

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON DC 20268-0001**

RATE ADJUSTMENT DUE TO )  
EXTRAORDINARY OR ) Docket No. R2010-4R  
EXCEPTIONAL CIRCUMSTANCES )

**REPLY COMMENTS OF ALLIANCE OF NONPROFIT MAILERS,  
ASSOCIATION FOR POSTAL COMMERCE,  
DIRECT MARKETING ASSOCIATION AND  
MAGAZINE PUBLISHERS OF AMERICA, INC.  
(August 1, 2011)**

The undersigned parties submit these reply comments in response to Order No. 757, which seeks comments on the legal issue remanded by the D.C. Circuit in *USPS v. PRC*, 640 F.3d 1263 (D.C. Cir. 2011) (“Remand Order”), and the Initial Comments of the United States Postal Service Regarding Court Remand (“USPS Comments”), submitted July 25, 2011.

**INTRODUCTION AND SUMMARY**

The initial comments filed by the Postal Service confirm that the central issue before the Commission is whether or not to continue enforcing a requirement of proximate or economic causation. As explained in our July 25 initial comments, the answer is yes.

The Postal Service argues for use of only a “standard of general proportionality” in interpreting the “due to” clause of 39 U.S.C. § 3622(d)(1)(e). At best, this standard is a “cause-in-fact” standard that would allow an above-CPI increase if extraordinary or exceptional circumstances contribute to Postal Service losses, even if other factors are the predominant causes of those losses. At worst, the Postal Services is arguing for a standard that would allow it to raise prices above inflation whenever extraordinary and exceptional circumstances exist, and the Postal Service has suffered a decline in revenue. In this latter sense, the Postal Service’s position in its Initial Comments appears to be nothing more than an attempt to revive the argument, rejected by the Court of Appeals, that the “reasonable and equitable and necessary” language of 39 U.S.C. § 3622(d)(1)(E) trumps the “due to” clause’s requirement of causality.

In arguing for a laxer standard, the Postal Service misrepresents the holding of the Court of Appeals, attempts to relitigate issues already decided by the Commission and upheld by the Court of Appeals, and continues to elide the clear requirement, endorsed by the Court of Appeals, that the “due to” clause of 39 U.S.C. § 3622(d)(1)(e) requires the Postal Service to affirmatively demonstrate a causal connection between the claimed exigent circumstances and its requested price increase.

Finally, whatever standard the Commission chooses to apply, the Postal Service has failed to meet that standard by failing to establish *any*

causal link between the recession and its need for additional revenue. Consequently, the Commission should affirm its decision to deny the Postal Service an exigent rate increase.

**I. THE COMMISSION PROPERLY INTERPRETED THE “DUE TO” STANDARD AS REQUIRING PROOF OF BOTH CAUSATION-IN-FACT AND EFFICIENT OR PROXIMATE CAUSATION.**

**A. The Basic Issue Before The Commission On Remand Is Whether To Require A Showing Of Proximate Causation.**

The initial comments underscore that the central issue before the Commission on remand is to decide where the “due to” requirement of 39 U.S.C. § 3622(d)(1)(E) should be placed on spectrum of causation standards suggested by the Court of Appeals in *USPS v. PRC*, 640 F.3d at 1268—and, in particular, whether the Commission should require a showing of proximate or “efficient” causation in addition to causation-in-fact.

The D.C. Circuit held that the “phrase ‘due to’ is ambiguous” and therefore must be interpreted by the Commission through the exercise of its expert judgment. 640 F.3d at 1268. This is so, the court stated, because the

causal nexus of ‘due to’ has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other. . . . In other words, the phrase can mean “due *in part* to” as well as due *only* to.” . . . The statute on its faces does not make clear which meaning of “due to” the Congress intended.

*Id.* (case citations omitted).

The court, by remanding the case on these terms, left the Commission with a wide range of discretion. An outcome may be regarded as due in part to a particular cause, and the cause considered a “cause-in-fact” of the outcome, merely if the result would not have occurred but for the cause. An outcome may have several causes-in-fact, all necessary for it to obtain, but any one cause-in-fact may play only a minor role in the outcome. By contrast, for a circumstance to be considered the “proximate” or “efficient” cause of an outcome, the circumstance must be the *primary* or *dominant* cause of the outcome. See *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989); ANM-PostCom-DMA-MPA Comments at 11-12.

The facts of this case illustrate the practical importance of this distinction. The record in the earlier stage of this proceeding makes clear that the decline in revenue from the recession (the supposed exigency identified by the Postal Service) was not the only factor leading to its financial difficulties, and caused only a small percentage of the Postal Service’s total losses.

ANM, PostCom, DMA and MPA propose in their initial comments a standard of proximate or efficient causation—i.e., that the Postal Service should be required to show that the exigent circumstance invoked by the Postal Service is the *proximate* or *efficient* cause of the Postal Service’s asserted need for an above-CPI rate increase. This standard is essentially the standard applied by the Commission in its Order No. 547, as the Postal

Service appears to concede. *See* USPS Comments at 16 (quoting Order No. 547 at 61, 68); PRC Brief to D.C. Circuit (Jan. 14, 2011) at 32-33. For the reasons explained in the initial comments of ANM *et al.* on remand, requiring the Postal Service to establish proximate causation is necessary to preserve the effectiveness of the price cap and give both the Postal Service and its stakeholders incentives to hold down the Postal Service's costs. ANM-PostCom-DMA-MPA comments at 4-11.<sup>1</sup>

The Postal Service, by contrast, advocates requiring only a showing of causation-in-fact, and a loose one at that. In the Postal Service's terminology, it proposes "a standard of general proportionality between the size of a requested increase and the impact of the exigent circumstances on the Postal Service." USPS Comments at 7. Under this standard, the Postal Service would be entitled to an exigent rate increase whenever an extraordinary or exceptional circumstance in some way contributes to a decline in revenue. Whether the extraordinary or exceptional circumstance is the sole, or even primary, cause of the decline in revenue would be irrelevant: notably absent from the proposed standard is any requirement of proximate causation. *Id.* at 16-24. Furthermore, the standard of causation-in-fact would also be weak:

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<sup>1</sup> *Cf.* SMC/Valassis comments ("due to" should be construed as limiting exigent rate increases to recovery of "impacts that are due *solely* to the exigent circumstances") (emphasis added); Time Warner comments (the exigent circumstance must be the "primary or predominant" cause of the need for an above-CPI rate increase) Sen. Collins comments (exigent increases should not be used to "cover losses that are due, in significant part, to avoidable or structural problems").

the Postal Service would not be required to limit the amount of the rate increase to the dollar losses for which the exigent circumstance was a contributing factor. *See id.* at 13-15 (arguing against standard of “strict offset” or a “quixotic search for perfect proportionality”). Finally, proof that the Postal Service would be unable to continue providing service without the full amount of the above-CPI rate increase would be unnecessary: a showing that the exigent event caused a decline in revenue or contribution would suffice. *Id.* at 7.<sup>2</sup>

The Postal Service makes essentially two groups of arguments in support of its undemanding standard of causation. First, the Postal Service contends that—despite the unambiguous language of the D.C. Circuit quoted above—the court’s decision, and the various elements of Section 3622(d)(1)(E), actually forbid the Commission from requiring a “strict” standard of causation, or requiring the Postal Service to show that the exigent circumstances were the proximate or primary cause of the increase. Second, the Postal Service argues that a stricter standard of causation would not cause the Postal Service to achieve greater efficiency or lower costs, but would be merely punitive or confiscatory, because all of the other factors affecting the Postal Service’s costs (other than the extraordinary or

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<sup>2</sup> The APWU likewise argues for a “weak” standard of causation that would “not require a close causal connection between the exigent circumstances and the Postal Service rate request.” APWU comments at 3-5.

exceptional circumstances) are “fixed” and utterly beyond the Postal Service’s power to change.

Neither set of arguments are well founded. We respond to the first set in part B, and the second set in part C.

**B. The Decision Of The D.C. Circuit Makes Clear That The Commission May Require The Postal Service To Show That The Exigent Circumstance Was The Proximate Or Efficient Cause Of The Postal Service’s Asserted Need For An Above-CPI Rate Increase.**

The bulk of the Postal Service’s arguments against requiring proof of proximate or efficient causation amount to crude attempts to misstate, or reargue the merits of, the decision of the D.C. Circuit in *USPS v. PRC*. Specifically, the Postal Service argues or suggests that (1) the court’s decision bars the Commission from requiring any showing of proximate cause; (2) the Commission is estopped from imposing a requirement of proximate causation because the Commission declined to defend a “strict offset approach” before the Court; and (3) a requirement of proximate causation would violate various provisions of 39 U.S.C. § 3622(d). These arguments are without merit.

**1. The Postal Service mischaracterizes the court’s decision.**

The Postal Service offers the astonishing claim that “[t]he Court rejected the Commission’s supposition that it may deny an exigent request

simply because the Postal Service's financial crisis may be caused by numerous factors, some of which are not covered by the exigent clause." USPS Comments at 19 (citing *USPS v. PRC*, 640 F.3d at 1268); *accord*, USPS Comments at 17 ("the existence of costs outside of the Postal Service's control is not evidence that the proposed increase is unrelated to the exigent circumstances"); *id.* at 22 (referring to "the Commission's mistaken view that an exigent increase is not available when a financial crisis is the result of multiple factors."). This is a crude inversion of the court's holding, which was that the Commission could, but need not, require a showing of proximate, primary or sole causation.

As previously noted, the court's holding vis-à-vis the causation standard was that (1) the text and legislative history of Section 3622(d)(1)(E) did not reveal what standard of causation Congress meant in the "due to" provision; (2) the Commission erred in finding that Congress had spoken unambiguously on the issue; and (3) the Commission's task on remand was to resolve the ambiguity in the statute by exercising the Commission's judgment. The error identified by the court in Order No. 547 thus was not in applying a strict standard of causation, but in finding that the standard was predetermined by Congress, and therefore could be applied without performing an independent analysis of what causation standard would be appropriate. Remand Order 640 F.3d at 1267-68. The clear import of the Remand Decision was thus not to foreclose the Commission from imposing a

requirement of proximate causation if the Commission saw fit, but to allow the Commission discretion to impose such a standard or not. Remand Decision, 640 F.3d at 1268; ANM-PostCom-DMA-MPA Comments at 2 (discussing decision).

Any possible ambiguity about the Court of Appeals' intent was dispelled by the errata issued on May 27, 2011—three days after the original slip opinion—clarifying that the court had engaged in a two step analysis. Among the changes made by the errata was the insertion of the footnote now reported at 640 F.3d at 1267 n. 4:

Our second inquiry will require us to proceed to Chevron step 2 because the phrase “due to” has an additional—and ambiguous—meaning, which the Commission did not address. *See infra* [slip op.] pp. 9-11 [codified at 360 F.3d 1267-68].

*USPS v. PRC*, errata issued May 27, 2011.

Moreover, any contrary reading of the court's decision would be at odds with the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (“*Chevron*”), 467 U.S. 837 (1984). As the Commission is aware, *Chevron* holds that, if traditional tools of statutory interpretation unambiguously reveal the legislative intent of a statutory phrase, the agency is bound by that intent. This analysis is known as *Chevron* step 1. *Id.* at 842-43; Remand Order, 640 F.3d at 1266. If, however, the phrase is ambiguous, the agency charged with implementing the statute must determine how to interpret the phrase, and courts will defer to the

agency's interpretation if it is a permissible construction of the statute. This analysis is known as *Chevron* step 2. *Chevron*, 467 U.S. at 843; Remand Order, 640 F.3d at 1266.

The Postal Service further distorts the Court's decision by claiming that it "indicated that the relevant question is whether the requested increase 'is so *disproportionate* to the exigency's impact on the Postal Service that it could not be considered 'due to' that exigency.'" USPS Comments at 7 (quoting Remand Order, 640 F.3d at 1268 n. 6) (emphasis added by USPS). In the quoted footnote, however, the Court was actually *declining* to decide whether a proposed increase could ever be so disproportionate to the exigency that it could not be considered "due to" the exigency *regardless of the standard of causation applied*. In the sentence to which this footnote corresponds, the Court noted that a requested increase *could be* "due to" exigent circumstances even if "it is also 'due to' other factors as well." *Id.* That is, the existence of multiple factors does not *necessarily preclude* a finding that the increase is "due to" extraordinary or exceptional circumstances under the language of the statute. The Commission's footnote recognizes that, *if* the Commission were decide that a revenue shortfall was "due to" exigent circumstances despite the presence of other causes, the amount of the increase allowed might be independently limited by a proportionality constraint. Since the court did not hold that the Commission would be required to allow *any* exigent rate increase in a multi-cause

scenario, the court obviously had no reason to offer *dicta* about where a proportionality constraint might be drawn.

Finally, the Postal Service's suggestion that the Commission and the mailers are estopped or barred from adopting a requirement of "strict" causation because the Commission and the mailers disavowed such a standard when the Postal Service challenged its lawfulness before the court has a similar air of unreality. *See, e.g.*, USPS Comments at 7 (claiming that the Commission "refus[ed] to defend the strict offset approach set forth in its Order when its suitability was presented for direct review by the court," and is now precluded from adopting that standard). The court's Remand Order specifically directed the Commission to consider whether "due to" requires "that the Postal Service match the amount of the proposed adjustments *precisely* to the amount of revenue lost as a result of the exigent circumstances" as part of a *Chevron* step 2 analysis. Order on Remand, 640 F.3d at 1268. And the court also made clear that the Commission was also free to resolve as it found appropriate the separate issue whether to require proof of *proximate* causation. *Id.* at 1267-68.

In this remand, then, the Commission has one obligation to the court: to decide the legal question of where on the spectrum of causation standards—from "due in part to" to "due only to"—the "due to" requirement of Section 3622(d)(1)(E) should be placed. 640 F.3d at 1267-68; ANM-PostCom-DMA-MPA Initial Comments at 2. The only limits on the

Commission in developing this standard are the goals of the Postal Accountability and Enhancement Act and the Commission's earlier findings on the record in this proceeding, none of which were disturbed by the Court of Appeals.

**2. The Postal Service's reliance on individual components of Section 3622(d) is also unfounded.**

The welter of claims advanced by the Postal Service concerning the supposed requirements for various elements of Section 3622(d)(1)(E) are also foreclosed by the Remand Order, or are otherwise without merit.

(1) The Postal Service's argument that the "due to" requirement of Section 3622(d)(1)(E) excludes any requirement of proximate causation, because a requirement of proving proximate causation could never be satisfied when multiple factors are at play is an attack on a straw man. *Cf.* USPS Comments at 18-19); *id.* at 22 (referring to "the Commission's mistaken view that an exigent increase is not available when a financial crisis is the result of multiple factors."). Requiring the Postal Service to show that the exigent circumstance was the proximate or efficient cause of the need for an above-CPI rate increase does not imply that the exigent circumstance must be the *sole* cause, and neither the Commission nor the undersigned parties have advocated such a result. The efficient cause standard simply means that when there are multiple factors behind the Postal Service's need for an exigent rate increase, the Commission should

grant the Postal Service's request only if the exigent circumstances are the *primary* cause of that need.

Rather, it is the lax standard of causation advanced by the Postal Service that would read the “due to” element out of the statute. The Postal Service's construction would effectively repeal the “due to” provision of Section 3622(d)(1)(E) by subsuming it in other clauses of the statute, such as the “reasonable and equitable and necessary” clause, and the objectives and factors of 39 U.S.C. § 3622(b) and (c). Such a construction would directly violate the plain holding of the Court of Appeals that “the Commission correctly construed ‘due to’ to require a causal relationship between the exigent circumstances’ effects on the Postal Service and the amount of the above-cap rate increases.” Remand Order, 640 F.3d at 1264.

(2) Likewise without merit is the Postal Service's claim that the “reasonable and equitable and necessary” language of Section 3622(d)(1)(E) requires “a broad, functional inquiry that is not consistent with a strict offset approach.” USPS Comments at 13. The Remand Decision squarely rejected this claim. As the Court explained, the Postal Service argued that the Commission erred by reading “due to” to require that the amount of the proposed increase is determined by—that is, causally related to—the amount of revenue lost due to the exigent circumstance. 640 F.3d at 1267. The Postal Service claimed that the proper statutory standard was that the increase be “reasonable and equitable and necessary to enable the Postal

Service, under the best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” *Id.* (quoting 39 U.S.C. § 3622(d)(1)(E)). The Court disagreed, explaining that the placement of the “due to” clause before the quoted phrase mandates that the proposed adjustment “be ‘due to’ the exigent circumstance.” *Id.* In other words, just as the Commission had done in Order No. 547, the Court recognized that “due to” is a requirement independent of the “reasonable and equitable and necessary” test. *See* 640 F.3d at 1265-66 (summarizing Order No. 547’s finding of three independent elements of an exigency request); Order No. 547 at 54 (stating the three independent requirements: the existence of exigent circumstances, the “due to” requirement, and the requirement that the adjustment be reasonable and equitable and necessary).

The requested increase may be denied, therefore, because it is not “reasonable and equitable and necessary” even though it is “due to” the exigent circumstances; likewise, it may be denied even if it is “reasonable and equitable and necessary” if it is not “due to” the exigent circumstances. Contrary to the Postal Service’s insinuations, the Court and the Commission have firmly established the independence of these clauses.

(3) The Postal Service’s further claim that the “honest, efficient and economical management” provision of Section 3622(d)(1)(E) bars the Commission from requiring a showing of proximate causation founders on

similar grounds. *See* USPS Comments at 19 (“costs can form a basis for rejecting an exigent increase only if they are avoidable through ‘honest, efficient, and economical management.’”). Like the Postal Service’s argument by implication from the phrase “reasonable and equitable and necessary,” this argument ignores the fact that “due to” is a separate and independent requirement from the “honest, efficient and economical management” requirement. Order No. 547 at 2.

(4) Equally without merit is the Postal Service’s further argument that “the Commission did not in Order No. 547 engage in a reasoned balancing of the objectives called for by the PAEA.” USPS Comments at 12. The Postal Service raised the same argument in its brief to the Court to support its position that the “reasonable and equitable and necessary” language, rather than “due to,” provides the proper “flexible and practical standard” for evaluating an exigent increase. USPS Br. at 31. As discussed above, the Court rejected this approach, holding that “due to” is an independent and necessary requirement of the statute. 640 F.3d at 1267.

(5) The Postal Service’s further claim that the exigency clause “is equally as central to the pricing system as the price cap” (USPS Comments at 8), and must be “balanced” against the latter (*id.* at 7-12) simply begs the question of what the exigency clause provides. The “balance” that Congress struck is defined by the specific operative limitations of Section 3622(d)(1)(E). When “Congress provides exceptions to a statute,” the “proper inference . . . is

that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.” *United States v. Johnson*, 529 U.S. 53, 58 (2000); *accord, TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001). Here, the Commission has already determined that the exigency clause should be narrowly construed, and that it is “not intended as a surrogate for cost-of-service ratemaking to be invoked by the Postal Service simply by demonstrating a need for revenues detached from the circumstances giving rise to that need and from the specific increases requested.” Order No. 547 at 60.

(6) The Postal Service further argues that an “unduly strict” causation requirement would be “less than compensatory,” and thus would violate several objectives of 39 U.S.C. § 3622(b), including “quality service,” “adequate revenues,” and “just and reasonable” rates. USPS Comments at 9 (citing 39 U.S.C. §§ 3622(b)(3), (5) and (8); *Farmers Union Central Exchange v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984)). This argument fails for several reasons.

First, the Section 3622(d) price cap has primacy over any of the objectives codified in Section 3622(b). As the Commission recently stated with respect to other elements of Section 3622(d):

Section 3622 creates a hierarchy based on “requirements,” sections 3622(d) and (e), “objectives,” section 3622(b), and “factors,” section 3622(c). [footnote omitted] 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.

Annual Compliance Determination Fiscal Year 2010 (March 29, 2011) at 18-19. The priority of Section 3622(d) over 3622(b) applies with equal force to the limitations of Section 3622(d)(1)(E) as to the provisions of 3622(d)(1)(A).

Second, the possibility that the CPI price cap might operate to prevent the Postal Service from recovering full costs (as determined under the pre-PAEA cost-of-service regulatory model of the Postal Reorganization Act) would not render the resulting rates non-compensatory even if the Postal Service were still operating under a cost-of-service ratemaking regime. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 500 (2002) (declining to read the “just and reasonable” requirement of the statute as mandating the recovery of historical costs, as agencies construing such statutes “have ample discretion to choose methodology.”).

The notion of challenging an *index* ratemaking scheme as noncompensatory is even more far-fetched. The possibility that an index ratemaking scheme will prevent a regulated enterprise from recovering all its costs is not only permitted in incentive regulation, but is one of its main control mechanisms. The very point of incentive ratemaking is to “focus management’s attention on cost control” by threatening the regulated enterprise with losses if it fails to limit its growth in unit costs to the rate of

inflation. Annual Compliance Determination Fiscal Year 2010 (Mar. 29, 2011) at 18. Reviewing courts are aware of the advent of price cap regulation. *See, e.g., Verizon Communications*, 535 U.S. at 486-87. Yet the Postal Service has cited no case in which a court has overturned an index ratemaking mechanism on the ground that the exigency clause was conditioned on a showing of proximate causation, and the undersigned parties are unaware of any such holding.

(7) The Postal Service also argues that a requirement of proximate causation would abdicate the Commission's responsibilities by denying recovery for losses resulting from costs imposed by Congress:

“Once the Postal Service demonstrates that an exigent event has occurred, and that the size of the requested increase is proportional to that event, the Commission cannot refuse to exercise the authority that Congress gave it and instead put the burden back on Congress to take more comprehensive action, simply because the exercise of its authority, standing alone, would not resolve the Postal Service's financial situation.”

USPS Comments at 23; *accord*, USPS Br. to D.C. Cir. at 35-37 (contending that a standard of proximate causation would abdicate the Commission's responsibility to “cure a serious problem that Congress has directed it to address”). This contention is equally wide of the mark. Congress was well aware when enacting PAEA that many of the financial problems of the USPS were structural or longstanding, or resulted from deliberate policy choices made by Congress in prior law or PAEA itself. Order at 55, 64 n. 52; S. REP. No. 318, 108th Cong. 2nd Sess. 2-5, 24-27, 34-36 (2004); H.R. REP. No. 66,

109th Cong., 1st Sess. 42-43 (2005); *see also* USPS Response to Motion to Dismiss at 6 (SA146) (“Congress legitimately considers a wide range of societal policy concerns to be important when operating the Postal Service. . . .”). By limiting above-CPI increases to the recovery of losses that are “due to” extraordinary or exceptional circumstances, Congress necessarily foreclosed the USPS from using section 3622(d)(1)(E) as an all-purpose “cure” for financial problems stemming from causes that are structural, and not extraordinary or exceptional. Hence, the PRC, in deferring to Congress on these matters, was not “passing the buck,” USPS Br. 34, but showing proper respect for the limits of its delegated authority. Order at 65 (“Those issues . . . must be decided in a different forum.”).<sup>3</sup>

**C. A Proximate Cause Requirement Is Sound Policy, As The Commission Has Found.**

As the undersigned parties explained in their initial comments, requiring the Postal Service to prove that the extraordinary or exceptional circumstances invoked as justification for an above-CPI rate increase with

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<sup>3</sup> The possibility of relief from Congress is not an empty one. Congress has intervened repeatedly to provide relief to the USPS when Congress found relief to be necessary and appropriate. In 2003, for example, Congress reduced the Postal Service’s future pension payment obligations by approximately \$78 billion. Blair Concurring Opinion at 2. In 2006, Congress waived another \$27 billion in future retirement payments associated with military service credits. *Id.* In 2009, Congress deferred \$4 billion of the \$5.4 billion payment to the Treasury for future retiree health care obligations due on September 30, 2009, when Congress concluded that the USPS lacked the funds to make the payment. Order at 81; Blair at 2.

the proximate or efficient cause of the need for the increase, provides the most effective incentives for both the Postal Service and its stakeholders (including Congress) to minimize the Postal Service's costs. By contrast, omitting a requirement of proximate causation, by allowing the Postal Service to recover revenue lost whenever an exigent circumstance contributed to financial problems, regardless of the relative significance of the exigent circumstances, would undermine the incentives of the price cap. ANM-PostCom-MPA-DMA comments at 4-14.

The Commission's findings in Order No. 547, and its representations to the Court on review of Order No. 547, are in the same vein. As the Commission has recognized, "allowing price increases untethered to the claimed exigency would undermine the inflation cap, which requires the Postal Service to improve its management and efficiency in order to improve its bottom line." PRC Brief at 17. A looser standard of causation would have precisely this effect. *See* Order No. 547 at 13-14 (citing Administration testimony that flexible CPI cap would not provide "the Postal Service with the appropriate incentives to reduce its costs and improve its productivity and efficiency. The Postal Service will come to believe that the CPI cap is not binding, but is instead negotiable."); *id.* at 56-57 (finding that stringent causation requirement "protects the basic integrity of the rate cap system").

The Postal Service's responds by portraying itself as a pitiful, helpless giant, essentially powerless to reduce its non-exigent costs or deal with their

causes. According to the Postal Service, all excess costs that result from non-exigent circumstances are “fixed,” and disallowing recovery of those costs by imposing a rigorous standard of proximate causation would be unproductive and punitive: the Postal Service simply cannot do better. USPS Comments at 18. In support of this theory, the Postal Service seizes upon the Commission’s dictum in Order No. 547 “commending” the Postal Service for its efforts to reduce costs. USPS Comments at 57.

The Postal Service’s posture of helpless passivity, far from justifying the Postal Service’s position, underscores the need for a tough standard of proximate causation.

(1) The Postal Service’s claim that it has done everything it reasonably can to cut costs and maximize efficiency is refuted by the extensive record in R2010-4 on this issue. Regulated monopolies in the process of emerging from cost-of-service regulation typically claim (and often believe) that they are already at the cutting edge of efficiency. But they typically have not eliminated all avoidable efficiencies, in ways that are hard for regulators to ferret out. That is precisely why index ratemaking has gained such appeal among regulators in recent years. See Sanford V. Berg & John Tschirhart, *Natural monopoly regulation: Principles and Practice* 304-305 (1988); Stephen G. Breyer, *Regulation and its Reform* 47-50 (1982); 1 Alfred E. Kahn, *The Economics of Regulation* 29-30 (1970); 2 Kahn, *op. cit.*, at 48; Michael A. Crew, *Economic Innovations in Public Utility Regulation* 63 (1992).

(2) The notion that the Postal Service operates at the frontier of efficiency—and can do nothing further to reduce costs—is refuted by the record. There is ample evidence in the record that the Postal Service’s losses result in large part on inefficient operations, including an oversized and obsolete network of mail processing facilities; an oversized work force that receives above-market rates of compensation; a failure to prepare adequately for the eminently foreseeable loss of volume to the Internet; and a failure to respond effectively to the downturn in mail volume during the recession. These are not just the advocacy positions of the mailers; they are supported by the findings of blue-ribbon commissions, the GAO, the Postal Service’s OIG, and other disinterested expert observers. *See* Docket No. R2010-4, Motion of Affordable Mail Alliance To Dismiss Request (July 26, 2010) at 17-61.

The Commission’s dictum in Order No. 547 praising some of the Postal Service’s cost-cutting efforts as “commendable” does not refute these facts. The Commission did not resolve whether these efforts raised the Postal Service’s overall performance to the level of “honest, efficient and economical management.” The Commission alluded briefly to the issue, but ultimately denied the rate increase on other grounds. Consistent with this, Order No. 547 discussed little of the evidence submitted by the mailers in Docket No. R2010-4.

The Postal Service's claim that the mailers waived any right to challenge the Commission's *dicta* concerning "honest, economical and efficient" management is frivolous. Because the Commission disallowed the proposed rate increases in their entirety on another ground, the Postal Service's failure to establish causation, the undersigned mailers had no standing to seek judicial review of any aspect of Order No. 547. *See* 28 U.S.C. § 2344 (a party must be "aggrieved" by an agency order to have standing to pursue judicial review of the order).

## **II. POSTAL SERVICE HAS NOT SATISFIED EITHER THE CAUSE-IN-FACT OR EFFICIENT CAUSE STANDARDS.**

Ultimately, the Postal Service cannot meet even the lesser cause-in-fact or general proportionality standard it advocates. As the Commission found in Order No. 547, the Postal Service made no showing of causation *at all* in its request for an exigent increase. *See* Order No. 547 at 4 (finding that "the Postal Service fails to quantify the impact of the recession on postal finances, address how the requested rate increases relate to the recession's impact on postal volumes, or identify how the requested rates resolve the crisis at hand"); *id.* at 58-60 ("[T]he Postal Service . . . fails to demonstrate the nexus between the additional \$3 billion in annual revenues it seeks, and the exigent circumstances that purportedly give rise to the need for it. It has not shown how the proposed relief relates to the claimed exigency as required by the Commission's rules.").

Still less has the Postal Service made a showing of proximate causation. ANM-PostCom-DMA-MPA comments at 14-19. The Commission applied the efficient cause analysis in practice in denying the Postal Service's request. The Commission identified the retiree health prefunding payments as the "principal cause" of the Postal Service's financial crisis. Order No. 547 at 68. In doing so, it recognized that the primary cause of the Postal Service's need for additional revenue was not the recession, but a non-exigent circumstance. Thus, on the record as it stands, the Commission is justified in denying the Postal Service's exigency request on an efficient cause theory.

## CONCLUSION

For the foregoing reasons, the Postal Service' renewed quest for approval of all or part of last year's rate proposal should be denied.

Respectfully submitted,

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August 1, 2011

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