Postal Regulatory Commission
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Before the
POSTAL REGULATORY COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Institutional Cost Contribution	)	Docket No. RM2017-1
Requirement for Competitive Products	)	
	)	

DECLARATION OF J. GREGORY SIDAK ON BEHALF OF UNITED PARCEL SERVICE

January 23, 2017

EXECUTIVE SUMMARY

1. The Postal Accountability and Enhancement Act (PAEA) of 2007 mandates that revenues from competitive products cover an "appropriate share" of the Postal Service's institutional cost, which the Postal Regulatory Commission (PRC) must determine and review at least every five years.[1] In its first review in 2012, the PRC decided to maintain the appropriate share at its initial level of 5.5 percent.[2] However, the PRC's 2012 analysis was flawed, and it relied upon a now-outdated understanding of the Postal Service's business model. It is well past time for the PRC to increase the share of institutional costs that competitive products cover.

2. The PRC's current appropriate-share requirement forces market-dominant products to bear a disproportionate amount of institutional costs, even as demand for those products declines and the Postal Service invests in aggressively expanding its competitive products business. Moreover, the Postal Service's incentive to underprice competitive products to increase the scale of its operations potentially places additional pressure on market-dominant revenues and on the Postal Service's finances. The Postal Service must recover a greater proportion of institutional costs from competitive products to avoid financial collapse. The Postal Service's inefficient pricing of competitive products also distorts dynamic competition in the markets for those products, to the detriment of consumers. To protect both consumers of market-dominant products and consumers of competitive products, and to improve the Postal Service's precarious financial condition, the PRC should increase the proportion of institutional costs that competitive products must recover through their prices.

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1. 39 U.S.C. § 3633(a)–(b).
2. Postal Regulatory Commission, Order Reviewing Competitive Products' Appropriate Share Contribution to Institutional Costs, Dkt. No. RM2012-3, at 5, 27 (Aug. 23, 2012) [hereinafter PRC, 2012 Appropriate Share Review], https://www.prc.gov/docs/85/85017/Order_1449.pdf.

QUALIFICATIONS

3. My name is J. Gregory Sidak. I am the chairman of Criterion Economics, LLC in Washington, D.C., which I founded in 1999. I am also a founding editor of the *Journal of Competition Law & Economics*, published quarterly by the Oxford University Press, as well as the publisher and editor of the recently launched *Criterion Journal on Innovation*. Since 1996, I have testified as a qualified expert economic witness for parties engaged in complex litigation, administrative proceedings, and international commercial arbitration. In addition, since 2013, I have twice served as Judge Richard Posner's court-appointed neutral economic expert pursuant to Federal Rule of Evidence 706. I have conducted research and written extensively about postal economics and state-owned enterprises since the 1990s.[3]

4. I have worked at the intersection of law and economics for 36 years. I earned A.B. (1977) and A.M. (1981) degrees in economics and a J.D. (1981), all from Stanford University. While an undergraduate student, I received the departmental prize for best honors thesis in economics at Stanford in 1977. While a graduate student, I was a member of the *Stanford Law Review* and a research assistant at the National Bureau of Economic Research (NBER) and the

3. *See* J. GREGORY SIDAK & DANIEL F. SPULBER, PROTECTING COMPETITION FROM THE POSTAL MONOPOLY (AEI Press 1996), https://www.criterioneconomics.com/docs/sidak-spulber-protecting-competition-from-the-postal-monopoly.pdf; J. Gregory Sidak, *The Economics of Mail Delivery: A Comment*, *in* GOVERNING THE POSTAL SERVICE 14 (J. Gregory Sidak ed., AEI Press 1994), http://www.aei.org/wp-content/uploads/2014/07/-governing-the-postal-service_163321145577.pdf; J. Gregory Sidak, *Abolishing the Letter-Box Monopoly*, 1 CRITERION J. ON INNOVATION 401 (2016), https://www.criterioneconomics.com/docs/abolishing-the-letter-box-monopoly.pdf; J. Gregory Sidak, *Maximizing the U.S. Postal Service's Profits from Competitive Products*, 11 J. COMPETITION L. & ECON. 617 (2015), https://www.criterioneconomics.com/docs/maximizing-us-postal-service-profits-from-competitive-products.pdf; J. Gregory Sidak & Damien Geradin, *The Future of the Postal Monopoly: American and European Perspectives After the Presidential Commission and* Flamingo Industries, 28 WORLD COMPETITION 163 (2005), https://www.criterioneconomics.com/docs/the_future_of_the_postal_monopoly1.pdf; David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L.J. 479 (2003), https://www.criterioneconomics.com/docs/competition_law_for_state-owned_enterprises-11.pdf; David E.M. Sappington & J. Gregory Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises*, 22 REV. INDUS. ORG. 183 (2003), https://www.criterioneconomics.com/docs/incentives_for_anticompetitive_behavior_by_public_enterprises1.pdf; J. Gregory Sidak & Daniel F. Spulber, *Monopoly and the Mandate of Canada Post*, 14 YALE J. ON REG. 1 (1997), https://www.criterioneconomics.com/docs/monopoly_and_the_mandate_of_canada_post1.pdf; J. Gregory Sidak, *Competition and the Postal Service*, AMERICAN ENTERPRISE, vol. 7, no. 3, at 74 (May/June 1996); J. Gregory Sidak, *Post Office Monopoly: Unfair Market Practice*, NAT'L L.J., Oct. 23, 1995, at A23.

Hoover Institution, where I co-authored an econometric study on antitrust enforcement published in the *Journal of Political Economy*.[4]

5. I have served in the federal government on three occasions. From 1981 to 1982, I was Judge Posner's first law clerk on the U.S. Court of Appeals for the Seventh Circuit. From 1986 to 1987, I was Senior Counsel and Economist to the Council of Economic Advisers (CEA) in the Executive Office of the President. There, I drafted portions of the *Economic Report of the President*, including President Reagan's introduction to the 1987 *Report*, and represented the CEA in working group meetings of the Economic Policy Council concerning regulatory, antitrust, and intellectual property policy. From 1987 to 1989, I was Deputy General Counsel of the Federal Communications Commission.

6. After leaving government, I practiced law with Covington & Burling in Washington, D.C. on antitrust cases and federal administrative, legislative, and appellate matters concerning telecommunications and other regulated industries. In one such matter, I represented an intervenor in a rate proceeding before the former Postal Rate Commission. Earlier in my career, before entering the Reagan administration, I worked as a management consultant with the Boston Consulting Group and practiced law with O'Melveny & Myers.

7. I have held several academic appointments. From 2009 to 2014, I was the Ronald Coase Professor of Law and Economics at Tilburg University in the Netherlands. From 1992 through 2005, I was a resident scholar at the American Enterprise Institute for Public Policy Research (AEI), where I directed AEI's Studies in Telecommunications Deregulation and held the F.K. Weyerhaeuser Chair in Law and Economics. From 1993 to 1999, while at AEI, I was

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4. Michael Kent Block, Frederick Carl Nold & Joseph Gregory Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429 (1981), https://www.criterioneconomics.com/docs/the_deterrent_effect_of_antitrust_enforcement1.pdf.

also a Senior Lecturer at the Yale School of Management, where I taught courses on regulation and competitive strategy in the telecommunications sector with the late Professor Paul W. MacAvoy. From 2005 to 2007, I was a Visiting Professor of Law at Georgetown University Law Center, where I taught courses on telecommunications regulation and antitrust law.

8. Since 1980, I have published six books and approximately 150 articles in scholarly journals and compilations. My writings have been downloaded more than 60,000 times from the Social Science Research Network. My most cited books are *Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States* (Cambridge University Press 1997), with Professor Daniel F. Spulber, and *Toward Competition in Local Telephony* (MIT Press and AEI Press 1994), with Professor William J. Baumol. My scholarly articles have appeared in many journals, including the *American Economic Association Papers and Proceedings*, the *Columbia Law Review*, the *Harvard International Law Journal*, the *Journal of Political Economy*, the *Stanford Law Review*, the *University of Chicago Law Review*, and the *Yale Law Journal*. My essays have appeared in many newspapers and business periodicals, including the *New York Times* and the *Wall Street Journal.*

9. My writings have been cited by the Supreme Court of the United States, the Supreme Court of Canada, the European Commission, the U.S. Court of Appeals for the D.C. Circuit, other federal appellate and district courts, the supreme courts of California and other states, various federal and state regulatory commissions, and the Office of Legal Counsel of the U.S. Department of Justice. American jurists across the political spectrum have cited my writings; they include Stephen Breyer, Frank Easterbrook, Douglas Ginsburg, Stephen Reinhardt, Laurence Silberman, David Souter, and Stephen Williams. I have testified before committees of the U.S. Congress on multiple occasions, including on postal regulatory matters.

10. I have served clients as a consulting or testifying economic expert in adversarial matters throughout the Americas, Europe, Asia, and the Pacific. In addition to performing these consulting engagements, I served from 2002 to 2006 as a member of the U.S. advisory board for NTT DoCoMo, Japan's largest wireless telecommunications operator. I briefed DoCoMo's chairman semiannually on the business implications of emerging regulatory and antitrust trends.

11. I attach as Appendix I to this report my current *curriculum vitae*, which lists my expert economic testimony in matters of public record.

I. The PRC's Flawed Analysis of Appropriate Share in 2012 Is Uninformative in 2017

12. In its first review of the appropriate share in 2012, the PRC decided to maintain the appropriate share at its initial level of 5.5 percent.[5] However, the PRC's decision was based in large part on its erroneous conclusion that the Postal Service lacked an artificial competitive advantage in the markets for competitive products. Moreover, to the extent that the PRC's 2012 order contained useful analysis, changes to the Postal Service's business model and mail mix render its conclusions about the appropriate share irrelevant in 2017.

A. The PRC Had No Basis for Concluding That the Postal Service Operates at a Net Disadvantage

13. As part of its 2012 analysis of the "prevailing conditions in the market" as required by statute, the Commission considered whether the Postal Service had a competitive advantage in the markets for competitive products.[6] The Commission cited a 2007 FTC report entitled "Accounting for Laws That Apply Differently to the United States Postal Service and Its Private Competitors" to support the PRC's conclusion that "[f]ederally-imposed restraints on the

5. PRC, 2012 Appropriate Share Review, *supra* note 2, at 5, 27.
6. *Id.* at 14–16.

Postal Service's operations increase its costs . . . and leave the Postal Service at a net competitive disadvantage."[7] However, the PRC's characterization of the FTC's analysis is false, misleading, and incomplete.

14. The PRC is correct in reporting that the FTC found that Postal Service experienced a small net disadvantage of $213 to $743 million per year.[8] However, the FTC provided its conclusion with the caveat that it had excluded key Postal Service benefits that the FTC had been unable to quantify.[9] Those benefits included "the ability to acquire property through eminent domain, disparate customs treatment, the use of highways from which commercial vehicles are restricted, . . . the ability to take advantage of the FTCA [Federal Tort Claims Act] . . . , [and the] postal and the mailbox monopolies."[10] Those excluded advantages are decidedly nontrivial. For example, in a 2015 white paper Dr. Robert Shapiro estimated the value of the Postal Service's mailbox monopoly to be $14.9 billion (or $13.0 billion in 2007 dollars).[11] Even under extremely conservative assumptions about the relative proportion of that value that accrues to competitive products, the value of the mailbox monopoly *alone* exceeds the net disadvantage that the FTC identified in 2007.[12] Based on that information alone, the PRC's conclusion that the Postal Service suffered from a net disadvantage in the markets for competitive products was plainly incorrect. Incorporating the other advantages omitted from the

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7. *Id.* at 14–15.

8. FEDERAL TRADE COMMISSION, ACCOUNTING FOR LAWS THAT APPLY DIFFERENTLY TO THE UNITED STATES POSTAL SERVICE AND ITS PRIVATE COMPETITORS 64 (2007) [hereinafter FTC, ACCOUNTING FOR LAWS], https://www.ftc.gov/sites/default/files/documents/reports/accounting-laws-apply-differently-united-states-postal-service-and-its-private-competitors-report/080116postal.pdf.

9. *Id.*

10. *Id.*

11. *See* Robert J. Shapiro, *The Basis and Extent of the Monopoly Rights and Subsidies Claimed by the United States Postal Service*, SONECON 16 (Mar. 2015), http://www.sonecon.com/docs/studies/Study_of_USPS_Subsidies-Shapiro-Sonecon-March_25_2015.pdf.

12. Even if 94 percent of the value that Dr. Shapiro identified accrues solely to market-dominant products—an unlikely scenario—the remaining 6 percent of that $13 billion (that is, 0.06 × $13 billion = $780 million) exceeds the FTC's competitive-disadvantage upper bound of $743 million.

FTC's estimate—even qualitatively—reveals that the Postal Service experienced a substantial net advantage.

15. In addition to citing the FTC report, the PRC cited the absence of any evidence of predatory pricing on the part of the Postal Service to support the contention that the Postal Service lacked a competitive advantage in the markets for competitive products.[13] The PRC's reasoning on this point is circular and unpersuasive. Although the Postal Service could use its competitive advantage to engage in predatory pricing, the two are not necessarily linked: each can exist without the other. As I explain in Part II below, the Postal Service's incentives to expand its scale at the expense of profit could induce it to engage in below-cost pricing even in the absence of an artificial competitive advantage.[14] Likewise, it does not follow from the presence of a competitive advantage that the Postal Service would pursue a strategy of below-cost pricing. In fact, a firm with a competitive advantage could more easily undercut its competitors' prices without engaging in below-cost pricing than could a firm without a competitive advantage. The PRC's reasoning collapses from a theoretical standpoint alone.

16. Moreover, the PRC's evidence in support of its contention that the Postal Service is not engaging in below-cost pricing is unconvincing. The PRC reasoned that the attributable-cost requirement "minimiz[es] the Postal Service's ability to engage in predatory pricing at the product level" and that "[t]he appropriate share can also be viewed as imposing another level of protection against unfair or anti-competitive pricing."[15] In evaluating competitive advantage for purposes of determining the correct level of the appropriate share, the PRC made the curious

13. PRC, 2012 Appropriate Share Review, *supra* note 2, at 15.

14. In antitrust terms, predatory pricing requires a high probability of recoupment. Because the Postal Service is unlikely to raise prices to attempt to recoup any losses from a below-cost pricing strategy, it is more accurate to refer to its prices as potentially below-cost rather than predatory. The choice of terminology would not influence the determination of whether the Postal Service's pricing violated section 2 of the Sherman Act, 15 U.S.C. § 2.

15. PRC, 2012 Appropriate Share Review, *supra* note 2, at 15.

argument that the mere existence of an appropriate share already precludes below-cost pricing. The implication appears to be that the PRC need not use the appropriate-share requirement to address a potential competitive advantage because any appropriate share at all already precludes a competitive advantage. Likewise, the PRC's reasoning that the Postal Service is subject to antitrust liability is irrelevant to the question of how much competitive products should contribute to institutional-cost coverage. The PRC's circular logic highlights the fact that the appropriate share is intended to be a contribution above and beyond the attributable-cost requirement and cross-subsidy test, which together already preclude below-cost pricing (at least in theory).[16] Although evidence of below-cost pricing might counsel the PRC to increase the appropriate share as a stopgap measure, that the Postal Service is pricing above its attributable costs would not justify the PRC in lowering the bar for competitive products' contribution to overhead.

17. The PRC's contention that the Postal Service's constant market share from 2006 to 2011 "minimizes concerns that the Postal Service may have an artificial advantage over its competitors" is similarly unpersuasive.[17] The size of the Postal Service's market share is not directly relevant for determining whether that share reflects an artificial competitive advantage. Instead, the relevant question is how the Postal Service's actual market share compares with the market share that it would capture in the absence of its special legal status and the implicit subsidies that it receives. For example, the Postal Service could have a substantial competitive advantage but capture only a very small market share due to its inefficient operations and high costs (other than those costs imposed by its legal obligations). In such a scenario, the Postal Service might not even be able to enter the market in the absence of the advantages that it enjoys.

16. *See* 39 U.S.C. 3633(a).
17. PRC, 2012 Appropriate Share Review, *supra* note 2, at 18.

Thus, the implicit argument that a low market share is evidence that the Postal Service lacks a competitive advantage is incorrect.

18. Moreover, the PRC's explicit argument is an additional step further removed from an inquiry about actual competitive advantage, because it rests upon the *change* in the Postal Service's market share between 2007 and 2012. Even if one were to assume that market share directly reflects competitive advantage, the Postal Service's maintenance of a constant market share over those years would imply only a constant level of competitive advantage—either high or low. That the Postal Service did not gain substantial market share between 2007 and 2012 therefore provides no evidence whatsoever that it lacks an artificial advantage over its competitors.

B. Changes in the Postal Service's Business Model and Mail Mix Render Its Analysis Regarding the Appropriate Share in 2012 Uninformative in 2017

19. In its 2012 analysis, the Commission noted that competitive products represented less than two percent of the Postal Service's total volume and that that proportion had increased by less than one percentage point since the PAEA's enactment in 2007.[18] On the basis of those figures, the Commission said that it did not "find the current appropriate share requirement inaccurately reflects the proportion of institutional costs that should be borne by competitive products."[19] However, the Commission stated that it would "consider changing the appropriate share contribution level" if the Postal Service's competitive-product volumes increased substantially relative to its market-dominant volumes.[20]

20. By the end of the Postal Service's 2016 fiscal year, in contrast, competitive products' share of volume had increased by 50 percent since 2012 and more than tripled since

18. PRC, 2012 Appropriate Share Review, *supra* note 2, at 22.
19. *Id.* at 23.
20. *Id.*

2007.[21] Competitive products now generate almost one-quarter of the Postal Service's total revenues. Moreover, as I explain in Part II below, the Postal Service's capital investments—the cost of which it is likely to treat as institutional costs—are increasingly designed to support competitive products. Given this shift in the Postal Service's business model, even a more rigorous analysis of appropriate share than the one that the PRC performed in 2012 would no longer suffice in 2017.

II. The PRC Should Protect Market-Dominant Consumers and Taxpayers by Increasing the Appropriate Share

21. Under the PRC's current appropriate-share requirement, if the Postal Service is to break even in any given year, revenues from market-dominant products must cover almost the entire remaining 94.5 percent of institutional costs.[22] That allocation imposes an excessive cost-recovery burden on market-dominant products, which face declining demand. Moreover, the Postal Service has a strong incentive to underprice competitive products to increase the scale of its operations. When the Postal Service sacrifices profit from competitive products in favor of attaining greater scale, it places additional pressure on quality-adjusted prices for market-dominant products and on the Postal Service's bottom line. To protect market-dominant consumers and to improve the Postal Service's financial condition, the PRC should increase the proportion of institutional costs that competitive products must cover.

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21. U.S. Postal Service, Annual Report for the Period Ending September 30, 2016 (SEC Form 10-K), at 16–17 (filed Nov. 15, 2016), https://about.usps.com/who-we-are/financials/10k-reports/fy2016.pdf; U.S. Postal Service, Annual Report for the Period Ending September 30, 2014 (SEC Form 10-K), at 16–17 (filed Dec. 5, 2014), https://about.usps.com/who-we-are/financials/10k-reports/fy2014.pdf; PRC, 2012 Appropriate Share Review, *supra* note 2, at 22.

22. In addition to the 5.5 percent of institutional costs that competitive products must cover as part of the appropriate share requirement, competitive products also contribute an imputed income tax to institutional costs. Historically, competitive products have not contributed any additional revenue to institutional costs in excess of those two statutorily mandated contributions. PRC, 2012 Appropriate Share Review, *supra* note 2, at 11.

A. The Postal Service Has the Incentive and Ability to Expand Scale at the Expense of Profit

22. To understand the appropriate-share requirement's role in regulating postal pricing, it is important to recognize that the Postal Service's incentives diverge from those of a private firm. If the Postal Service were a regulated private firm whose sole objective were to maximize profits, then the Postal Service would have little incentive to set inefficiently low prices for its competitive products, and price floors for competitive products would be less important as a regulatory tool. However, the Postal Service is not a strictly profit-maximizing firm. The Postal Service, like many state-owned-enterprises, has the incentive to sacrifice profit to expand its scale, in part due to statutory mandates and policy goals that diverge from profit maximization.[23] Moreover, managers of state-owned-enterprises often have considerable interest in expanding the scale or scope of their activities, partly because a manager's abilities might be inferred from the size of the operations that he or she oversees.[24] It is telling that the Postal Service's incentive compensation explicitly rewards managers with bonuses that are tied to measures of scale, including deliveries per hour and total revenue, rather than profit.[25] In other words, the Postal Service's objective function likely maximizes some weighted average of profit and scale, rather than profit alone.[26] That pressure to increase scale at the expense of profit

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23. Sidak, *Maximizing the U.S. Postal Service's Profits from Competitive Products*, *supra* note 3, at 662; *see also* Sappington & Sidak, *Competition Law for State-Owned Enterprises*, *supra* note 3; David E.M. Sappington & J. Gregory Sidak, *Are Public Enterprises the Only Credible Predators?*, 67 U. CHI. L. REV. 271, 285–86 (2000), https://www.criterioneconomics.com/docs/are_public_enterprises_the_only_credible_predators1.pdf (arguing that a public enterprise has a greater incentive than a private firm to engage in predatory pricing).

24. Sappington & Sidak, *Competition Law for State-Owned Enterprises*, *supra* note 3, at 500.

25. *See* JEFFREY C. WILLIAMSON, UNITED STATES POSTAL SERVICE, FISCAL YEAR 2014 PAY FOR PERFORMANCE PROGRAM 4 (2013), http://www.nalc3825.com/PFP-Prog-FY-2014-31.pdf; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, U.S. POSTAL SERVICE NEW DELIVERY PERFORMANCE MEASURES COULD ENHANCE MANAGERS' PAY FOR PERFORMANCE PROGRAM (2008), http://www.gao.gov/assets/290/280446.pdf.

26. For a formal model of a state-owned enterprise's maximization of a weighted objective function consisting of profit and output (the most tractable measure of scale in a multiproduct firm), see Sappington & Sidak, *Competition Law for State-Owned Enterprises*, *supra* note 3; Sappington & Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises*, *supra* note 3.

creates a strong incentive for the Postal Service to decrease its prices below the profit-maximizing level and perhaps even below costs. As I explain in Part II.B, demand for the Postal Service's competitive products is likely more sensitive to price than is the remaining demand for market-dominant products. Thus, the Postal Service can most easily expand its scale by underpricing competitive products.[27]

23. The Postal Service has the ability to expand scale at the expense of profit—and perhaps even at a loss—for several reasons. Unlike a private firm, the Postal Service need not break even overall (and, in fact, it runs chronic losses). Nor does the PRC's current regulation of competitive-product pricing necessarily preclude below-cost pricing. The process by which the Postal Service assigns costs to different products and product categories is complex and opaque. The costs that the Postal Service attributes to its competitive products are not publicly available in sufficient detail to enable scrutiny of the Postal Service's costing procedures.[28] That lack of transparency, when combined with the Postal Service's incentive to expand its output of competitive products, gives the Postal Service considerable latitude and incentive to understate the costs attributable to its competitive products.

24. Even without deliberate manipulation of accounting data, the Postal Service's cost attribution methodologies are likely to understate the cost of providing competitive products. The Postal Service attributes a very small proportion of its total costs, choosing to categorize 45.6

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27. *See* Sappington & Sidak, *Competition Law for State-Owned Enterprises*, *supra* note 3, at 505–06; Sidak, *Maximizing the U.S. Postal Service's Profits from Competitive Products*, *supra* note 3, at 652–53.

28. The Postal Service provides relatively detailed cost data for its market-dominant products, but it releases costs for competitive products only in broad categories. The Postal Service considers costing information for competitive products to be proprietary. *See, e.g.*, U.S. Postal Service, USPS-FY14-1, FY 2014 Public Cost and Revenue Analysis (PCRA) Report (2015), https://www.prc.gov/docs/91/91009/USPS-FY14-1.Preface.pdf.

percent of its costs as institutional costs.[29] As electronic substitution continues to erode demand for market-dominant products and as the Postal Service's focus consequently shifts, those resources will increasingly be diverted to competitive products in ways that the Postal Service's accounting procedures are unlikely to capture. For example, the Postal Service plans to purchase a new fleet of 180,000 purpose-built delivery vehicles with over three times the cargo space of its current delivery vehicles.[30] Under current Postal Costing, the majority of the cost of those vehicles will be treated as being institutional.[31] Yet, the larger vehicles are clearly intended—at additional expense to the Postal Service—to accommodate large volumes of parcels.[32]

25. As the Postal Service continues to shift its business strategy toward parcels, expenditures of this kind—plausibly used for the postal network as a whole but in reality designed to support competitive products—will increase. For example, the Postmaster General said in 2014 that the Postal Service "plans to invest $10 billion over the next four years for improvements, including buying new vehicles, retrofitting old ones and upgrading package-

29. POSTAL REGULATORY COMMISSION, FINANCIAL ANALYSIS OF UNITED STATES POSTAL SERVICE FINANCIAL RESULTS AND 10-K STATEMENT, FISCAL YEAR 2015, at 46 (2016), https://www.prc.gov/sites/default/files/reports/FY 2015 Financial Analysis Report.pdf.

30. The Postal Service recommends that the new delivery vehicles have 330 to 400 cubic feet of cargo space. U.S. POSTAL SERVICE, U.S. POSTAL SERVICE NEXT GENERATION DELIVERY VEHICLE SUPPLIER CONFERENCE 4 (2015), http://savethepostoffice.com/wp-content/uploads/Supplier_Conference_Pres_FBO_Posting.pdf. The Postal Service's current standard delivery vehicles have only 108 cubic feet of cargo space, or less than one-third of the Postal Service's recommended cargo capacity for its new delivery vehicles. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 11-386, STRATEGY NEEDED TO ADDRESS AGING FLEET 9 (2011), http://www.gao.gov/assets/320/318032.pdf.

31. *See* United Parcel Service, Comments of United Parcel Service on Rulemaking on Analytical Principles Used in Periodic Reporting (Proposal Twelve) 5–6 (Dec. 4, 2015), http://www.prc.gov/docs/93/93916/RM2016-3 UPS Comments.pdf.

32. *See, e.g.*, POSTAL SERVICE OFFICE OF INSPECTOR GENERAL, REP. NO. DR-MA-14-005, DELIVERY VEHICLE FLEET REPLACEMENT 2 (2014), https://www.uspsoig.gov/sites/default/files/document-library-files/2015/dr-ma-14-005.pdf ("[G]rowth in the package market could help dictate the design and technologies selected for a new vehicle."); U.S. POSTAL SERVICE, REQUEST FOR INFORMATION AND PREQUALIFICATION/SOURCES SOUGHT FOR NEXT GENERATION DELIVERY VEHICLE (NGDV) ACQUISITION PROGRAM 1 (2015), https://www.fbo.gov/utils/view?id=66eca89526d1abae248f70be62161173 ("The NGDVs are expected to share some design similarities with current [delivery vehicles], but they will also need to incorporate changes to accommodate new market projections for mail and package delivery volumes.").

sorting equipment."[33] In making investments to grow its competitive-products business, the Postal Service has the incentive to favor technologies with relatively large fixed costs (which the Postal Service will call institutional) and relatively small marginal costs (which it will attribute to competitive products).[34] Such a strategy would enable the Postal Service to suppress prices for competitive products artificially by funding capital investments that primarily benefit competitive products with revenues from market-dominant products.

26. Leaving aside the possibility of below-cost pricing, it is undeniable that the Postal Service has the ability to price competitive products below the profit-maximizing level. Given the Postal Service's flexibility in attributing costs and given the tiny share of institutional costs that competitive products currently must cover, it is implausible that the price floor that the PRC's regulations imply even remotely approaches the profit-maximizing level. As I will explain in Part II.B and Part III, those suboptimal prices for competitive products harm market-dominant consumers, the Postal Service's financial stability, and competition in those markets.

B. Increasing the Appropriate Share Is Necessary to Restore Financial Stability and Ease the Cost-Recovery Burden of Market-Dominant Products

27. Given the Postal Service's chronic losses and its incentives to expand scale at the expense of profit, increasing the contribution that competitive products make to the recovery of overhead costs is necessary to protect market-dominant consumers and to restore financial stability to the Postal Service. Under the current appropriate-share regime, if the Postal Service is to break even in a given year, it must cover 94.5 percent of its institutional costs, less a small

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33. Laura Stevens, *For FedEx and UPS, a Cheaper Route: The Post Office*, WALL ST. J. (Aug. 4, 2014), http://www.wsj.com/articles/u-s-mail-does-the-trick-for-fedex-ups-1407182247.

34. *See* Sappington & Sidak, *Competition Law for State-Owned Enterprises*, *supra* note 3, at 508. The Postal Service attributes almost exclusively costs that are variable rather than fixed. *See* Postal Regulatory Commission, Order Concerning United Parcel Service, Inc.'s Proposed Changes to Postal Service Costing Methodologies (UPS Proposals One, Two, and Three), Dkt. No. RM2016-2, at 9 (Sept. 9, 2016) [hereinafter PRC Order on UPS Proposals], https://www.prc.gov/docs/97/97114/Order3506.pdf.

additional "imputed tax" contribution from competitive products, using revenues solely from market-dominant products.[35] That situation is untenable.

28. In the short term, that cost-recovery burden puts extreme upward pressure on quality-adjusted prices for market-dominant products. The role of quality is key here, given that regulation ties prices for market-dominant products to inflation.[36] Even assuming that the PRC approves no further temporary surcharges, the Postal Service can raise—and arguably has raised—the quality-adjusted price of market-dominant products by making service cuts.[37] That quality-adjusted price hike for market-dominant products could temporarily increase the Postal Service's profits (or, more accurately, decrease its losses).

29. Such an increase would be consistent with the economic theory of multiproduct pricing, in which prices (and price-cost margins) are higher for products whose demand is less elastic. As substitutes continue to erode demand for market-dominant services, the remaining demand will be for products for which there are no close substitutes (or demand from consumers who eschew those substitutes). That remaining demand will be less sensitive to changes in price.[38] Consequently, the price (or quality-adjusted price) that the Postal Service can charge will increase. Moreover, almost tautologically, competitive products face more competition and more

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35. *See* PRC, 2012 Appropriate Share Review, *supra* note 2, at 11.

36. 36 U.S.C. § 3622(d)(1).

37. For example, the percentage of on-time deliveries for three-to-five-day single-piece first-class mail declined from a high of 92 percent in 2012 to 84 percent in 2016. UNITED STATES POSTAL SERVICE, QUARTERLY PERFORMANCE FOR SINGLE-PIECE FIRST-CLASS MAIL, QUARTER IV, FY 2016, at 3 (2016), https://about.usps.com/what-we-are-doing/service-performance/fy2016-q4-single-piece-first-class-mail-quarterly-performance.pdf; *see also* Press Release, U.S. Postal Service, Our Future Network: Key Facts on Network Rationalization, https://about.usps.com/news/electronic-press-kits/our-future-network/ofn-usps-key-fact-on-network-rationalization.htm (describing plans for increasing delivery times for First-Class Mail).

38. *See, e.g.*, Henry Grabowski & John Vernon, *Brand Loyalty, Entry, and Price Competition in Pharmaceuticals After the 1984 Drug Act*, 35 J.L. & ECON. 331 (1992), http://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/6714/Number_31.pdf?sequence=1; Jerry A. Hausman & J. Gregory Sidak, *Why Do the Poor and the Less-Educated Pay More for Long-Distance Calls?*, CONTRIBUTIONS IN ECONOMIC AND POLICY RESEARCH, vol. 3, issue 1, article 3 (2004), https://www.criterioneconomics.com/docs/why-do-the-poor-and-the-less-educated-pay-more-for-long-distance-calls1.pdf.

elastic (price-sensitive) demand. Therefore, the Postal Service's ability to increase quality-adjusted prices is strongest for market-dominant products. In this way, the low appropriate-share requirement effectively privileges expansion into competitive markets over the welfare of captive market-dominant consumers. Moreover, as I explain in Part III, the Postal Service's expansion into the markets for competitive products likely harms consumer welfare in those markets in the long run. Thus, the low appropriate share enables pricing strategies that harm consumers of both market-dominant and competitive products.

30. In the long term, however, the Postal Service's attempts to recover institutional costs with little contribution from competitive products are doomed to fail. Substitution to electronic communication will continue to erode the Postal Service's potential profits from market-dominant products. Even as the profit-maximizing price for market-dominant products increases, the total profit from market-dominant products will decline. To avoid financial collapse, the Postal Service will eventually—and sooner rather than later—need to recover a substantial portion of its institutional costs from competitive products. Thus, both consumer-welfare and financial-stability considerations counsel the PRC to adopt a higher appropriate share.

III. Increasing the Appropriate Share Is Necessary for Competitive Parity in the Markets for Competitive Products

31. In addition to harming market-dominant consumers and threatening the Postal Service's financial stability, allowing competitive products to recover only 5.5 percent of institutional costs harms competition in the markets for competitive products. At first glance, it might seem that the low competitive-product prices that the current appropriate share enables might help competition for and consumers of competitive products, so long as those prices

exceed marginal cost. Prices that maximize static efficiency are close to marginal costs, such that no consumer is overcharged.[39] However, prices might be efficient from a short-run static perspective but inefficient in the long run if no new entry occurs and no firm introduces new products.[40] In contrast to static competition, dynamic competition occurs when firms compete for a market by introducing new products, entering new markets, or developing cost-reducing innovations.[41] It is the potential to earn profits greater than those generated by static efficiency that drives dynamic competition. Pricing the Postal Service's competitive products at levels near their marginal costs might maximize static efficiency, but such prices would stifle dynamic competition.

32. The potential for entry and expansion is what drives prices down to marginal costs in textbook examples of competitive markets. However, a firm will enter a market only if its expected revenues cover not only its expected variable costs of production, but also its sunk investment in entry (or expansion). If the Postal Service prices at its marginal costs, it will reduce competitors' potential revenues and incentives to enter or expand. Thus, by charging low prices in the short run, the Postal Service will likely cause prices to increase in the long run. In contrast, bringing the Postal Service closer to a profit-maximizing price by increasing its required coverage of institutional costs will encourage all competitors to compete for the market and invest in new products and cost-reducing innovations. A higher appropriate share will thus reduce long-run prices and produce the most long-run benefits for consumers.

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39. *See, e.g.*, J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 603 (2009), https://www.criterioneconomics.com/docs/dynamic-comp1.pdf.
40. *Id.*
41. *Id.*

IV. CONCLUSION

33. For the foregoing reasons, I recommend that the Commission adopt UPS's proposed appropriate-share contribution.

* * *

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct to the best of my knowledge.

Respectfully submitted,

J. Gregory Sidak

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Executed: January 23, 2017.

APPENDIX I: CURRICULUM VITAE OF J. GREGORY SIDAK

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EDUCATION

STANFORD UNIVERSITY, J.D., 1981; A.M. (Economics), 1981; A.B. with honors and distinction (Economics), 1977. Associate Editor, *Stanford Law Review*. Myers Prize in Economics, 1977.

CURRENT EMPLOYMENT

CRITERION ECONOMICS, L.L.C., Washington, D.C.: Chairman, 2008–present. Founder, 1999–present.

JOURNAL OF COMPETITION LAW & ECONOMICS, published by the Oxford University Press, Oxford, United Kingdom: Founding Co-Editor, 2004–present.

EMPLOYMENT HISTORY

TILBURG UNIVERSITY, Tilburg, The Netherlands: Ronald Coase Professor of Law and Economics, 2009–2014.

GEORGETOWN UNIVERSITY, Washington, D.C.: Visiting Professor of Law, 2005–2007.

AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, Washington, D.C.: Resident Scholar and F.K. Weyerhaeuser Fellow in Law and Economics Emeritus, 2002–2005. Director, AEI Studies in Telecommunications Deregulation, 1992–1995. F.K. Weyerhaeuser Fellow in Law and Economics, 1995–2002. Resident Scholar, 1992–1995.

YALE UNIVERSITY, New Haven, Connecticut: Senior Lecturer, Yale School of Management, 1993–2000.

COVINGTON & BURLING, Washington, D.C.: Associate, 1989–1992.

FEDERAL COMMUNICATIONS COMMISSION, Washington, D.C.: Deputy General Counsel, 1987–1989.

COUNCIL OF ECONOMIC ADVISERS, EXECUTIVE OFFICE OF THE PRESIDENT, Washington, D.C.: Senior Counsel and Economist, 1986–1987.

THE BOSTON CONSULTING GROUP, INC., Los Angeles: Management Consultant, 1984–1986.

O'MELVENY & MYERS, Los Angeles: Associate, 1982–1984.

U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, Chicago: Law Clerk to Judge Richard A. Posner, 1981–1982.

CORPORATE BOARDS

NTT DOCOMO, Tokyo, Japan: Member, U.S. Advisory Board, 2002–2006.

Authored Books

Broadband in Europe: How Can Brussels Wire the Information Society, co-authored with Dan Maldoom, Richard Marsden, and Hal J. Singer (Springer 2005).

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Bar Admissions

California (1982); District of Columbia (1989); Supreme Court of the United States (1989).

Memberships

The American Law Institute

The London Court of International Arbitration, North American Users' Council

World Intellectual Property Organization, Neutral Expert

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