order No. 1890. Specifically, the Postal Service contends that "the test articulated in Order No. 1890 did not set forth a comprehensible standard, so the Commission must devise a *different* standard." Motion for Reconsideration at 3-4 (emphasis added); *see also id.* at 4-7. The Postal Service argues that the Commission erred because the test articulated in Order No. 3047 is essentially the same test as the one in Order No. 1890 that it claims was rejected by the Court. *See id.* at 4-7.

In making this argument, the Postal Service misinterprets the holding of the Court. The Court found that the Commission failed to provide sufficient explanation for its standard that it applied in Order No. 1890. 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.'" *IMb Remand* 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. The Court's holding was limited to the Commission's inadequate articulation and explanation of the standard, not the standard itself.

Therefore, contrary to the Postal Service's assertions, the Court did not require the Commission to create and identify a different standard than the one in Order No. 1890; rather, it found that the standard as articulated was insufficient and failed to provide guidance to interested parties. On remand, the Commission was tasked to provide an intelligible standard accompanied by sufficient explanation, regardless of its similarity to the standard set forth in Order No. 1890. Accordingly, as the Commission set forth a standard in Order No. 3047 with detailed explanation of the meaning and parameters of that standard as well as an application of the standard to both the Full Service IMb requirement and the FSS requirement, the Commission reaffirms its holding in Order No. 3047.

C. Compliance with Statutory Criteria and Consideration of Postal Service Comments

In this section, the Commission addresses the Postal Service's arguments that the Commission failed to analyze or comply with the statutory objectives under the PAEA and failed to respond to the Postal Service's comments regarding various issues. First, the Commission addresses the argument that the standard set forth in Order No. 3047 failed to contain an analysis of the statutory objectives. Second, the Commission addresses the Postal Service's argument that the Commission failed to adequately consider or respond to the Postal Service's comments and proposals. Finally, the Commission addresses the Postal Service's comment that Order No. 3047 fails to address the standard's application to the Return Receipt for Merchandise (RRM) service matter.

1. The Commission adequately accounted for the statutory objectives.

The Postal Service argues that the Commission is legally bound to analyze how its "final rule" addresses the statutory objectives under 39 U.S.C. § 3622(b). Motion for Reconsideration at 22-23. The Postal Service claims that "because the statutory price cap language is ambiguous and the Commission therefore has a choice as to how to apply the regulatory system to mail preparation changes, section 3622 requires the Commission to consider what approach best achieves the objectives, taking into account the factors." *Id.* at 16. Further, the Postal Service argues that the Commission "must meaningfully explain how its chosen standard fulfills the relevant statutory objectives and factors." *Id.* It disagrees with the Commission's discussion of the various statutory objectives and claims that the Commission should have done more to support its standard under the statutory objectives. *Id.* at 30-31. The Postal Service contends that the Commission failed to adequately address concerns it raised in its initial and reply comments concerning the application of the statutory criteria. *Id.*

Contrary to the Postal Service's representations, in articulating the standard to be used to determine when mail preparation changes have rate effects under the price cap

rules, the Commission is neither creating a new final rule nor altering the price cap system. Rather, the Commission is interpreting its regulation, 39 C.F.R. § 3010.23(d)(2), in the context of mail preparation changes, as was originally contemplated when the rule was designed. The application of 39 C.F.R. § 3010.23(d)(2) to changes in mail preparation requirements was contemplated and accepted when 39 C.F.R. § 3010.23(d) was originally implemented. Specifically, 39 C.F.R. § 3010.23(d) was implemented with the Postal Service's acknowledgment that the rule would apply to certain mail preparation changes.<sup>7</sup> When the price cap rules (including 39 C.F.R. § 3010.23(d)) were originally implemented, the rules addressing the application of the price cap for market dominant price adjustments were structured around the statutory objectives of the PAEA.

As the Commission explained in Order No. 1890, in regulating certain mail preparation requirements, it is applying 39 C.F.R. § 3010.23(d)(2) in a manner consistent with the approach previously set forth by the Postal Service during the design of the price cap rules. When the Commission initially developed the rules for calculating the percentage change in rates to determine compliance with the price cap, the issue of whether and how to include changes to mail preparation requirements was addressed.<sup>8</sup> As explained by the Commission in Order No. 1890:

The Commission's price cap rules continue to take the approach suggested by the Postal Service's comments in Docket No. RM2007-1. The rules reflect a "constant mail mix" approach, wherein the volumes used in the weighted index used to calculate the percentage change in rates stay constant but the current rates are different than the planned rates. Although the total volumes stay constant, 39 C.F.R. § 3010.23(d) provides that, "[t]he Postal Service shall make reasonable adjustments to the billing determinants to account for the effects of classification changes such as the

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<sup>7</sup> Price Cap Rules for Certain Postal Rate Adjustments, 78 Fed. Reg. 52,694, at 52,698-52,700 (Aug. 26, 2013) (regarding the discussion of how the Postal Service's method of developing billing determinant adjustments would apply to "a change in mail preparation requirements that shifts some mail into a different price category" under 39 C.F.R. § 3010.23(d)(2)) (Price Cap Rules).

<sup>8</sup> Docket No. R2013-10, Commission Information Request No. 1, October 28, 2013, at 1-2.

introduction, deletion, or redefinition of rate cells.” This is precisely the approach suggested by the Postal Service in Docket No. RM2007-1. When a change in mail preparation requirements causes 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 old rate and the volume of mail sent in the previous year that would have to pay the new rate if it were sent under the new mail preparation requirements. The Full Service IMb requirements effect such a change.<sup>9</sup>

Accordingly, “reasonable adjustments” to the billing determinants under 39 C.F.R. § 3010.23(d)(2) would apply the “constant mail mix” approach because the adjustments are based on known historical mail characteristics and are used solely for the purpose of “mapping” historical mail volumes to new or redefined classifications.<sup>10</sup>

After adopting the Postal Service’s “constant mail mix” approach when implementing the final price cap rules (including 39 C.F.R. § 3010.23(d)(2)), in Docket No. R2011-1, the Commission applied this approach to a change in mail preparation requirements made by the Postal Service.<sup>11</sup> In Docket No. R2011-1, the Postal Service proposed an increase in the threshold used to measure compliance with the Move Update program. See Order No. 606 at 1-2. As a result of changing this threshold, the Commission found that the change was a redefinition of rate cells under 39 C.F.R. § 3010.23(d)(2) that resulted in a rate increase to mailers. *Id.* at 3. Accordingly, the Postal Service was required to comply with the provisions of 39 C.F.R. § 3010.23(d)

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<sup>9</sup> Docket No. R2013-10, Order No. 1890 at 21 (citing Docket No. RM2007-1, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007, at 52-53, 124 (Order No. 43) (internal citations omitted)).

<sup>10</sup> See Price Cap Rules at 52,700 (explaining how in the design of 39 C.F.R. § 3010.23(d)(2), the reasonable adjustments to the billing determinants “adopted the concept of weighting the current and new rates by a fixed set of historical billing determinants, with adjustments based on additional historical mail characteristics data where necessary to reflect changes in the rate and classification structure”).

<sup>11</sup> Docket No. R2011-1, Order Approving Market Dominant Classification and Price Changes, and Applying Price Cap Rules, December 10, 2010, at 28-29 (Order No. 606).

and adjust its billing determinants to account for the change. It was only in Docket No. R2013-10 that the Postal Service attempted to challenge how 39 C.F.R. § 3010.23(d)(2) was applied to mail preparation changes where it sought to mandate the Full Service IMb and eliminate the Basic IMb option without first complying with 39 C.F.R. § 3010.23(d). In Docket No. R2013-10, the Postal Service took the new position that only changes to the Mail Classification Schedule (MCS) required compliance with 39 C.F.R. § 3010.23(d)(2) and, accordingly, it was not subject to the price cap because it was using a DMM change to make Full Service IMb mandatory.<sup>12</sup> However, as explained by the Commission in Order No. 1890 and Order No. 3047, the Postal Service's approach with respect to the Full Service IMb requirement change was, and continues to be, inconsistent with the original design and application of the price cap rules. Docket No. R2013-10, Order No. 1890 at 23-27; Order No. 3047 at 36-37.

Therefore, in implementing the standard used to determine when mail preparation changes result in the deletion or redefinition of rate cells under 39 C.F.R. § 3010.23(d)(2), the Commission is neither revising nor rewriting the price cap rules. Rather, the Commission is providing additional explanation and clarification of an existing rule. As 39 C.F.R. § 3010.23(d)(2) is already consistent with the objectives and factors under 39 U.S.C. §§ 3622(b) and (c), the Commission does not need to discuss and balance the objectives of the PAEA as if it is revising the system for modern rate regulation.

In arguing that the Commission failed to sufficiently analyze the statutory objectives and factors under sections 3622(b) and (c), the Postal Service continues to ignore the absolute and central role of the price cap and the hierarchy based on the requirements, objectives, and factors of section 3622. The Commission previously explained this concept in various dockets throughout the history of the PAEA. The Commission stated that:

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<sup>12</sup> Docket No. R2013-10, Response of the United States Postal Service to Chairman's Information Request No. 3, Questions 1-2, and 6-7, October 24, 2013, question 1 (Response to CHIR No. 3).

Section 3622 creates a hierarchy based on “requirements,” section 3622(d) and (e), “objectives,” section 3622(b), and “factors,” section 3622(c). With the exception of an exigent rate request and use of banked pricing authority, the PAEA’s price cap mechanism in section 3622(d)(1)(A) takes precedence over the statutory pricing objectives and factors in sections 3622(b) and (c), even if some of these can be considered quantitative. Therefore, to the extent an objective or factor with a quantitative component can be seen as competing with the price cap, the price cap has primacy.<sup>13</sup>

As explained by the Commission in this proceeding, the controlling finding is the determination that mail preparation changes that result in the deletion or redefinition of a rate cell under 39 C.F.R. § 3010.23(d)(2) must comply with the price cap. Under the section 3622 hierarchy, the price cap requirement is central, and the application of the objectives and factors are a secondary consideration. Contrary to the Postal Service’s arguments, the fact that the standard may conflict with a particular objective or factor under the PAEA does not warrant finding an exception to the requirement that certain mail preparation changes be regulated under the price cap. Accordingly, under the system of ratemaking established by 39 U.S.C. § 3622 in 2006, there cannot be any exception to the price cap based on any objective or factor under the PAEA.

As repeatedly emphasized in Order No. 1890 and Order No. 3047, “[t]he 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.”<sup>14</sup> The Commission previously explained that “[t]he price cap...stands as the single most important safeguard for mailers.” Order No. 547 at 13. The Commission stated that the “role of the price cap is central to

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<sup>13</sup> Docket No. ACR2010, *Annual Compliance Determination*, March 29, 2011, at 18-19 (footnote omitted) (FY 2010 ACD).

<sup>14</sup> Order No. 3047 at 14 (citing Docket No. R2010-4, Order Denying Request for Exigent Rate Adjustments, September 30, 2010, at 12 (Order No. 547)).

ratemaking, and the integrity of the price cap is indispensable if the incentive to reduce costs is to remain effective. Therefore, it would undermine the basic regulatory approach of the PAEA if the Postal Service could pierce the price cap routinely.” *Id.* at 49-50.

However, in Order No. 1890 and Order No. 3047, the Commission found, as a secondary consideration, that the standard applying 39 C.F.R. § 3010.23(d)(2) to mail preparation changes not only fulfilled the price cap requirement but was supported by various relevant objectives under section 3622(b).

Although the statutory price cap has primacy over the provisions setting forth the objectives and factors of section 3622, this precedence does not render the statutory objectives inconsequential.<sup>15</sup> Ultimately, the Commission articulated a standard that represents the most balanced approach to regulating mail preparation changes under the price cap rules in light of the objectives of the PAEA. The Commission explained that 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.” Order No. 3047 at 19. Contrary to the Postal Service’s assertions that the Commission did not evaluate the statutory objectives, in Order No. 3047, the Commission explained that “[i]n 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.’” *Id.* at 3. The Commission concluded that specific statutory objectives, including “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

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<sup>15</sup> See, e.g., FY 2010 ACD at 19.

establishing a just and reasonable schedule for rates and classifications,” supported the Commission’s standard applying 39 C.F.R. § 3010.23(d)(2) to certain mail preparation changes. *Id.* at 18.

In interpreting 39 C.F.R. § 3010.23(d)(2), the Commission determined that the following objectives “support applying a standard that looks to whether the mail preparation change triggers compliance with the 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”: objective 1 (maximizing the Postal Service’s incentives to reduce costs and increase efficiency), objective 2 (creating predictability and stability in rates), objective 4 (allowing the Postal Service pricing flexibility), objective 6 (reducing administrative burden and increasing transparency of the ratemaking process), and objective 8 (establishing and maintaining a just and reasonable schedule for rates and classifications).<sup>16</sup>

In Order No. 3047, the Commission found that the standard is supported by objective 1 where it “allow[s] the Postal Service to continue improving the efficiency of its operations with minimal administrative burden.” Order No. 3047 at 19. The Postal Service disagrees with this interpretation. The Postal Service previously argued that the regulation of mail preparation changes would inhibit its ability to make changes to enhance efficiency and that it “would have no good options for implementing mail preparation changes, should it face the risk of later cap space determinations by the Commission in its proceedings.”<sup>17</sup> The Postal Service’s argument on this issue once again stems from its failure to acknowledge the Commission’s determination upheld by the Court that mail preparation changes are subject to the price cap under 39 C.F.R. § 3010.23(d)(2). Its argument also fails to acknowledge the fact that the price cap is a

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<sup>16</sup> *Id.* at 18-19; see 39 U.S.C. § 3622(b). Although not expressed in Order No. 3047, as with the objectives of 39 U.S.C. § 3622(b), the Commission’s standard does not alter the degree to which 39 C.F.R. § 3010.23(d) addresses the relevant factors of 39 U.S.C. § 3622(c). The standard also takes into account factors 3, 5, 6, 7, 8, 9, 10, 12, 13, and 14.

<sup>17</sup> Initial Comments of the United States Postal Service, August 17, 2015, at 18 (Postal Service Comments).

requirement, first and foremost, and the fact that the Postal Service has to comply with the price cap is not a constraint on its ability to cut its costs and improve the efficiency of its operations. Finally, the rulemaking in Docket No. RM2016-6, held in abeyance per the Postal Service's request, would create a process to avoid after-the-fact price cap determinations by establishing a procedure to resolve those questions prior to implementation of the mail preparation requirement.<sup>18</sup>

Along the same lines, the standard is consistent with objective 4, where it does not impact or impede the Postal Service's pricing flexibility any more than the constraints of the price cap requirement. For those changes that amount to a deletion or redefinition of a rate cell, as with any classification change, the Postal Service can implement the change so long as it accounts for the effects of the change under the price cap rules using the backward-weighted index/constant mail mix approach supported by the Postal Service. Recognizing the price cap as a binding constraint, the Commission's standard represents the approach that least inhibits the Postal Service to improve its efficiency and reduce its costs consistent with objectives 1 and 4.

In Order No. 3047, the Commission also determined that the standard is consistent with objectives 2 and 8 where it will "protect mailers from operational changes that impose significant costs and operational adjustments without regulation under the price cap statute." Order No. 3047 at 19. Objectives 2 and 8 look to creating predictable and stable rates on a reasonable schedule. The Postal Service objects to the Commission's statement about protecting mailers and claims that the Commission has erred by analyzing the effects of the mail preparation requirements on mailers under the redefinition prong of its standard. Motion for Reconsideration at 12-13. However, the Postal Service again overlooks the price cap as the foundational principle for the standard and the fact that the price cap was created in order to help protect mailers from "unreasonable use of the Postal Service's statutorily-granted monopoly." S. Rep. No. 108-318, at 6-7, 19 (2004). In addition to acting as a check on the Postal

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<sup>18</sup> See Docket No. RM2016-6, Order No. 3048 at 2-5.

Service's market dominant rate-setting authority, the price cap acts as a check against the Postal Service's rule-making authority where the rules implicate rates. The Commission's standard is consistent with objective 2 (creating predictability and stability in rates) because it recognizes that certain mail preparation changes must be accounted for under the price cap and accordingly, protects mailers from paying higher rates without notice or compliance with the price cap.

In addition, the rulemaking initiated in Docket No. RM2016-6 was intended to address the Postal Service's concerns of unpredictability of how mail preparation changes would be handled by creating a procedure and timeframe by which mailers must file a motion with the Commission concerning certain mail preparation changes. See Docket No. RM2016-6, Order No. 3048. Not only does the Commission's standard protect mailers from unreasonable and unpredictable rate changes that could result from the Postal Service's manipulation of mail preparation requirements, it also protects the Postal Service from future impromptu and unpredictable challenges to its handling of mail preparation requirements with regard to the price cap.

In addition to supporting objectives 1, 2, 4, and 8, the Commission determined that its standard would be the least burdensome to the Postal Service compared to alternative standards proposed by the commenters.<sup>19</sup> This finding supports objective 6 (reduce the administrative burden and increase the transparency of the ratemaking process). The Commission analyzed the alternative proposals provided by the Public Representative and PostCom, *et al.*, and determined that the regulation of nearly all mail preparation changes under those standards would result in too large of an administrative burden on the Postal Service. See Order No. 3047 at 39-52. The Commission has determined that its standard and proposed rulemaking setting forth a clear procedure and timeframe for motions concerning mail preparation changes

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<sup>19</sup> As the Postal Service's standard failed to recognize the Commission's finding that only certain mail preparation changes would be subject to the price cap and was therefore untenable, the Commission did not consider the administrative burden of the Postal Service's proposal.

constitutes the most reasonable standard among the alternatives proposed and imposes minimal administrative burden consistent with objective 6.

The Commission did not address objective 5 under its standard set forth in Order No. 3047. Objective 5, to assure adequate revenues to maintain financial stability, is a prime example of how the price cap requirement can sit in tension with various objectives. The price cap requirement by its nature limits the Postal Service's ability to raise prices and accordingly, limits the Postal Service's ability to assure adequate revenues. The application of 39 C.F.R. § 3010.23(d) to mail preparation changes will have the same effect on the Postal Service's revenue as any other classification change it seeks to make that would result in the introduction, deletion, or redefinition of a rate cell. The Commission's standard set forth in Order No. 3047 applies the price cap rules to mail preparation changes only where the changes result in the deletion or redefinition of rate cells. As previously explained in Order No. 3047, the Postal Service must then make reasonable adjustments to its billing determinants using the backward-weighted index/constant mail mix approach in the event a mail preparation change falls under 39 C.F.R. § 3010.23(d).<sup>20</sup>

In sum, the Commission's standard does not alter the degree to which 39 C.F.R. § 3010.23(d) already addresses the objectives and factors of 39 U.S.C. § 3622. The objectives were addressed by the design of the system itself, including the price cap rules. Further, despite the Postal Service's disagreement with the Commission's conclusions, the standard articulated in Order No. 3047 is consistent with the statutory objectives and factors of section 3622.

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<sup>20</sup> The Postal Service is correct in recognizing that the Commission did not consider all of the objectives under the PAEA when implementing its standard. Not all objectives of the PAEA are relevant to the Commission's application of 39 C.F.R. § 3010.23(d). The other objectives, objective 3 (to maintain high quality service standards), objective 7 (to enhance mail security and deter terrorism), and objective 9 (to allocate the total institutional costs of the Postal Service appropriately between market-dominant and competitive products), are not relevant to the inquiry of when a mail preparation change is subject to 39 C.F.R. § 3010.23(d)(2).

The Commission properly considered the Postal Service's comments and alternative proposals.

The Postal Service asserts that the Commission erred in rejecting the Postal Service's<sup>2</sup> alternative proposals and failed to respond to its significant comments. In support of its argument, the Postal Service restates both of its alternative proposals to regulate mail preparation changes and argues that the Commission rejected its proposals in error. Specifically, the Postal Service states that the "Commission rejected both proposals because they supposedly would require the Commission to 'abdicate' or 'relinquish' its 'statutory duty' to evaluate changes to mail preparation requirements under the price cap or otherwise to enforce the cap, and thus would be 'inconsistent with Commission precedent, the Court's remand, and the price cap statute.'" Motion for Reconsideration at 7-8. The Postal Service argues that "nothing in either the court's opinion or the statutory text suggests that the Commission has a 'duty' to evaluate mail preparation requirements under the price cap." *Id.* at 8. Specifically, the Postal Service argues that the Commission should adopt its interpretation of "changes in rates" to mean "only changes in actual 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." Postal Service Comments at 23-24.

As a threshold issue, the Court did not require the Commission on remand to reconsider the Postal Service's alternative proposals for regulating mail preparation changes. As the Court explicitly stated in the *IMb Remand*, "[w]e find no merit in the Postal Service's other arguments, including its objection to the Commission's application of the historical-volume rule in this case, so we deny the petition for review with respect to these matters." *IMb Remand* at 756. However, despite the fact that the Commission did not have to reevaluate the Postal Service's proposals on remand, the Commission again considered the Postal Service's alternative proposals in Order No. 3047.

The Postal Service does not claim the Commission misunderstood or misinterpreted its proposals; rather, the Postal Service disagrees with the Commission's rejection of same and the Commission's accompanying explanation for the rejection. However, in so arguing, the Postal Service misconstrues the Commission's explanation for why it was declining to adopt the Postal Service's proposals and ignores the Commission's previous rejection of the Postal Service's proposals in Docket No. R2013-10. As the Commission explained in Order No. 1890, in response to the Postal Service's proposal that classification changes can only occur "when modifications are made to the [MCS],"<sup>21</sup> the Commission declined "to narrow the range of changes that could be considered to result in the redefinition of rate cells as proposed by the Postal Service." Docket No. R2013-10, Order No. 1890 at 22. Although the Postal Service disagrees with the Commission's statement of its authority to regulate changes in rates, it fails to point to any support for this proposition and rather, maintains its original position that the Commission should not regulate mail preparation changes under the price cap rules.

Second, contrary to the Postal Service's argument, the Commission did not need to consider the Postal Service's contentions that its proposals best fulfilled the objectives under 39 U.S.C. § 3622(b) when its proposals were inconsistent with the Court's remand, past Commission precedent, and the price cap statute. Order No. 3047 at 36-37. As stated in Order No. 3047, the Commission found that 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)." *Id.* at 36. Given this finding, any argument by the Postal Service that its proposal met the objectives of the price cap statute was a non-starter, where to accept its premise required the Commission reverse its finding that certain mail preparation requirement changes could have rate effects. These threshold findings, that the Postal Service's

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<sup>21</sup> Docket No. R2013-10, Order No. 1890 at 22 (citing Docket No. R2013-10, Response of the United States Postal Service to Commission Information Request No. 1, November 5, 2013, at 6 (footnote omitted)).

proposals failed to comport with the Commission's finding that certain mail preparation changes can cause changes in rates, rendered the Postal Service's arguments that its proposals fulfilled the objectives of the price cap statute irrelevant.

Accordingly, as the Postal Service does not raise any error of fact or law in the Commission's rejection of the Postal Service's proposed standards, the Commission reaffirms the Order No. 3047 holding on this issue.

The RRM service matter will be addressed in a separate order.

The Postal Service argues that the Commission failed to apply its standard to "determine whether the elimination of the Return Receipt for Merchandise (RRM) service is a 'change in rates' under that standard." Motion for Reconsideration at 31. The Postal Service claims that the Commission was to apply this standard to the RRM service matter "pursuant to its agreement with the Postal Service in moving to remand Order No. 2322." *Id.*

In a joint motion to remand filed in the RRM service matter, the parties "agree[d] that, on remand, the Commission should establish an 'intelligible standard' as ordered by this Court in D.C. Circuit No. 13-1308 and should then determine whether the proposed elimination of Return Receipt for Merchandise service is a 'change in rates' under that new standard."<sup>22</sup> The parties' agreement did not require the Commission to decide the RRM service matter in the same order as the Full Service IMb matter. Indeed, as both issues were before the Commission in separate dockets, it is appropriate for the Commission to issue separate orders. As Order No. 3047 articulated the "intelligible standard" and applied it to both the Full Service IMb and FSS mail preparation changes that were before the Commission in Docket No. R2013-10, the Commission will be issuing a forthcoming order in Docket No. MC2015-8 applying the standard to the deletion of the RRM service.

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<sup>22</sup> Joint Motion to Remand Order of the Postal Regulatory Commission, *United States Postal Serv. v. Postal Regulatory Comm'n*, No. 15-1307, at 4 (June 5, 2015).

However, to provide some guidance with respect to the Postal Service's concern that the standard set forth in Order No. 3047 "speaks only to when a mail preparation change will be considered a classification change with price cap effects requiring compliance with 39 C.F.R. § 3010.23(d),"<sup>23</sup> in the forthcoming order applied to the RRM service, the Commission will look to whether the elimination of a service causes the deletion or redefinition of a rate cell under 39 C.F.R. § 3010.23(d)(2). The relevant inquiry will be whether the elimination of a service is a classification change that results in either the deletion or redefinition of a rate cell under the price cap rules—the same inquiry set forth under the Commission standard in Order No. 3047. As acknowledged by the Postal Service in its motion, as "the Postal Service does not wish to delay any work that the Commission may be undertaking in a separate venue,"<sup>24</sup> and as the Commission will be issuing a separate order on the RRM service, the Commission does not find it appropriate to revisit Order No. 3047 on these grounds.

- D. The standard set forth in Order No. 3047 properly sets forth the parameters governing mail preparation changes under 39 C.F.R. § 3010.23(d)(2).

In this section, the Commission addresses the Postal Service's arguments surrounding the Commission's explanation and implementation of the standard used to determine when mail preparation changes are subject to the price cap. First, the Commission addresses the Postal Service's claim that the first prong of the standard is confusing. Second, the Commission addresses the Postal Service's contention that the second prong of the standard should not evaluate the significance of mailer costs. Finally, the Commission addresses the Postal Service's repeated argument that the Commission improperly assumes that no mailers will adapt to the change by maintaining the backward-weighted index.

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<sup>23</sup> Motion for Reconsideration at 32 (emphasis in original).

<sup>24</sup> *Id.* at 32 n.85.

The deletion prong requires a straightforward inquiry.

The Postal Service argues that the first prong of the standard “only adds to the confusion over which mail preparation changes will be deemed changes in rates.” Motion for Reconsideration at 49. In making this argument, the Postal Service states its view that “in the case of the Full-Service IMb requirement, the Commission has reached the contrary conclusion concerning the effect on the price cap: that the effective elimination of the higher rate amounts to a rate increase.” *Id.* at 51. However, this view misconstrues the Commission’s determination. Nowhere in Order No. 3047 does the Commission state that the elimination of a higher rate available to mailers results in a rate increase. The Commission clearly explains that the elimination of Basic IMb would be a deletion that resulted in a rate increase because, by mandating Full Service IMb, the Postal Service was requiring mailers who used Basic IMb to pay a higher non-automation rate:

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 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.

Order No. 3047 at 21-22.

Section 3010.23(d)(2) merely sets the parameters for when the billing determinants need to be adjusted under the price cap; it does not dictate the manner of adjustment. The finding that a rate cell is deleted does not mean that the Postal Service will be accountable for a rate increase when there is none. Therefore, the Postal

Service is in error when it suggests the Commission's standard would find the Postal Service's elimination of a higher rate akin to a rate increase.

In addition, the Postal Service argues that the Commission's standard should permit the Postal Service to obtain price cap room where it makes certain mail preparation changes that allow more mailers "to qualify for a lower rate as a result of relaxing existing mail preparation rules." Motion for Reconsideration at 47. Nowhere in the Commission's decision did the Commission determine that the Postal Service was not permitted to gain price cap authority. To the contrary, the Commission acknowledges that the "Postal Service can apply (and has applied) the price cap to mail preparation requirement changes to its advantage."<sup>25</sup> Indeed, the standard only determines when a mail preparation change will be subject to the price cap rules; it does not determine how the change will be accounted for under those rules. Neither the Commission's rules nor its "significance test" under the second prong of the standard preclude the Postal Service from accounting for the effect of changes to mail preparation requirements that result in a price decrease whether the change is made in the DMM or the MCS. Therefore, the "effects of classification changes" as set forth by 39 C.F.R. § 3010.23(d)(2) can reflect either a price increase or decrease under the price cap.

In addition to the Postal Service's misconception relating to the deletion prong, the Postal Service again objects to the Commission's characterization that the Postal Service properly adjusted billing determinants to account for the price cap effect of the Full Service IMb requirement for the Package Services class. Motion for Reconsideration at 45 n.132 (citing Order No. 3047 at 26). The Postal Service maintains that the billing determinants were adjusted for the removal of a different barcode discount, and not the Full Service IMb requirements. Motion for Reconsideration at 45 n.132. However, the discount eliminated was for barcoded

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<sup>25</sup> Order No. 3047 at 37 (citing Public Representative Reply Comments, August 31, 2015, at 6, in which the Public Representative describes an example in Docket No. R2015-4 where the Postal Service gained price cap authority in Periodicals by appropriately accounting for a DMM change).

non-Full Service mail. In the Package Services class, the rates for Full Service mail were also increased, whereas the rates for Full Service mail for other classes were not increased. The Postal Service's position is that the deletion of the rates for barcoded non-Full Service mail in the Package Services class differs from the de facto elimination of rates for barcoded non-Full Service mail in other classes. The Commission did not err when concluding that the Postal Service properly adjusted the billing determinants for the Package Services class to account for the elimination of rates for barcoded non-Full Service mail. In any event, the Postal Service's treatment of the elimination of the barcode rate for the Package Services class was not a basis for the Commission's finding in either Order No. 1890 or Order No. 3047. Rather, it is an illustration of how this type of change should be reflected in the calculation of the change in rates resulting from the deletion of a rate cell under 39 C.F.R. § 3010.23(d). It also demonstrates the feasibility and simplicity of reflecting these types of changes in the price cap compliance calculations.

2. The second prong of the Commission's standard properly measures when a rate cell will be redefined under 39 C.F.R. § 3010.23(d)(2).

The Postal Service asserts that the Commission's standard erroneously regulates the costs mailers incur for a mailing as opposed to the prices mailers pay by measuring the significance of the change. It contends that looking to mailers' costs is improper because the Commission is "equating 'rates' mailers pay with the costs they incur in preparing their mailings...." Motion for Reconsideration at 14. The Postal Service objects to the Commission's interpretation of 39 C.F.R. § 3010.23(d)(2), yet fails to offer its view for how the "redefinition" of a rate cell should be measured under the second prong of the standard.

Specifically, the Postal Service claims that the Commission "makes no attempt to explain why the magnitude of a mail preparation change is the proper basis for determining whether mailers will shift to paying higher rates." *Id.* at 11. This statement

ignores the extensive discussion of the relevance and reasoning behind the significance prong of the standard used to determine when a mail preparation change will result in the redefinition of a rate cell. See Order No. 3047 at 16-20, 22-27. As explained in Order No. 3047, the significance of a change is used 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).” *Id.* at 16-17.

As set forth in Order No. 3047, the Commission’s standard contains two prongs: first, whether a rate cell has been deleted; and second, whether a rate cell has been redefined under 39 C.F.R. § 3010.23(d)(2). *Id.* at 15-16. The first prong looks to whether the rate is available to the mailer as a result of the mail preparation change, or whether the change resulted in the deletion of the rate cell or its equivalent. The second prong looks to whether a rate cell is redefined, where the mail preparation change has a significant impact on a basic characteristic of a mailing. It is only this second prong of the standard that contains a significance component, which is measured by looking to the operational and cost impacts of the change to the mailer. As stated in Order No. 3047, “[b]ecause 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.” *Id.* at 18 (emphasis in original). Measuring the effect of the change on a rate cell requires looking to the mailers’ costs and operational adjustments required to meet that change in order to determine whether the nature of the rate cell itself is changed significantly as to constitute a “redefinition.”

In addition, the Postal Service claims that the Commission did not “repeat the point that it made in its brief to the court that the more insignificant a mail preparation change is, the more willing mailers are to make the change, and hence the less likely that mailers would be to pay a higher price.” Motion for Reconsideration at 12. To the contrary, the Commission provided additional explanation for its rationale behind the significance component, explaining in the context of whether a change would redefine a rate cell as the inquiry required under 39 C.F.R. § 3010.23(d)(2) that “[t]he 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.” Order No. 3047 at 17. As stated in Order No. 1890, “[t]he definition of ‘rates’ provided by 39 U.S.C. § 102(7) does not limit the term to those sources of revenue considered by the Postal Service to be rates or identified by the Postal Service in a notice as such. This point was explicitly recognized in the adoption of 39 C.F.R. § 3010.23(d).”<sup>26</sup>

The Postal Service further claims that “[t]he Commission needs to reconcile the significance standard with its prior position that accurate, detailed information on mailer costs is unavailable.” Motion for Reconsideration at 34. The Postal Service refers to the Commission’s prior position to reject a “proposal that the Postal Service should be required to estimate mailer costs each time it changes a mail preparation requirement.” *Id.* The Postal Service also questions the types of costs that could potentially be included in an analysis of mailer costs. *Id.* at 38-39.

The Commission’s standard does not conflict with its prior position that requiring a cost analysis for every mail preparation change would require using specific, detailed information that is not available. In Order No. 3047, the Commission rejected a proposal from PostCom, *et al.*, that sought to regulate nearly all mail preparation changes under the price cap and would have required detailed cost information at such a finite level that would be extremely difficult to quantify and measure. See Order No. 3047 at 43-44. The significance prong only requires a determination of whether the mail preparation change is large in magnitude.<sup>27</sup> There is no contradiction with the Commission’s previous position; the Commission continues to recognize the limitations of the available data. As anticipated by the proposed rules set forth in Docket No.

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<sup>26</sup> Docket No. R2013-10, Order No. 1890 at 23 (citing Docket No. RM2007-1, Order No. 26, Order Proposing Regulations to Establish a System of Ratemaking, August 15, 2007, at 34-36).

<sup>27</sup> The Postal Service questions how to handle investments that may give the mailer internal benefits and the time period to consider for mailer investment. If a mailer must make a large investment to qualify for the same rate as before, then regardless of any secondary benefit to the mailer, the Postal Service is imposing a cost on mailers that will be evaluated for its significance.

RM2016-6, mailers can provide such evidence as is available in the event that “the Postal Service may have erred by failing to account for the price cap impact of a mail preparation change.” Docket No. RM2016-6, Order No. 3048 at 5. The calculation of the actual effect on the price cap does not require estimating mailer costs. Rather, once a change has been determined to be significant enough to redefine a rate cell, the calculation requires the allocation of volume to the rate cells the mailer would qualify for without making the changes required by the proposed mail preparation requirement. In other words, if the proposed mailing requirement places a large burden on mailers, the Postal Service cannot assume mailers will make the necessary changes to continue to qualify for the same rate.

In conclusion, where a mail preparation change redefines a rate cell, the Postal Service must account for the rate effects of the change under the price cap rule. The magnitude of the rate effects of the change is not tied to the mailers’ costs, as a finding of significance merely triggers the Postal Service’s obligation to adjust its billing determinants to account for the rate effects of the redefinition under 39 C.F.R. § 3010.23(d).

3.

The Commission properly applied the backward-weighted index.

In its Motion for Reconsideration, the Postal Service repeats its argument that the Commission erred in applying the backward-weighted index to mail preparation changes and claims that the Commission improperly assumes that no mailers will adapt to the changes. Motion for Reconsideration at 54-62. As a threshold issue, the Court’s remand did not require the Commission to revisit the application of the backward-weighted index as the Postal Service’s views on that issue were rejected by the Court. The Court found “no merit in the Postal Service’s other arguments, including its objection to the Commission’s application of the historical-volume rule in this case, so we deny the petition for review with respect to these matters.” *IMb Remand* at 756. However, in the interest of providing additional clarity and rectifying various misconceptions made by the Postal Service, the Commission submits the following

response to the arguments made by the Postal Service in its Motion for Reconsideration with respect to the backward-weighted index.

As stated in Order No. 1890 and discussed in section C.1., *supra*, “[i]n developing the price cap rules, the Commission considered the possibility that the Postal Service could make a change in mail preparation requirements that would have price cap implications.”<sup>28</sup> During the development of 39 C.F.R. § 3010.23(d)(2), mailers raised the issue that significant changes to mail preparation requirements would have rate implications and need to be accounted for under the price cap statute. See Docket No. R2013-10, Order No. 1890 at 19-20. In response to mailer concerns, the Postal Service “advocated a means of incorporating a change in mail preparation requirements into the determination of compliance with the price cap” by using a process that would adjust billing determinants to account for the mail preparation change. See Docket No. R2013-10, Order No. 1890 at 20.

In originally creating the backward-weighted index, the Commission considered input from all interested parties, including the Postal Service. The Postal Service was in favor of adopting the backward-weighted index and previously took the position that mailer behavior should not be considered when adjusting billing determinants. In proposing that mail preparation changes should only be considered when modifications are made to the MCS, the Postal Service stated that it “interpret[ed] 39 C.F.R. § 3010.23(d) to require billing determinant adjustments when an MCS change moves mail from one category to another, *regardless of mailer behavior*.”<sup>29</sup>

The Postal Service also overlaps its argument regarding the application of the backward-weighted index with its assertion that its mail preparation changes do not benefit the Postal Service in situations where mailers “adapt” and qualify for less costly rate categories. Motion for Reconsideration at 54-57. If this were true, there would be no reason for the Postal Service to implement any such changes, except as a means of

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<sup>28</sup> Docket No. R2013-10, Order No. 1890 at 19 (citing Docket No. RM2007-1, Order No. 43).

<sup>29</sup> Docket No. R2013-10, Order No. 1890 at 22 n.40 (citing Docket No. R2013-10, Response to CHIR No. 3, question 1 at 3 (emphasis added)).

extracting additional revenue from those mailers for whom it is not cost effective to “adapt” and make the required changes. However, the Postal Service also simultaneously characterizes these changes in requirements as “efficiency-enhancing.” It asserts that the “Commission’s approach...makes it economically irrational for the Postal Service to adopt efficiency-enhancing requirement changes.” *Id.* at 54. The Postal Service’s conclusion that such changes would be “economically irrational” is based on the fact that the effective rate increases from the mail preparation changes under the price cap would need to be offset by lower rates than would be permissible if the changes were not regulated under the price cap as rate increases.

The Postal Service’s arguments are based on a one-sided analysis that ignores the very efficiency gains that the changes are intended to produce.<sup>30</sup> The purpose of changes to mail preparation requirements is for the mail to be in a form that is more efficient for the Postal Service to process, transport, and/or deliver. Whether a potential change in requirements is economically rational depends on the net effect of the cap impact and the efficiency gains resulting from the changed requirements. The Postal Service’s argument regarding this issue ignores this tradeoff and represents another attempt to avoid regulating mail preparation changes under the price cap rules.

In their Response to Motion for Reconsideration, Respondents reject the Postal Service’s argument that the Commission’s standard would “penalize the Postal Service for implementing operational requirements that enhance efficiency...by requiring the Postal Service to forego a disproportionate amount of its scant price cap authority.”<sup>31</sup> Instead, Respondents contend that:

Operational requirements that force mailers into higher rate categories, or that shift significant costs to mailers to allow them to remain in the same rate category, do not “enhance efficiency.” The efficiency of the mail system is determined

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<sup>30</sup> This discussion is non-inclusive of the many other benefits the Postal Service receives from application of the backward-weighted index. See Docket No. RM2007-1; see *also* Price Cap Rules at 52,698-52,700.

<sup>31</sup> Response to Motion for Reconsideration at 3 (quoting Motion for Reconsideration at 2).

by the total costs of entering, processing, and transporting mail incurred by both the USPS and mailers. By shifting costs to mailers through operational requirements, the Postal Service simply increases the cost to mailers to achieve the same level of service. These shifts are not efficiency enhancements; they are rate increases, and the Commission's order properly recognizes the distinction.

Response to Motion for Reconsideration at 3.

Therefore, the Commission is unpersuaded by the Postal Service's arguments on this issue and reaffirms its holding in Order No. 3047.

#### IV. CONCLUSION

For the reasons explained above, the Commission rejects the Postal Service's arguments made in its Motion for Reconsideration. The Postal Service has not shown that the Commission failed to comply with the Court's remand or committed error in Order No. 3047. Thus, the Commission maintains its holding set forth in Order No. 3047.

#### V. ORDERING PARAGRAPH

*It is ordered:*

The Postal Service's Motion for Reconsideration is resolved.

By the Commission.

Stacy L. Ruble  
Secretary