APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 2021
Decided November 12, 2021

No. 17-1276

NATIONAL POSTAL POLICY COUNCIL,
PETITIONER

v.

POSTAL REGULATORY COMMISSION,
RESPONDENT

NATIONAL NEWSPAPER ASSOCIATION, ET AL.,
INTERVENORS

Consolidated with 20-1505, 20-1510, 20-1521

On Petitions for Review of Orders
of the Postal Regulatory Commission

Ayesha N. Khan argued the cause for Mailer petitioners. With her on the briefs were *William B. Baker, Eric S. Berman, Matthew D. Field, Ian D. Volner*, and *Elizabeth C. Rinehart.*

David C. Belt, Attorney, U.S. Postal Service, argued the cause for petitioner United States Postal Service. With him on the briefs was *Morgan E. Rehrig*, Attorney. *Stephen J. Boardman*, Chief Counsel, entered an appearance.

Dana Kaersvang, Attorney, U.S. Department of Justice, argued the cause for respondent. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, and *Michael S. Raab* and *Michael Shih*, Attorneys, *David A. Trissell*, General Counsel, United States Postal Regulatory Commission, *Christopher Laver*, Deputy General Counsel, and *Anne J. Siarnacki* and *Reese T. Boone*, Attorneys.

Morgan E. Rehrig and *David C. Belt*, Attorneys, United States Postal Service, were on the brief for intervenor United States Postal Service in support of respondent.

William B. Baker, Ayesha N. Khan, Eric S. Berman, Matthew D. Field, Ian D. Volner, and *Elizabeth C. Rinehart* were on the brief for intervenors Alliance of Nonprofit Mailers, *et al*. in support of respondent. *David M. Levy* entered an appearance.

Before: ROGERS and TATEL, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In 2006, Congress passed the Postal Accountability and Enhancement Act, which directed the Postal Regulatory Commission to establish a ratemaking system to govern the prices set by the U.S. Postal Service for its market-dominant products. Although Congress left many details to the Commission, it forbid rates from increasing faster than the rate of inflation. The Commission was also required to assess after ten years whether the system

had achieved nine objectives. If not, then the Commission could modify the ratemaking system or adopt an alternative one. This case arises from that mandatory ten-year review. In 2017, the Commission found that the existing ratemaking system was deficient and had not maintained the Postal Service's financial stability. After extensive review, it adopted a new system in 2020, which retains the price cap generally but allows above-inflation rate increases to target specific costs. *Order 5763: Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3 (P.R.C. Nov. 30, 2020), 85 Fed. Reg. 81,124 (Dec. 15, 2020) ("*Order 5763*").

Groups whose members purchase postal products ("Mailers") and the Postal Service seek review of the Commission's new ratemaking system. The Mailers oppose any new rate authority. They contend that the system is inconsistent with the statute that gives the Commission its regulatory authority and is arbitrary and capricious. In contrast, the Postal Service contends that the Commission's new ratemaking system is irrational because it does not confer enough rate authority. The Commission responds that its actions are authorized by statute and reasonably explained.

For the following reasons, the court concludes that the Commission acted within its authority under the Accountability Act, and that its predictive judgments and economic conclusions satisfy the Administrative Procedure Act's requirement of reasoned decision-making. Accordingly, the court denies the petitions for review.

I.

By way of introduction, a summary of the Accountability Act is followed by a summary of the proceedings before the Commission.

A.

For much of the Nation's history, postal services were administered by the Post Office Department at rates fixed by Congress. *See Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 813 (1983) ("*Greeting Card Publishers*"). In 1970, Congress relinquished control of ratesetting and replaced the Post Office Department with two independent executive agencies: the United States Postal Service and the Postal Rate Commission. *See* Postal Reorganization Act of 1970, Pub. L. No. 91-375, §§ 201–02, 3601, 84 Stat. 719, 720, 759. Superintended by a Board of Governors, consisting of experts in economics, accounting, law, and public administration, 39 U.S.C. § 502(a), the Postal Service was required to set rates equal to costs with the goal of breaking even. *See Greeting Card Publishers*, 462 U.S. at 813. To guide the Postal Service, Congress charged the Postal Rate Commission (later renamed the Postal Regulatory Commission) with reviewing the Board's rate proposals. *See id.* at 813–14.

In 2006, Congress modernized the Postal Service in the Postal Accountability and Enhancement Act ("Accountability Act" or "Act"), Pub. L. No. 109-435, 120 Stat. 3198 (2006). Section 201 of the Act, 39 U.S.C. § 3622, "completely reformed the ratemaking system

for market-dominant products," *i.e.*, those "products for which the Postal Service enjoys a statutory monopoly, or for which the Postal Service exercises sufficient market power so that it can effectively dictate the price of such products without risk of losing much business to competing firms." *U.S. Postal Serv. v. Postal Regul. Comm'n*, 785 F.3d 740, 744 (D.C. Cir. 2015) (citing 39 U.S.C. § 3642(b)(1)–(2)). The Act required the Commission to "establish" within eighteen months "a modern system for regulating rates and classes for market-dominant products." 39 U.S.C. § 3622(a). The system had to "be designed to achieve [nine] objectives, each of which shall be applied in conjunction with the others," *id.* § 3622(b), taking fourteen "[f]actors" into account, *id.* § 3622(c). The Act further enumerates five "[r]equirements" that the ratemaking system "shall" contain. *Id.* § 3622(d).

Pertinent here, the Act mandates that the ratemaking system "include an annual limitation on the percentage changes in rates . . . equal to the change in the Consumer Price Index." *Id.* § 3622(d)(1)(A). This prevents rates for market-dominant products from rising faster than the inflation rate. *See U.S. Postal Serv.*, 785 F.3d at 744. The hope was that moving from a cost-of-service model to a price cap would incentivize the Postal Service to cut costs and improve efficiency. *See* S. Comm. on Gov't Affairs, Postal Accountability and Enhancement Act, S. REP. 108-318, at 9 (2004). The Postal Service may exceed the price cap if the Commission finds, after notice and comment, that a rate change is warranted due to "extraordinary

or exceptional circumstances" if "reasonable and equitable and necessary" to maintain postal services. 39 U.S.C. § 3622(d)(1)(E).

The Accountability Act provides the Commission two ways to change the ratemaking system. First, the Commission may "revise" the system "from time to time." *Id.* § 3622(a). Second, the Commission must assess ten years after the Act's passage "if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c)." *Id.* § 3622(d)(3). "If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives," then it "may, by regulation, make such modification or adopt such alternative system for regulating rates . . . as necessary to achieve the objectives." *Id.*

B.

In December 2017, the Commission released the findings of its ten-year review. *Order 4257*, Docket No. RM2017-3 (P.R.C. Dec. 1, 2017). It found that "while some aspects of the system" had "worked as planned, overall[] the system has not achieved the [Act's] objectives." *Id.* at 5. The Commission explained that the "operating environment" of the Postal Service "changed quickly and dramatically" after the Act's passage. *Id.* at 45. The "Great Recession" of 2008 resulted in the most severe decline in mail volumes since the Great Depression of the 1930s, causing the Postal Service's revenue to plummet. *Id.* at 38. The period of

deflation after the Great Recession meant the Postal Service could not increase rates due to the statutory price cap. *Id.* Throughout, the Postal Service's costs soared due to an obligation imposed on it by the Accountability Act requiring the prefunding of retirement benefits. *Id.* at 37. As a result, the Postal Service accumulated a $59.1 billion deficit in just ten years. *Id.* at 171.

Given those findings, the Commission determined that the existing ratemaking system failed to achieve three statutory objectives. First, the system had not maintained the financial stability of the Postal Service. *Id.* at 178. Although the Postal Service could cover its immediate operating expenses, *id.* at 159–65, it had not achieved "medium-term stability" as it had suffered a net loss for ten straight years, *id.* at 165–69. Nor had the Postal Service achieved "long-term stability" because it lacked the funds to invest in capital improvements or pay down debts. *Id.* at 169–71. Second, the system had not maximized incentives to cut costs and improve efficiency. *Id.* at 226. Despite the Postal Service having reduced costs, *id.* at 191, and improved its efficiency, *id.* at 203–21, the ratemaking system did not maximally incentivize such efforts because they "were insufficient to address the Postal Service's financial instability," *id.* at 222. Third, the system had not achieved reasonable rates "because certain products and [mail] classes threatened the financial integrity of the Postal Service." *Id.* at 236.

Concurrent with its findings, the Commission proposed "a two-pronged solution designed to place the

Postal Service on the path to financial stability by providing [it] rate adjustment authority in addition to the CPI-U rate authority." *Order 4258*, Docket No. RM2017-3, at 37 (P.R.C. Dec. 1, 2017). To address medium-term financial stability, the Commission proposed authorizing the Postal Service to raise rates annually by an additional 2% per mail class for five years. *Id.* at 45. This would "put the Postal Service on the path to medium-term financial stability by providing [it] the opportunity to generate additional revenue to cover its obligations." *Id.* at 38. As for long-term financial stability, the Commission proposed a performance-based rate authority, which conditioned a 1% annual rate increase on hitting various benchmarks. *Id.* at 39. In addition to these rate authorities, the Commission also proposed mandating rate increases for mail products whose costs exceeded revenue. *Id.* at 77–78.

In response to comments, the Commission issued a revised ratemaking proposal in December 2019. *Order 5337*, Docket No. RM2017-3 (P.R.C. Dec. 5, 2019). In place of an across-the-board annual rate increase, the Commission proposed two rate authorities targeted to "costs that are outside of the Postal Service's control": declines in mail density and statutorily mandated retirement payments. *Id.* at 12. First, the Commission found that decreases in mail volume in concert with the Postal Service's statutory obligation to service every address had resulted in a decline in mail density, *i.e.*, the ratio of mail pieces to delivery points. *Id.* at 70. This, in turn, raises the cost of delivering each piece of

mail. To account for these costs, the Commission proposed allowing the Postal Service to raise rates annually by the amount by which per-unit costs are expected to increase based on the change in mail density in the prior year. *Id.* at 77. Second, the Commission found that "congressionally mandated [retirement] payments are outside of the Postal Service's direct control" but "continue to be one of the primary drivers of net loss." *Id.* at 90. The Commission proposed allowing the Postal Service to raise rates annually by the amount necessary for revenues to cover these payments. *Id.* at 91–92. According to the Commission, its modified proposal was "intended to go beyond the initial supplemental rate authority's goal of placing the Postal Service on the path to medium-term financial stability by providing the mechanisms necessary for the system to adjust appropriately to changes in the operating environment that are driving the Postal Service's net losses." *Id.* at 13.

In *Order 5763*, issued in November 2020, the Commission adopted this new ratemaking system with minor adjustments. As an initial matter, the Commission rejected the Mailers' argument that it had to reopen the record to examine the impact of the COVID-19 pandemic on the Postal Service, reasoning that "nothing specific to the pandemic undermines the findings [it] made in Order No. 4257." *Id.* at 26. In the new ratemaking system, the Commission adopted the density-based and retirement-based rate authorities, concluding that they were "necessary to achieve the objectives of [39 U.S.C. § 3622(b)], in conjunction with each other"

and "focused on vital near-term improvements." *Id.* at 298. The Commission withdrew the proposed performance-based rate authority but adopted the rate increases for non-compensatory mail products. *Id.* at 21–22. The Commission stated that it would review the new system in five years, or sooner if necessary. *Id.* at 23, 267.

The Mailers and the Postal Service petitioned for review of *Order 5763*. The Mailers unsuccessfully petitioned for stays by the Commission and by the court. *See* D.C. Cir. Order, Doc. No. 1887800 (Mar. 1, 2021); *Order 5818*, Docket No. RM2017-3 (P.R.C. Jan. 19, 2021). In July 2021, the Commission approved a proposal of the Postal Service to increase rates for market-dominant products. *See Order 5937*, Docket No. R2021-2 (P.R.C. July 19, 2021). The Mailers again unsuccessfully petitioned for a stay by the court. *See* D.C. Cir. Order, Doc. No. 1911271 (Aug. 24, 2021). The new prices took effect on August 29, 2021. *Order 5937.*

II.

The Mailers contend that *Order 5763* exceeded the Commission's statutory authority and is arbitrary and capricious.

A.

First, the Mailers maintain that the Commission exceeded its statutory authority in allowing the Postal Service to raise rates in excess of inflation because

§ 3622 unambiguously forecloses the Commission from altering the price cap. Mailers Br. 19–24. Even were the Act susceptible to multiple interpretations, the Mailers maintain that the new ratemaking system is "irreconcilable with the Commission's prior understanding of the price cap" and is thus unreasonable. *Id.* at 25. Finally, the Mailers maintain that the constitutional avoidance canon counsels against the Commission's interpretation because § 3622(d)(3) is otherwise an unconstitutionally standardless delegation of authority. *Id.* at 26–30.

Under the two-step framework in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the court first deploys the "traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." *Id*. at 842–43 & n.9. If so, the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, "the statute is silent or ambiguous with respect to the specific issue," the court will defer to the Commission's interpretation if it is "a permissible construction of the statute." *Id*.; *see United Parcel Serv. v. Postal Regul. Comm'n*, 890 F.3d 1053, 1061–62 (D.C. Cir. 2018).

Consequently, the court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (citation omitted). Subsection 3622(d)(3) provides:

> Ten years after the date of enactment of the Postal Accountability and Enhancement Act and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), *the Commission may, by regulation, make such modification or adopt such alternative system* for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

39 U.S.C. § 3622(d)(3) (emphasis added).

The plain text contemplates two types of change: the Commission can "make [] modification[s]" to the ratemaking system or it can "adopt [an] alternative system." The word "modification" means to make a "limited change in something." *Modification*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/modification. In contrast, "alternative," when used as a noun, describes a "situation offering a choice between two or more things only one of which may be chosen." *Alternative*, MerriamWebster.com, https://www.merriam-webster.com/dictionary/alternative. By its plain terms, then, the provision permits the Commission to either make minor changes to the ratemaking system or replace it altogether.

The Mailers do not contest this interpretation. Instead, they argue that the alternative ratemaking system adopted under § 3622(d)(3) must incorporate the price cap. They submit that § 3622(d)(1) precludes the Commission from altering the price cap because it is a "[r]equirement[]" that the "system for regulating rates and classes for market dominant products *shall*[] include." Mailers Br. 19–20. But "[a] standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). In § 3622(a) and (d)(1)(A), "system" refers broadly to a scheme for "regulating rates and classes for market-dominant products," not to the subset of schemes that comply with the price cap. Therefore, absent evidence that Congress had a contrary intent, "system" most logically means the same in § 3622(d)(3), and includes rules that do not comply with the price cap.

The Mailers further contend that because § 3622(d)(3) permits the Commission to review the system "established under" § 3622, any alternate system adopted must also comply with all of § 3622's requirements. Their conclusion does not follow. Whatever meaning the Mailers give to the word "under," the phrase "established under" modifies only the system the Commission may review, not the alternative system it may adopt. Congress knew how to limit the Commission's authority following the ten-year review and yet declined to require it to maintain the rate cap. Subsection (d)(3) requires that any changes to the

system be "necessary to achieve the objectives" in § 3622(b), but makes no mention of the rate cap.

The Mailers also invoke the presumption in *Russello v. United States*—that the inclusion of a phrase in one provision and its absence in another is deliberate, 464 U.S. 16, 23 (1983)—to argue that the exception to the price cap for emergencies in § 3622(d)(1)(E) demonstrates that Congress decided not to grant the Commission the authority to override the price cap in § 3622(d)(3). Mailers Br. 20–21. That canon has limited force here, however, because the two provisions use different words and are not otherwise parallel. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435–36 (2002). Section 3622(d)(1)(E) is only meaningful insofar as a price cap exists, so it is unsurprising that it references the cap.

The Mailers' narrow interpretation of § 3622(d)(3) would also render § 3622(a) superfluous. *See Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 986 F.2d 509, 515 (D.C. Cir. 1993) (canon against surplusage). In addition to directing the Commission to "establish" a ratemaking system, § 3622(a) also provides that the Commission may "revise" the system "from time to time thereafter by regulation." 39 U.S.C. § 3622(a). The Mailers' interpretation of § 3622(d)(3) would render these words surplusage: if the price cap is an immutable feature of the ratemaking system, then there is no meaningful difference between the Commission's authority to "revise" the ratemaking system and its authority to adopt an "alternative" ratemaking system after ten years. In contrast, the Commission's authority

to revise the ratemaking system under § 3622(a) suggests that its authority following the ten-year review must be broader under § 3622(d)(3): the former allows the Commission to make modest changes to the ratemaking system at its discretion while the latter authorizes the Commission to replace the existing system if, after ten years, it concludes that the existing system has failed to achieve the Act's objectives. Broad authority under § 3622(d)(3) would be consistent with the more onerous procedural requirements imposed by that section, which requires notice and comment and a determination that the current system is not achieving the statutory objectives.

The legislative history supports the Commission's interpretation. *See Pharm. Rsch. & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001). Section 3622(d)(3) was not in the versions of the bills initially passed by the House and Senate; the Senate bill retained a price cap while the House bill contained a price cap that could be eliminated after notice and comment. H.R. 22, 109th Cong. § 201(a) (as passed by House, July 26, 2005); H.R. 22, 109th Cong. § 201(a) (as passed by Senate, Feb. 9, 2006). Subsection (d)(3) was added during the House-Senate Conference and thereafter enacted by both Houses of Congress. *See* 152 Cong. Rec. H9160–H9182 (daily ed. Dec. 8, 2006); *id.* at S11,821–S11,822 (daily ed. Dec. 8, 2006). The primary Senate sponsor of the conference bill, Senator Susan Collins, addressed the provision on the floor of the United States Senate:

> After 10 years, the Postal Regulatory Commission will review the rate cap and, if necessary, and following a notice and comment period, the Commission will be authorized to modify or adopt an alternative system.
>
> While this bill provides for a decade of rate stability, I continue to believe that the preferable approach was the permanent flexible rate cap that was included in the Senate-passed version of this legislation. But, on balance, this bill is simply too important, and that is why [the conferees] have reached this compromise to allow it to pass. We at least will see a decade of rate stability, and I believe the Postal [Regulatory] Commission, at the end of that decade, may well decide that it is best to continue with a CPI rate cap in place. It is also, obviously, possible for Congress to act to reimpose the rate cap after it expires.

152 Cong. Rec. S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins). The Senator's remarks reinforce the plain meaning of the statutory text: during its ten-year review, the Commission may adopt an alternative system and is not necessarily constrained the price cap.

The Mailers additionally maintain that the Commission's interpretation of the statute runs afoul of the nondelegation doctrine and should be rejected on constitutional avoidance grounds. Mailers Br. 26–30. But this argument, too, is unavailing. A statutory delegation of authority is constitutional so long as Congress has provided an "intelligible principle to which the person or body authorized to [act] is directed to confirm."

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (200 1) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). To date, the Supreme Court has found "the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id.* at 474 (citing *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). Section 3622(d)(3), by contrast, provides an intelligible principle to guide the Commission by requiring that alterations to the ratemaking system be "necessary to achieve the objectives" in § 3622(b), which enumerates nine criteria.

B.

The Mailers next contend that the Commission's ratemaking system is arbitrary and capricious because it fails to achieve statutory objectives. They also raise issues with the density-based rate adjustment specifically and contend that the Commission erred by not updating its analysis in response to the COVID-19 pandemic. Mailers Br. 30–48.

Here, the court's review is deferential, reflecting "'reluctan[ce] to interfere with [an] agency's reasoned judgments' about technical questions within its area of expertise." *Alliance of Nonprofit Mailers v. Postal Regul. Comm'n*, 790 F.3d 186, 197 (D.C. Cir. 2015)

(quoting *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 953 (D.C. Cir. 2013)). An agency need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mu t. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted).

Two features of *Order 5763*'s regulatory regime weigh in favor of deference. First, the Accountability Act requires the Commission to consider nine objectives. 39 U.S.C. § 3622(b). "[O]ur review of agency decisions based on multi-factor balancing tests . . . is necessarily quite limited. We may not merely substitute the balance we would strike for that the agency reached." *U.S. Postal Serv. v. Postal Regul. Comm'n*, 963 F.3d 137, 141 (D.C. Cir. 2020) (quoting *USAir, Inc. v. Dep't of Transp.*, 969 F.2d 1256, 1263 (D.C. Cir. 1992)). Second, the Commission's decision depends on "predictive judgments about the likely economic effects of a rule," which are "squarely within the ambit of the Commission's expertise." *Newspapers Ass'n of Am. v. Postal Regul. Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013) (alteration adopted; citation omitted). The court's "narrow task" is thus "to ensure that the Commission sufficiently supported its analysis." *Id*.

1.

The Mailers maintain that the Commission's ratemaking system is arbitrary and capricious because it will both "upset the prior system's successes in achieving multiple objectives" and "aggravate" its "failure to

achieve other objectives." Citing the statutory objectives in § 3622(b), they contend the new system will weaken incentives to cut costs, harm rate predictability and stability, render rates unjust and unreasonable, reduce transparency, and exacerbate the existing system's failure to incentivize efficiency improvements. Mailers Br. 31, 33–34.

***Maximizing incentives to improve efficiency*:** Before the Commission, the Mailers argued that giving the Postal Service additional rate authority would weaken incentives to be more economical and efficient because the Postal Service would cover its costs through rate increases. Comments, Alliance of Nonprofit Mailers, at 14–18 (Feb. 3, 2020). The Commission disagreed. *Order 5763* at 298–310. It stated that although a price cap "[t]heoretically" incentivizes the regulated entity to reduce costs and increase efficiency, the Act had failed to do so because factors outside of the Postal Service's control had resulted in its costs far exceeding its revenues. *Id.* at 301–02. Therefore, the Commission explained, "providing the Postal Service with the needed pricing tools to narrow the existing formidable gap between revenues and costs" would incentivize the Postal Service "to bridge that gap fully via efficiency gains and cost reductions." *Id.* at 303. Further, the Commission found that the supplemental rate authorities would not weaken efficiency incentives because they compensate the Postal Service for costs that are "largely outside of its direct control." *Id.* at 304. "By closely tailoring the modifications" to these exogenous costs, the Commission can "provide correct

incentives and . . . encourage prudent pricing and operational decision-making by the Postal Service." *Id.* at 302.

***Maintaining predictable and stable rates*:** The Commission found unpersuasive the Mailers' argument that the new ratemaking system would produce excessive price hikes, explaining that the rate authorities limit the maximum allowable annual rate increase. *Id.* at 312. It also concluded that "[t]his concern fails to account for the Commission's findings and analysis, which extensively discusses the deficiencies of the existing ratemaking system," namely that it failed to maintain the Postal Service's financial stability and resulted in unreasonably low rates. *Id.* at 313. The Commission further found that the Mailers' concern overlooked that the Postal Service has "inherent incentives to exercise business judgment" and not raise rates too sharply. *Id*. at 314. Further, the use of rate formulas would minimize unpredictable price fluctuations and allow for forecasting. *Id.* at 315.

***Increasing transparency*:** The Commission found that the new ratemaking system was consistent with the statutory objective of promoting transparency because it "provided a thorough, publicly available explanation" of the rate authorities, "the formula uses inputs from publicly available data and information," and it would "maintain[ ] the underlying calculations on its public website, similar to existing practice." *Id.* at 349. Additionally, the Commission concluded that "[a]ny additional administrative burden associated with the calculation is minimal and justified by the

need to address underlying drivers of the existing system's deficiencies." *Id.*

***Establishing just and reasonable rates*:** In *Order 5763*, the Commission rejected as "largely overstated," *id*. at 352, the Mailers' concern that the new rate system would unjustly enrich the Postal Service. Giving the Postal Service greater rate authority was necessary, in the Commission's view, to allow "the Postal Service to set rates that would not threaten its financial integrity." *Id.* The new system would also protect mailers because it "limit[ed] the accrual and use of rate authority to correct particular systemic deficiencies." *Id.* For instance, the Commission found that the density-based rate authority would not result in excessive rates because it does not constitute a rate reset, and its formula is designed to produce conservative cost estimates. *Id.* at 353–54. The Commission also found that the ratemaking system included "sufficient safeguards" to prevent excessive rate increases, pointing out that ratepayers may challenge rate changes before the Commission. *Id.* at 358–59.

Despite the Mailers' objections to the new ratemaking system, the Commission articulated a rational connection between the statutory objectives and the decision it made. Given the deference due to an agency's judgment about how to balance competing factors, *USAir*, 969 F.2d at 1263, the Mailers offer no basis for the court to conclude that the Commission's decision was arbitrary and capricious in meeting the statutory objectives.

2.

The Mailers challenge the density-based rate authority as arbitrary and capricious, because (1) it fails to account for per-unit revenue and therefore will "grossly over-recover delivery costs," and (2) it will accelerate, rather than remedy, the decline in mail density. The Mailers further maintain that the Commission failed to respond meaningfully to comments raising these objections. Mailers Br. 34–46.

The Commission adequately justified its density-based rate authority. First, it was not arbitrary for the Commission to reject comments that the density-based rate authority had to account for the mix of delivered mail and per-unit revenues. As the Commission explained, the "rate authority is designed to offset increases in per-unit costs" caused by declining mail density, "not . . . to offset contribution changes from individual mail classes." *Order 5763* at 95. Per-unit revenues are irrelevant, according to the Commission, because "changes to per-unit costs are not isolated to specific classes." *Id.* Rather, "[a]s overall volume decreases," the fixed costs associated with delivering the mail "are borne by fewer pieces, driving an increase in per-unit costs, irrespective of class." *Id*. Additionally, a revenue-based formula would tie the density authority to the Postal Service's pricing decisions, leading to inefficient pricing. *Id*.

Nor did the Commission irrationally reject the Mailers' argument that the density-based rate authority would accelerate volume loss. Before the Commission,

the Mailers argued that the supplemental rate authority would trigger a "death spiral," a self-reinforcing cycle where price hikes induce further volume loss. Comments, Alliance of Nonprofit Mailers, at 28–39 (Feb. 3, 2020); Comments, Nat'l Postal Policy Council, 36–38 (Feb. 3, 2020). The Commission, however, found that this argument rested on the faulty premise that market-dominant products are highly price sensitive. *Order 5763* at 82. In its "experience, demand for Market Dominant products has been relatively price inelastic": volumes "grew steadily" before 2006 when prices were not capped yet consistently declined during the price-cap era. *Id*. As a result, the Commission "expected" "the decrease in volume induced by the density-based rate authority . . . to be less in proportional terms than the amount of density-based rate authority." *Id*.

The Mailers maintain that the Commission's estimate of price sensitivity is too low, because it is calculated using data from a period when price changes were small relative to those anticipated with the new rule. Comments, Alliance of Nonprofit Mailers, at 31–32 (Feb. 3, 2020). But a disagreement over price sensitivity is insufficient to invalidate the Commission's order, as this court defers to the Commission's reasonable economic assumptions and predictions. *See Newspapers Ass'n of Am.*, 734 F.3d at 1216; *City of Los Angeles v. Dep't of Transp.*, 165 F.3d 972, 977 (D.C. Cir. 1999). Further, the Commission responded to the Mailers' objection by noting that the Postal Service did not have to use all available rate authority if doing so

would be counterproductive. *Order 5763* at 83. The Commission also noted that it "retains the authority to revisit the density-based rate authority" if "volume effects are outside the expected range." *Id*.

And the Mailers object that the Commission ignored their comments that *Order 5763* overestimated density-related costs relative to the "roll-forward" method used in other contexts. But the Commission found that using a prospective method like the roll-forward method "would be more complicated," "entail more uncertainty," and "require an additional mechanism in later years to correct for inaccurate projections." *Id.* at 91. Given that "[n]one of the commenters ha[d] shown that a forward-looking model would have sufficiently improved accuracy over the Commission's backwards-looking estimate," the Commission concluded that they had failed "to justify these tradeoffs." *Id.* at 91 n.136.

3.

Lastly, the Mailers maintain that the Commission "ignored evidence demonstrating that density and other new rate authorities are not necessary" because "the pandemic has spurred massive volume increases in profitable packages, improving [the Postal Service's] financial condition overall." Mailers Br. 46–47.

The Commission adequately supported its decision not to reopen the record. It found that the COVID-19 pandemic did not alter its finding that the existing ratemaking system failed to achieve the Accountability

Act's objectives because "[t]he Postal Service's finances remain[ed] unstable" and "the problems identified in Order No. 4257 with respect to pricing and operational efficiency and unreasonable rates have not abated." *Order 5763* at 26–27. "These challenges," the Commission observed, "which all pre-date the pandemic, are expected to persist as long as the existing ratemaking system remains in effect, and nothing specific to the pandemic alters [its] findings with regard to these deficiencies." *Id.* at 27. The Commission therefore "[did] not find any good cause to further delay implementation of the [new] ratemaking system," and stated that it would "intervene as necessary if economic conditions prevent the final rules from operating as intended to achieve the objectives of section 3622." *Id.* at 31.

The Mailers further submit that the Commission relied on "stale data" from 2019, and that the Postal Service's revenue and cash position meaningfully improved by mid-2020. Mailers Br. 48. But in *Order 5763*, the Commission noted that pricing authority should be determined not by revenue, but by costs, and that "as a result of the pandemic[,] there are fewer total mailpieces today over which the costs of servicing and maintaining the Postal Service's network can be distributed." *Order 5763* at 28–29, 95. The mid-2020 financial data cited by the Mailers does not invalidate the Commission's reasoning. Moreover, in response on appeal the Commission points out that the Postal Service's financial condition worsened by the end of 2020, as indicated by operating losses comparable to those in previous years and declining profitability. P.R.C. Br. 72

(citing its financial analysis and 10-K Statement, Fiscal Year 2020).

III.

The Postal Service also contends that *Order 5763* was arbitrary and capricious, but advances arguments diametrically opposed to those of the Mailers.

A.

The Postal Service first maintains that the Commission's new ratemaking system defies reasoned decision-making by "not actually provid[ing] [it] with an opportunity to cover its costs" and so "perpetuates the same faults that [the Commission] found in the legacy system." USPS Br. 27. Analogizing its situation to that of a bicycle tire with a leak, the Postal Service argues that the Commission's new system had not only to account for future revenue loss (*i.e.*, patch the hole) but also return rates to a compensatory level (*i.e.*, reinflate the tire). *See id*. at 28–29. Because the new system does not reset rates, the Postal Service posits that its financial stability remains insecure, making *Order 5763* arbitrary and capricious "on its [o]wn [t]erms." *Id*. at 26–27, 30–31.

In *Order 5763*, the Commission addressed the Postal Service's argument that its proposed rate authorizations were inadequate to achieve financial stability because they did not reset rates to fully compensatory levels. *Order 5763* at 347–48. The

Commission explained that it "ha[d] never asserted that the Market Dominant ratemaking system must immediately recover all of the historic net losses or reset all rates to a level sufficient to cover all costs." *Id.* at 347. Such a system "would fail to balance" the competing objectives of rate stability and predictability and maximizing efficiency incentives because it would "incentivize the Postal Service to *solely* raise rates to respond to its challenges." *Id*. In contrast, the supplemental rate authorities balanced these objectives because they "mitigate the imminent financial pressure on the Postal Service, correct certain harmful pricing practices, and retain sufficient incentives to pursue cost reductions and efficiency gains." *Id*. Further, "[g]iven that the near-term financial instability is a source of imminent peril," the Commission concluded that it was reasonable "to address those more time-sensitive issues first and then evaluate how the longer-term financial stability issues should be addressed, in conjunction with the other objectives, under the modified ratemaking system." *Id.* at 348.

This explanation satisfies arbitrary-and-capricious review. The Accountability Act instructs that the nine objectives "shall be applied in conjunction with [each other]." 39 U.S.C. § 3622(b). Following that directive, the Commission reasonably concluded that although a rate reset might further the goal of financial stability, it would undermine other objectives. It explained that allowing the Postal Service to cover its costs solely through rate increases would discourage, not incentivize, cost-cutting and efficiency improvements. *Order*

5763 at 347. Further, a rate reset of the magnitude proposed by the Postal Service would "represent a regression" in progress toward achieving predictable and stable rates. *Id.* at 297. With these findings, it was not arbitrary for the Commission to choose a system that balanced the Act's competing objectives rather than one that maximized financial stability at the expense of other goals. *See U.S. Postal Serv.*, 963 F.3d at 141. Equally reasonable was the Commission's decision to address the problem incrementally. It is well settled that agencies need not solve a problem in a single rulemaking. *See Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 231 (1991).

B.

In a related challenge, the Postal Service maintains that the Commission failed to provide a reasoned explanation for deciding not to implement a rate reset. In its view, the Commission's "suggest[ion] that a rate reset is unnecessary" is contrary to the evidence, which shows that a rate reset is needed to return the Postal Service to financial solvency, as well as the Commission's own statements in *Order 5763*. USPS Br. 32–35. Further, the Postal Service maintains that the Commission inadequately explained its finding that a rate reset was contrary to some statutory objectives. *Id*. at 36–43.

The Postal Service's objections are unavailing. To begin, the record does not support the Postal Service's argument that the Commission suggested a rate reset

is "unnecessary." The materials cited by the Postal Service merely state that the Commission has decided to adopt rate authorities tailored to specific costs; the materials did not state or otherwise suggest that the new ratemaking system rendered a rate reset unnecessary. *Order 5337* at 60; *Order 5763* at 173. Nor is the Commission's decision inconsistent with the evidence or its prior statements. Rather, the Commission reasonably determined that implementing a rate reset "at this time" would be contrary to various statutory objectives. *Order 5763* at 347–48.

Finally, the Postal Service's challenge to the Commission's weighing of the statutory objectives is unpersuasive. The Commission explained that resetting rates to equal costs would weaken the Postal Service's incentive to cut costs and improve efficiency. *Id.* On the other hand, enhancing the Postal Service's rate authority so it can cover some of its costs through rate increases "narrow[s] the existing formidable gap between revenues and costs" thereby creating "meaningful" incentives to "bridge that gap fully via efficiency gains and cost reductions." *Id.* at 303. As for predictable and stable rates, the Commission explained that a sudden and significant price increase could harm mailers and mail volume. *Id.* at 196. Regarding just and reasonable rates, the Commission explained that the new regulatory system "balance[d] . . . differing views" and "would neither threaten [the Postal Service's] financial integrity nor would be excessive to mailers." *Id.* at 352–53. The Commission's decision not

to implement a rate reset at this time was thus reasonable and reasonably explained.

Accordingly, the court denies the petitions for review.

APPENDIX B

ORDER NO. 5763

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

Before Commissioners: Robert G. Taub, Chairman;
Michael Kubayanda,
Vice Chairman;
Mark Acton;
Ann C. Fisher; and
Ashley E. Poling

Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products	Docket No. RM2017-3

ORDER ADOPTING FINAL RULES FOR THE SYSTEM OF REGULATING RATES AND CLASSES FOR MARKET DOMINANT PRODUCTS

[LOGO]

Washington, DC 20268-0001
November 30, 2020

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. OVERVIEW 4

A. The Need for Modifications to the Ratemaking System 4

B. Overview of Proposals in the NPR 11

C. Overview of Proposals in the Revised NPR 16
D. Final Rules 21
III. STATUTORY AUTHORITY 32
A. Introduction and Background 32
B. Additional Rate Authority 40
1. The PAEA expressly authorizes the Commission to modify or replace all aspects of the existing ratemaking system, including the CPI-U price cap, if necessary to achieve the statutory objectives 40
2. If any ambiguity exists, it is reasonable to construe the CPI-U price cap as part of the system subject to review and potential modification or replacement by the Commission 60
C. Workshare Discounts 68
D. Annual Compliance Reporting Requirements 70
IV. DENSITY-BASED RATE AUTHORITY 72
A. Introduction 72
B. Background 74
1. Economies of Density in Network Industries 74
2. Density-Based Rate Authority in the Revised Notice of Proposed Rulemaking 76
C. Commission Analysis 79

1. Conceptual Objections to the Density-Based Rate Authority 80
2. General Methodological Objections to Density-Based Rate Authority ... 90
3. Specific Critiques of the Density-Based Rate Authority Formula 97
D. Conclusion 99
V. RETIREMENT-BASED RATE AUTHORITY 100
A. Introduction 100
B. Background 101
1. Postal Service Retirement Costs 101
2. Retirement-Based Rate Authority in the Revised Notice of Proposed Rulemaking 104
C. Commission Analysis 110
1. Conceptual Objections to Retirement-Based Rate Authority 110
2. Methodological Objections to Retirement-Based Rate Authority 122
3. Objections Concerning Removal of Retirement-Based Rate Authority ... 129
D. Conclusion 130
VI. PERFORMANCE-BASED RATE AUTHORITY 132
A. Introduction 132
B. Comments 133
1. Overview 133
2. Incentive Regulation 135

3. Amount of Rate Authority 137
4. Operation of the Rate Authority Adjustment Mechanism..... 145
5. Operational Efficiency-Based Requirement 148
6. Service Standard-Based Requirement..... 156
C. Commission Analysis of Comments 158
1. Overview..... 158
2. Areas for Further Refinement in the New Rulemaking..... 166
3. Analysis of Alternatives 171
D. Revisions to Proposed Rules..... 177
VII. NON-COMPENSATORY PRODUCTS AND CLASSES..... 181
A. Non-Compensatory Products..... 181
1. Introduction..... 181
2. Comments..... 183
3. Commission Analysis of Comments.... 185
4. Revisions to Proposed Rules..... 189
B. Non-Compensatory Classes..... 189
1. Introduction..... 189
2. Comments..... 191
3. Commission Analysis of Comments 194
4. Revisions to Proposed Rules..... 197
VIII. WORKSHARE DISCOUNTS..... 198
A. Introduction..... 198

B. Comments 200
1. Comments Supporting Commission's Revised Rules without Modifications 200
2. Comments Recommending Modifications to the Commission's Revised Rules 202
C. Commission Analysis 211
1. Elimination of Passthrough Floor 211
2. Inclusion of Passthrough Floor in Waiver Application Process for Below-Avoided-Costs Workshare Discounts 213
3. Flexibility for Passthroughs Between 85 Percent and 100 Percent 214
4. Expansion of 39 U.S.C. § 3622(e)(3)(B) Exception 219
5. Pending Cost Avoidance Methodology Dockets 222
6. Mail Matter with ECSI Value 224
D. Revisions to Proposed Rules 224
IX. COST-REDUCTION REPORTING REQUIREMENTS 226
A. Introduction 226
B. Comments 231
1. The Necessity of the Proposed Reporting Requirements 231
2. Risk of Commercial Harm 232

3. Whether Reporting Requirements Alone Provide a Sufficient Incentive 233
4. Recommended Changes to Proposed Reporting Requirements 234
5. Tension with Objective 6 235
C. Commission Analysis of Comments 236
1. The Necessity of the Proposed Reporting Requirements..... 236
2. Risk of Commercial Harm 237
3. Whether Reporting Requirements Alone Provide a Sufficient Incentive 238
4. Recommended Changes to Proposed Reporting Requirements 239
5. Tension with Objective 6 241
D. Revisions to Proposed Rules..... 241
X. PROCEDURAL IMPROVEMENTS..... 242
A. Introduction..... 242
B. Comments..... 244
1. Rate Adjustment Notice Period..... 244
2. Commission Review Periods..... 245
3. Discussion of Objectives and Factors 246
4. Other Procedural Changes to Rate Adjustment Proceedings..... 248
C. Commission Analysis of Comments 248
1. Rate Adjustment Notice Period..... 248

2. Commission Review Periods 250
3. Discussion of Objectives and Factors 255
4. Other Procedural Changes to Rate Adjustment Proceedings 265
D. Revisions to Proposed Rules 265
XI. 5-YEAR REVIEW 266
A. Introduction 266
B. Comments 266
C. Commission Analysis 267
XII. OTHER ISSUES 268
A. Introduction 268
B. General Comments 268
1. Impact on Mailers of Cumulative Proposal 268
2. Lack of Incentives for Efficiency 270
3. Lack of Productivity Growth Target 271
4. Effect on Competitive Product Prices 272
C. Specific Suggestions for Final Rules 273
1. Market Dominant Negotiated Service Agreement (NSA) Rules 273
2. Clarification in Language of Final Rules 273
3. Timing 275
4. Price Cap Exclusion of UPU Prices 277
XIII. THE OBJECTIVES OF THE PAEA 279

A. Introduction 279
B. The Existing Ratemaking System 282
C. The Modified Ratemaking System 285
D. Comments 286
1. Objective 1 286
2. Objective 2 287
3. Objective 3 288
4. Objective 4 289
5. Objective 5 289
6. Objective 6 292
7. Objective 7 292
8. Objective 8 292
9. Objective 9 293
E. Commission Analysis of Comments 293
1. Objective 1 298
2. Objective 2 310
3. Objective 3 322
4. Objective 4 328
5. Objective 5 333
6. Objective 6 348
7. Objective 7 350
8. Objective 8 351
9. Objective 9 359
F. Factors 360
G. Conclusion 364
XIV. CHANGES TO THE FINAL RULES 366

A. Renumbering Consistent with Amended Rules of Practice 366
B. Other Non-Substantive Clarifications and Corrections 366
C. Withdrawal of Performance-Based Rate Authority 367
D. Generation of Unused Rate Authority and Banking 368
E. Interaction with the Non-Compensatory Products Rate-Setting Criteria 368
F. Changes Related to Rate Incentives ... 369
XV. REGULATORY FLEXIBILITY ACT ANALYSIS 370
XVI. ORDERING PARAGRAPHS..... 370
Attachment—Final Rules
Appendix A—Technical Appendix (Density and Retirement)
Appendix B—List of Commenters and Comments

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[32] III. STATUTORY AUTHORITY

A. Introduction and Background

The legal authority for the rules adopted in this docket derives from 39 U.S.C. § 3622, which was enacted as part of the PAEA in 2006.[36] Section 3622, which is titled "Modern rate regulation," contains six subsections, which can be summarized as follows. Subsection (a), entitled "Authority generally," provides that within 18 months after the PAEA's enactment the Commission shall "by regulation establish (and may from time to time thereafter by regulation revise) a modern system for regulating rates and classes for market-dominant products." 39 U.S.C. § 3622(a). Subsection (b) enumerates nine specific "objectives" that the ratemaking system shall be designed to achieve. 39 U.S.C. § 3622(b). Subsection (c) enumerates 14 specific "factors" that the Commission must take into account in establishing or revising the ratemaking system. 39 U.S.C. § 3622(c).

Subsection (d), titled "Requirements," contains three paragraphs. Paragraph (d)(1), titled "In general," provides that the ratemaking system shall: include an annual price cap on rate increases corresponding to the CPI-U; establish a schedule of rate changes; require public notice and an opportunity for Commission review

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[36] PAEA, Pub. L. No. 109-435, 120 Stat. 3198 (2006). The Commission also has general authority to "promulgate rules and regulations and establish procedures . . . and take any other action [it] deem[s] necessary and proper to carry out [its] functions and obligations to the Government of the United States and the people as prescribed under [Title 39 of the United States Code]." 39 U.S.C. § 503.

of proposed rate adjustments; and establish procedures for rate adjustments. 39 U.S.C. § 3622(d)(1)(A)-(E).

[33] Paragraph (d)(2), titled "Limitations," provides that the price cap is to be applied to mail products at the class level;[37] permits the Postal Service to round rates and fees as long as the overall rate increase does not exceed the price cap; and contains provisions regarding the use of unused rate authority.[38]

Paragraph (d)(3), titled "Review," provides the following specific language which is at the heart of the issue with regard to the Commission's legal authority in this docket:

> Ten years after the date of enactment of the [PAEA] and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines, after notice and opportunity

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[37] A mail class is a grouping of Market Dominant mail products, "as defined in the Domestic Mail Classification Schedule as in effect on the date of enactment of the [PAEA]." 39 U.S.C. § 3622(d)(2)(A). There are five such mail classes: First-Class Mail; USPS Marketing Mail; Periodicals; Package Services; and Special Services.

[38] 39 U.S.C. § 3622(d)(2)(A)-(C). Unused rate authority is left-over rate authority that the Postal Service opts not to avail itself of in any given price adjustment. 39 U.S.C. § 3622(d)(2)(C)(i). Under the PAEA, the Postal Service is permitted to retain such rate authority for future use, subject to a number of conditions and limitations. 39 U.S.C. § 3622(d)(2)(C)(ii)-(iii).

> for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

39 U.S.C. § 3622(d)(3).

Subsection (e) contains provisions related to workshare discounts, which are rate discounts provided to mailers who perform certain mail preparation activities prior to entering mail into the Postal Service's network. 39 U.S.C. § 3622(e)(1). Subsection (e) generally requires (subject to certain exceptions) that such discounts not exceed the cost that the Postal Service avoids as a result of not having to perform the individual workshare activity in question. 39 U.S.C. § 3622(e)(2)-(4). Finally, subsection (f) [34] provides for a 1-year transition period to the PAEA ratemaking system from the ratemaking system that preceded it. 39 U.S.C. § 3622(f).

The PAEA represented a compromise between two competing postal reform bills in Congress. Order No. 4258 at 19-21. The first bill, H.R. 22, was introduced in the House of Representatives by Representative John McHugh on January 4, 2005, and reported back to the House out of the House Committee on Government Reform with amendments on April 28, 2005.[39] On July 26,

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[39] 151 Cong. Rec. H72 (daily ed. Jan. 4, 2005); 151 Cong. Rec. H2734 (daily ed. Apr. 28, 2005).

2005, H.R. 22 as amended was passed by the House.[40] Under this bill proposed section 3622(d) was titled "Allowable Provisions." 151 Cong. Rec. H6523 (daily ed. July 26, 2005). It provided that the ratemaking system could include one or more of several forms of regulation: incentive regulation (*e.g.*, price caps, revenue targets); cost-of-service regulation; or any other form of regulation that the Commission considered appropriate to achieve the bill's listed objectives, consistent with its listed factors. *Id.* Proposed section 3622(e) under this bill was titled "Limitation." *Id.* This provision would have capped annual product-level rate increases at the CPI, unless the Commission were to determine, after public notice and comment, that an above-CPI increase was reasonable, equitable, and necessary. *Id.*

The second bill, S. 662, was introduced in the Senate by Senator Susan Collins on March 17, 2005, and reported back to the Senate out of the Homeland Security and Governmental Affairs Committee with amendments on July 14, 2005.[41] On February 9, 2006, the Senate considered these and additional amendments by unanimous consent, and the bill, as amended, was passed.[42] Under this bill, proposed section 3622(d) was [35] titled "Requirements," and was subdivided into paragraphs titled "In general" and "Limitations." *Id.* at S913-S914. The content of these paragraphs employed similar language to that which was eventually

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[40] 151 Cong. Rec. H6511, H6548-H6549 (daily ed. July 26, 2005) (Roll Call No. 430).

[41] 151 Cong. Rec. S2994, S3012-S3031 (daily ed. Mar. 17, 2005); 151 Cong. Rec. S8301 (daily ed. July 14, 2005).

[42] 152 Cong. Rec. S898-S927 (daily ed. Feb. 9, 2006).

used in the final version of the PAEA. *Compare id. with* 39 U.S.C. § 3622(d)(1) and (2). Specifically, they provided for an annual class-level price cap indexed to CPI-U, with a narrow exception for "unexpected and extraordinary circumstances." *Id.*

Also on February 9, 2006, the Senate through unanimous consent passed H.R. 22 by replacing H.R. 22's text with the text of S. 662.[43] Therefore, as passed by the Senate, H.R. 22 contained the same title structure as S. 662, with proposed section 3622(d)—titled "Requirements"—being subdivided into two paragraphs titled "In General" and "Limitations." *Id.* at S929. The Senate then sent H.R. 22, as amended and passed by the Senate, back to the House and requested a conference to resolve the differences between the two versions.[44] None of the versions of the bills described above included the review provision that would eventually be codified at 39 U.S.C. § 3622(d)(3). Nor was this provision referenced in hearings, committee reports, or the presidential signing statement. Instead, paragraph (d)(3) was included only in the final version of the PAEA introduced on December 7, 2006—H.R.

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[43] 152 Cong. Rec. at S927-S942 (daily ed. Feb. 9, 2006). H.R. 22 had been pending in the Senate since July 27, 2005. 151 Cong. Rec. S9155, S9156 (daily ed. July 27, 2005).

[44] *Id.* at S927, S942. For instance, as passed by the House on July 26, 2005, H.R. 22 provided for the ratemaking system to achieve 7 objectives and for the Commission to take into account 11 factors. 151 Cong. Rec. H6523 (daily ed. July 26, 2005). By contrast, as passed by the Senate on February 9, 2006, H.R. 22 provided for the ratemaking system to achieve 8 objectives and for the Commission to take into account 13 factors. 152 Cong. Rec. at S928-S929 (daily ed. Feb. 9, 2006).

6407.[45] Pursuant to a compromise between the Senate and the House, H.R. 6407 blended together concepts appearing in the separate versions of the bills described above, including combining each bill's respective lists of objectives and factors.

[36] There is only one statement in the Congressional Record about the review provision contained at paragraph (d)(3), and it was made upon receipt of the final version of the bill on December 8, 2006. Senator Collins, the Senate sponsor of postal reform, remarked:

> The Postal Service will have much more flexibility, but the rates will be capped at the CPI. That is an important element of providing 10 years of predictable, affordable rates, which will help every customer of the Postal Service plan. After 10 years, the Postal Regulatory Commission will review the rate cap and, if necessary, and following a notice and comment period, the Commission will be authorized to modify or adopt an alternative system.
>
> While this bill provides for a decade of rate stability, I continue to believe that the preferable approach was the permanent flexible rate cap that was included in the Senate-passed version of this legislation. But, on balance, this bill is simply too important, and that is why we have reached this compromise to allow it to pass. We at least will see a decade of rate stability, and I believe the Postal [Regulatory] Commission, at the end of that decade, may well decide that it is best to continue

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[45] H.R. 6407, 109th Cong. § 3622(d)(3) (2006).

> with a CPI rate cap in place. It is also, obviously, possible for Congress to act to reimpose the rate cap after it expires. But this legislation is simply too vital to our economy to pass on a decade of stability. The consequences of no legislation would be disastrous for the Postal Service, its employees, and its customers.[46]

The Commission's interpretation of section 3622, based on its plain language, its structure, and its purpose, and as confirmed by its legislative history, has been consistent throughout this docket. That interpretation, which is more fully articulated below, can be summarized as follows. Subsection (a) directed the Commission to promulgate rules establishing the ratemaking system following the PAEA's enactment. The ratemaking system was required to be designed to achieve the statutory objectives enumerated in subsection (b), taking into account the statutory factors enumerated in subsection (c).

[37] In its initial form, the ratemaking system was also required to contain certain mandatory features, as embodied in paragraphs (d)(1) and (d)(2), as well as subsection (e). The most significant of these features was the CPI-U price cap. However, those mandatory features were the product of the legislative compromise that reconciled the competing postal reform bills in Congress. A central component of that legislative compromise was paragraph (d)(3), which directed the Commission to review the ratemaking system after 10 years and determine if the ratemaking system,

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[46] 152 Cong. Rec. S11,674, S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins).

including the mandatory features, was achieving the statutory objectives set out in subsection (b), taking into account the statutory factors set out in subsection (c). If the Commission determined that the ratemaking system was not achieving the statutory objectives, taking into account the statutory factors, then the Commission was empowered to "by regulation, make such modification or adopt such alternative system . . . as necessary to achieve the objectives." 39 U.S.C. § 3622(d)(3).

The Commission conducted the required review and issued its findings on December 1, 2017. *See generally* Order No. 4257. The Commission determined that the ratemaking system has not achieved the statutory objectives, taking into account the statutory factors. Pursuant to paragraph (d)(3), the Commission thereafter set about the task of "mak[ing] such modification or adopt[ing] such alternative system . . . as necessary to achieve the objectives." In doing so, the Commission interprets its authority as encompassing all aspects of the ratemaking system under section 3622, including the price cap provisions at paragraphs (d)(1) and (d)(2) and the workshare discount provisions in subsection (e).

[38] Order No. 4258 addressed comments positing that the Commission lacks the statutory authority to modify or replace the CPI-U price cap. Order No. 4258 at 14-25. The Commission analyzed the three primary arguments raised by commenters to support this position: that the plain language of section 3622 clearly forecloses modification or replacement of the CPI-U price cap; that modification or replacement of the CPI-U

price cap would be inconsistent with the PAEA's legislative history; and that modification or replacement of the CPI-U price cap would produce unconstitutional results. *Id.* The Commission also addressed comments objecting to the inclusion of workshare discounts as an issue in this proceeding. *Id.* at 18-19, 25.

Order No. 5337 addressed comments received in response to Order No. 4258 pertaining to the Commission's initial proposal to make additional rate adjustment authority available to the Postal Service. Order No. 5337 at 18-31, 32-57. The Commission also addressed comments concerning the statutory authority underlying the Commission's initial proposal to limit the setting of inefficient workshare discounts. *Id.* at 57-58. Many of the comments received in response to Order No. 4258 echoed prior remarks submitted in this proceeding. Order No. 5337 at 18-27. Some commenters reiterated their prior positions again with regard to the revised proposal presented in Order No. 5337.[47] Generally, no new arguments concerning statutory authority were introduced in response to Order No. 5337.[48]

Primarily, commenters contending that the Commission lacks the statutory authority to adopt the final

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[47] *See* ANM *et al.* Comments at 91-99; ANM *et al.* Reply Comments at 16-17; ABA Comments at 4-5.

[48] Because no commenter re-raised arguments having to do with the constitutionality of modifying or replacing the CPI-U price cap in response to Order No. 5337, those arguments are not addressed in this Order. They were addressed in detail in Order Nos. 4258 and 5337. *See* Order No. 4258 at 23-25; Order No. 5337 at 53-57.

rules in this Order argue that a reviewing court would reject the Commission's interpretation of section 3622 under the two-step framework for [39] evaluating an agency's interpretation of its governing statute set forth in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron* step one, a court considers whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If not, then the court proceeds to *Chevron* step two and considers whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* at 843. The court must defer to the agency's interpretation if it is "reasonable." *Id.* at 844.

Because paragraph (d)(3) expressly authorizes the Commission to adopt regulations modifying the ratemaking system or adopting an alternative ratemaking system if necessary to achieve the statutory objectives, the final rules adopted in this Order would survive judicial scrutiny under *Chevron* step one. Moreover, even if there were any ambiguity as to whether the Commission had the authority to adopt the final rules, because the Commission's interpretation is based on a permissible and reasonable construction of section 3622, the Commission would be accorded deference under *Chevron* step two.

In the remainder of this section, the Commission first addresses the positions of commenters asserting that the Commission lacks the statutory authority to make additional rate adjustment authority available

to the Postal Service. The Commission then addresses issues that pertain exclusively to the Commission's statutory authority to limit the setting of inefficient workshare discounts, as well as the Commission's authority to modify specific Postal Service reporting requirements.

[40] B. Additional Rate Authority

1. The PAEA expressly authorizes the Commission to modify or replace all aspects of the existing ratemaking system, including the CPI-U price cap, if necessary to achieve the statutory objectives.

At *Chevron* step one, the question is whether the meaning of a statute is unambiguously clear. *Chevron*, 467 U.S. at 842-843. In order to determine this, a court must "exhaust the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue[,] . . . [which] include examination of the statute's text, legislative history, and structure, as well as its purpose."[49] Courts "consider not only the language of the particular statutory provision under scrutiny, but also the structure and context of the statutory scheme of which it is a part."[50]

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[49] *Petit v. United States Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012) (quoting *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997)) (internal marks omitted).

[50] *Petit*, 675 F.3d at 781-782 (quoting *Cty. of L.A. v. Shalala*, 192 F.3d 1005, 1014 (D.C. Cir. 1999)) (internal marks omitted).

The Commission's interpretation of section 3622 begins with the text of paragraph (d)(3). Paragraph (d)(3) states:

> If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

39 U.S.C. § 3622(d)(3). In the absence of an express definition, a statutory phrase must be given its ordinary meaning.[51] "May" is a permissive word, which indicates that the Commission has discretion under paragraph (d)(3) whether to take any action [41] following its 10-year review of the ratemaking system.[52] "Or" is a disjunctive word, which indicates that the two options on either side of it have distinct meanings.[53]

Of the two options presented in paragraph (d)(3), the word "modification" is defined as "the making of a

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[51] *Smith v. United States*, 508 U.S. 223, 228 (1993).

[52] Order No. 4258 at 14; *see United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion." (citations omitted)).

[53] Order No. 4258 at 14; *see Loughrin v. United States*, 573 U.S. 351, 357 (2014) ("[o]rdinary use [of the term 'or'] is almost always disjunctive, that is, the words it connects are to be given separate meanings." (internal marks and citation omitted)); *Chao v. Day*, 436 F.3d 234, 236 (D.C. Cir. 2006) (terms connected using the disjunctive "or" must be given separate meanings).

limited change in something."[54] Therefore, "make such modification" connotes the making of moderate changes to the existing ratemaking system.[55] On the other hand, "alternative" is defined as "a proposition or situation offering a choice between two or more things *only one of which may be* chosen."[56] Therefore, the phrase "adopt such alternative system" contemplates replacement of the existing ratemaking system with a different ratemaking system.[57]

Accordingly, if the Commission determines, after conducting its required review of the ratemaking system, that the ratemaking system is not achieving the statutory objectives, taking into account the statutory factors, then the Commission has discretion to, by regulation, either "make such modification [to the ratemaking system] . . . as necessary to achieve the objectives," which connotes moderate change to the existing ratemaking system, or "adopt such alternative system . . . as necessary to achieve the [42] objectives," which contemplates replacement of the existing ratemaking system with a different ratemaking system. See Order

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[54] *See* Merriam-Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/modification.

[55] Order No. 4258 at 15 (quoting 39 U.S.C. § 3622(d)(3)); *see MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (" 'Modify,' in our view, connotes moderate change.").

[56] *See* Merriam-Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/alternative (emphasis added).

[57] Order No. 4258 at 15 (quoting 39 U.S.C. § 3622(d)(3)); *see* Merriam-Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/adopt ("adopt" defined as "to accept formally and put into effect").

No. 4258 at 14-15 (quoting 39 U.S.C. § 3622(d)(3)). In either instance, the only limit that paragraph (d)(3) imposes on the scope of any such changes is that they must be "necessary" to achieve the statutory objectives. Order No. 4258 at 15. "Necessary" means "logically unavoidable."[58]

The scope of the Commission's authority under paragraph (d)(3) plainly extends to all aspects of the ratemaking system under section 3622, including the price cap provisions at paragraphs (d)(1) and (d)(2). Order No. 4258 at 25; Order No. 5337 at 35. This interpretation takes into account the text and structure of section 3622 as a whole, and properly gives the statutory language its ordinary meaning. Order No. 5337 at 35 (citing *Smith*, 508 U.S. at 228). Paragraph (d)(3) grants the Commission authority to modify the "system" or to adopt an "alternative system." The word "system" is used throughout section 3622. Subsection (a) instructs the Commission to establish a "modern system for regulating rates and classes for market-dominant products." 39 U.S.C. § 3622(a). Subsection (b) provides that the "system" shall be designed to achieve the statutory objectives. 39 U.S.C. § 3622(b). Subsection (c) provides that in establishing the "system" the Commission shall take into account the statutory factors. 39 U.S.C. § 3622(c). Subsection (d), at paragraphs (d)(1) and (d)(2), provides additional features that the "system" shall include, including the CPI-U price cap. 39 U.S.C. § 3622(d)(1)-(2). Subsection (d)

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[58] Order No. 4258 at 15; *see* Merriam-Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/necessary.

also, at paragraph (d)(3), provides that if the Commission, after conducting its required 10-year review, determines that the "system" is not achieving the statutory objectives, taking into account the statutory factors, then the Commission may by regulation modify or replace the "system" as necessary to achieve the statutory objectives. 39 U.S.C. § 3622(d)(3). As ordinarily defined, [43] "system" is a general term referring to a set of connected things or parts forming a complete whole.[59] It is clear that all of the provisions within section 3622 relate to the same "system" of ratemaking, including the CPI-U price cap provisions, and that under paragraph (d)(3) all aspects of that "system" are subject to review and, if necessary to achieve the statutory objectives, potential modification or replacement. Order No. 5337 at 35-36.

The structure of subsection (d), specifically the relationship between paragraph (d)(3) and paragraphs (d)(1) and (d)(2), also serves to confirm this. Paragraph (d)(3)'s review provision follows the price cap provisions set out in paragraphs (d)(1) and (d)(2). Each of paragraph (d)(2)'s limitations modify the general provisions contained in paragraph (d)(1). *Id.* at 36. This structure reinforces the conclusion that the provisions at paragraphs (d)(1) and (d)(2) are part of the system subject to review and potential modification or replacement under paragraph (d)(3). *Id.*

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[59] Order No. 5337 at 35; *see* Merriam-Webster Dictionary, available at: http://www.merriam-webster.com/dictionary/system ("system" defined as "a regularly interacting or interdependent group of items forming a unified whole").

Moreover, textual differences between paragraph (d)(3) and subsection (a) plainly demonstrate that the extent of regulatory action permissible under paragraph (d)(3) is broader than under subsection (a). *Id.* Subsection (a) provides that:

> The Postal Regulatory Commission shall, within 18 months after the date of enactment of this section, by regulation establish (and may from time to time thereafter by regulation revise) a modern system for regulating rates and classes for market-dominant products.

39 U.S.C. § 3622(a). The definition of "establish" is "to institute (something, such as a law) permanently by action or agreement."[60] The definition of "revise" is "to look over [44] again in order to correct or improve."[61] The use of parentheticals along with the conjunction "and" explains the relationship between "establish" and "revise"—the ratemaking system established pursuant to subsection (a) is subject to periodic revision by the Commission at the Commission's discretion. Order No. 4258 at 16; Order No. 5337 at 36. Thus, "establish" and "revise" are connected powers under subsection (a)—any "revision" is to the ratemaking system "established" under subsection (a). Order No. 5337 at 36. This differs from the wording of paragraph (d)(3), which speaks of "modifying" the system *or* "adopt[ing] [an]

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[60] Order No. 4258 at 16; *see* Merriam-Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/establish.

[61] Order No. 4258 at 16; *see* Merriam-Webster Dictionary, available at: https://www.merriam.webster.com/dictionary/revise.

alternative system"—two separate options with different meanings. Order No. 4258 at 17; Order No. 5337 at 36-37.

The conditions necessary to trigger the Commission's authority under paragraph (d)(3) are more demanding than those under subsection (a). Subsection (a) required the Commission to set up the ratemaking system within a specified period after the PAEA was enacted, and it permits the Commission to improve or correct those regulations "from time to time thereafter" through normal rulemaking procedures. Order No. 4258 at 16. Paragraph (d)(3), by contrast, is not triggered until several separate and specific requirements are met: first, a review of the ratemaking system by the Commission 10 years after the PAEA's enactment, following notice and an opportunity for public comment; and second, a determination by the Commission that the ratemaking system has not achieved the statutory objectives, taking into account the statutory factors.[62]

[45] The different language used in subsection (a) compared to paragraph (d)(3), coupled with the existence of separate triggering mechanisms, and in conjunction with the overall structure of section 3622, in which any regulatory action under paragraph (d)(3) is premised on a finding that the ratemaking system established under subsection (a) has failed to achieve the statutory objectives, taking into account the statutory

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[62] 39 U.S.C. § 3622(d)(3); *see* Order No. 4258 at 16; Order No. 5337 at 37.

factors, demonstrates that Congress intended to create two separate but complementary processes. First, Congress provided for the Commission's general authority to set up and periodically recalibrate the ratemaking system in its initial form under subsection (a), which was required to include certain mandatory features.[63] Second, Congress provided for the Commission's specific authority pursuant to paragraph (d)(3) to review the ratemaking system established under subsection (a) after 10 years and modify or replace any part of it, including the mandatory features, as necessary to achieve the statutory objectives. Order No. 4258 at 17; Order No. 5337 at 36-37. Thus, it is plain that subsection (a) and paragraph (d)(3) serve different purposes within the statutory scheme of section 3622, and that the Commission's authority under paragraph (d)(3) is broader than the Commission's authority under subsection (a). Order No. 4258 at 17-18; Order No. 5337 at

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[63] Historically, the Commission had not possessed such broad regulatory authority. Order No. 4258 at 17; Order No. 5337 at 43. Prior to the enactment of the PAEA, the Postal Rate Commission, as the Postal Regulatory Commission was formerly known, was limited to "review of rate, classification, and major service changes, unadorned by the overlay of broad FCC-esque responsibility for industry guidance and of wide discretion in choosing the appropriate manner and means of pursuing its statutory objective." Order No. 4258 at 17 n.30 (citing *Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 2 F.3d 408, 415 (D.C. Cir. 1993 (quoting *Governors of U.S. Postal Serv. v. Postal Rate Comm'n*, 654 F.2d 108, 117 (D.C. Cir. 1981)). The PAEA transformed the Postal Rate Commission into the Postal Regulatory Commission, a separate independent agency with regulatory oversight of the Postal Service. *Id.* (citing *U.S. Postal Serv. v. Postal Reg. Comm'n*, 717 F.3d 209, 210 (D.C. Cir. 2013)).

36-37. The purpose of paragraph (d)(3) is plainly to ensure that the statutory objectives in subsection (b) are being met and, if needed, to empower the Commission to remedy any failure to meet the objectives. Order No. 5337 at 37.

[46] Paragraph (d)(3) places only one limit on the features that a "modifi[ed]" or "alternative system" can contain: such features must be necessary to achieve the statutory objectives in subsection (b). There is no requirement that any other specific feature of the existing ratemaking system be retained, including the CPI-U price cap. Moreover, subsection (b), in which the statutory objectives are set out, states that the objectives are to be applied in conjunction with each other, not in conjunction with any other statutory provisions. Order No. 4258 at 15; Order No. 5337 at 40.

In reaching its interpretation of section 3622, the Commission has considered alternative interpretations and constructions offered by commenters.[64] Commenters have cited the title of subsection (d)—

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[64] In response to Order No. 5337, two of these commenters, ANM *et al.* and ABA, have renewed their previous arguments, which are addressed below. National Postal Policy Council, Major Mailers Association, National Association of Presort Mailers, and Association for Mail Electronic Enhancement (collectively, NPPC *et al*.) incorporate all of their prior arguments by reference. NPPC *et al.* Comments at 9. A new commenter, the Coalition for a 21st Century Postal Service (C21), also adopts by reference in its reply comments the general arguments advanced by other commenters in this proceeding that the Commission lacks the statutory authority to modify or replace the CPI-U price cap. C21 Reply Comments at 3.

"Requirements"—as meaning that any modified or alternative ratemaking system promulgated pursuant to paragraph (d)(3) must contain the features specified in paragraphs (d)(1) and (d)(2).[65] Commenters have similarly cited the use of the word "shall" in paragraph (d)(1) *(i.e.,* "The system for regulating rates and classes for market dominant products shall . . . contain an annual limitation on the percentage change in rates . . . equal to the change in [CPI-U]. . . ." (emphasis added)) as making the CPI-U price cap mandatory for any and all versions of the ratemaking [47] system that might be adopted.[66] Alliance of Nonprofit Mailers, Association

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[65] 2014 ANM *et al.* White Paper at 4-7; Comments of the Major Mailers Association, the National Association of Presort Mailers, and the National Postal Policy Council, March 20, 2017, at 14-15 (2017 MMA *et al.* Comments); Initial Comments of the Greeting Card Association, March 20, 2017, at 29-31 (2017 GCA Comments) (citing *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)); Comments of the National Postal Policy Council, the Major Mailers Association, and the National Association of Presort Mailers, March 1, 2018, at 22-23 (2018 NPPC *et al.* Comments); Comments of Alliance of Nonprofit Mailers, American Catalog Mailers Association, Inc., Association for Postal Commerce, Idealliance and MPA—the Association of Magazine Media, March 1, 2018, at 17, 21-22 (2018 ANM *et al.* Comments).

[66] Alliance of Nonprofit Mailers; the Association for Postal Commerce; the Association of Marketing Service Providers; the Direct Marketing Association; EMA; MPA—the Association of Magazine Media; the National Association of Advertising Distributors, Inc.; and the Saturation Mailers Coalition, Limitations on the Commission's Authority Under Section 3622(d)(3), October 28, 2014, at 6-7 (2014 ANM *et al.* White Paper); Comments of Alliance of Nonprofit Mailers, Association for Postal Commerce, and MPA—the Association of Magazine Media, March 20, 2017, at 9-10 n.2 (2017 ANM *et al.* Comments); Comments of American Bankers Association, March 20, 2017, at 8-9 (2017 ABA Comments);

for Postal Commerce, MPA—the Association of Magazine Media, American Catalog Mailers Association, Direct Marketing Association of Washington, Nonprofit Alliance, Envelope Manufacturers Association, Saturation Mailers Coalition, and Continuity Shippers Association (collectively, ANM *et al.*), and the American Bankers Association (ABA) continue to make these arguments in response to Order No. 5337. ANM *et al.* Comments at 91-92; ABA Comments at 4.

As an initial matter, the Commission has noted that section titles are not dispositive—they can aid in resolving an ambiguity but they cannot enlarge text or confer powers.[67] Nevertheless, the Commission maintains that its interpretation of paragraph (d)(3) is consistent with the "Requirements" title of subsection (d) and the use of "shall" in paragraph (d)(1), because it is the mandatory features—the "requirements"—of the ratemaking system established under subsection (a), which were put in place during the PAEA's first decade, that are subject to review and potential modification or replacement under paragraph (d)(3). Order No. 5337 at 40. The structure of subsection (d), in which paragraph (d)(3) follows paragraphs (d)(1) and (d)(2), and the text of paragraph (d)(3), which does not impose any specific requirement on a modified or alternative ratemaking system other than that its features must be necessary

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Comments of American Bankers Association, March 1, 2018, at 4-5 (2018 ABA Comments); 2018 ANM *et al.* Comments at 11; 2018 NPPC *et al.* Comments at 20-22.

[67] Order No. 4258 at 16 (citing *Pa. Dep't. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)).

to achieve the statutory objectives, both confirm this. Order No. 5337 at 36, 38-39.

[48] ANM *et al.* argue in response to Order No. 5337 that paragraphs (d)(1), (d)(2), and (d)(3) are each requirements of the ratemaking system, and "[n]othing in the law's structure states that paragraph (d)(3) eliminates the CPI cap from paragraph (d)(1)." ANM *et al.* Comments at 93-94. However, this argument ignores the statutory context on which the second sentence of paragraph (d)(3) is premised—a finding that the ratemaking system established under subsection (a), which included the provisions in paragraphs (d)(1) and (d)(2), has failed to achieve the statutory objectives, taking into account the statutory factors. Moreover, it ignores the fact that the only limit paragraph (d)(3) places on the Commission's ability to modify the ratemaking system or to adopt an alternative ratemaking system is that such changes must be necessary to achieve the objectives in subsection (b). Paragraph (d)(3) does not say that a modified or alternative ratemaking system has to contain the features specified in paragraphs (d)(1) and (d)(2).

Commenters have argued that under general canons of statutory construction, specific provisions, such as the price cap provision at paragraph (d)(1)(A), trump general provisions, such as paragraph (d)(3).[68] However, the logic underlying this general principle does not hold with respect to paragraph (d)(3) because

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[68] 2014 ANM *et al.* White Paper at 15 (citing *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003)).

paragraph (d)(3) expressly contemplates the potential modification or replacement of other provisions of the ratemaking system under section 3622, including the provisions contained in paragraphs (d)(1) and (d)(2). In Order No. 4258, the Commission found that the language of paragraph (d)(3) was intentionally broad, stating that "Congress knew how to impose express limits on the scope of [an] 'alternative system' but chose not to do so with respect to the Commission's authority under [paragraph] (d)(3)." Order No. 4258 at 15.

[49] Commenters have contended that it was not necessary for paragraph (d)(3) to contain a textual modifier limiting the scope of what a modified or alternative system could consist of because the relevant restrictions appear in paragraphs (d)(1) and (d)(2). 2018 ANM *et al.* Comments at 21, 23. In response to Order No. 5337, ANM *et al.* continue to argue that paragraph (d)(3) does not specifically reference the price cap at all, and that "Congress clearly knew how to explicitly refer to the CPI cap. . . ." ANM *et al.* Comments at 94. They maintain that "[paragraphs] (d)(1) and (d)(2) set forth the required parameters of the system[,]" and "it would have been superfluous for Congress to have [repeated them in paragraph (d)(3)]." *Id.* at 98-99. However, nothing in paragraph (d)(3) states that the Commission's authority is limited by paragraphs (d)(1) or (d)(2), and the structure of subsection (d) reinforces the conclusion that paragraphs (d)(1) and (d)(2) are both part of the system subject to modification or replacement under paragraph (d)(3). Order No. 5337 at 38. The

Commission continues to conclude that if Congress had intended to restrict the scope of the Commission's authority in this way, it could have done so expressly.[69]

Commenters have argued that if Congress had intended to enact a sunset date on the CPI-U price cap provision contained in paragraph (d)(1)(A) it would have done so explicitly. 2018 NPPC *et al.* Comments at 25-26. They have noted that paragraph [50] (d)(2) imposes specific limits on paragraph (d)(1), and they have asserted the general legal principle that where certain exceptions to a general prohibition (*i.e.*, the price cap provision at paragraph (d)(1)) are enumerated

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[69] Order No. 5337 at 38 (citing *Smith*, 508 U.S. at 228-229 (rejecting a *Chevron* step one challenge contending that the statutory phrase "use of a firearm" referred only to use as a weapon and did not include use of a firearm as an item of barter to receive drugs, holding that "[s]urely petitioner's treatment of his [firearm] can be described as 'use' within the everyday meaning of that term[,]" and "[h]ad Congress intended the narrow construction petitioner urges, it could have so indicated.")).

Notably, there are instances in the text of section 3622 where Congress explicitly restricted the scope of a particular provision. Paragraph (c)(4), for example, limits the scope of "alternative means of sending and receiving letters and other mail matter at reasonable costs" to alternative means which are "available." 39 U.S.C. § 3622(c)(4); Order No. 4258 at 15. This confirms that Congress knew how to impose limits on the scope of what a modified or alternative ratemaking system could consist of, but it chose not to do so with respect to paragraph (d)(3), and instead drafted it to be intentionally broad. Order No. 4258 at 15-16; Order No. 5337 at 38. The plain language of paragraph (d)(3) leaves it to the Commission's discretion to determine what regulatory changes to the existing ratemaking system, if any, are logically required to achieve the statutory objectives. Order No. 4258 at 15.

specifically, others are not to be implied.[70] As the Commission has explained, however, its interpretation does not rest on an implied exception to paragraph (d)(1); it rests on the express language of paragraph (d)(3), which contemplates that paragraph (d)(1) is part of the system that is to be reviewed and potentially modified or replaced. Order No. 5337 at 41. Moreover, no sunset provision was needed for the CPI-U price cap (or any other feature of the existing ratemaking system) because paragraph (d)(3) does not automatically remove the CPI-U price cap (or any other feature of the existing ratemaking system). *Id.* at 4041. If the existing ratemaking system did not suffer from deficiencies that prevented it from achieving the statutory objectives, taking into account the statutory factors, the Commission's authority under paragraph (d)(3) would not have been invoked and the existing ratemaking system would have remained unchanged. *Id.*

Commenters have argued that the quantitative pricing standards (i.e., paragraphs (d)(1) and (d)(2)) outrank the qualitative pricing standards (*i.e.*, the statutory objectives and factors listed in subsections (b) and (c)) within the hierarchy of pricing standards set out in section 3622.[71] However, regardless of how one classifies the hierarchy of pricing standards for purposes of the existing ratemaking system, the plain language of paragraph (d)(3) states that the only

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[70] 2018 NPPC *et al.* Comments at 26 (citing *Andrus v. Glover Constr.* Co., 446 U.S. 608, 616-617 (1980)).

[71] 2014 ANM *et al.* White Paper at 12; 2017 MMA *et al*. Comments at 15-16; 2018 ANM *et al*. Comments at 18.

criteria that a modified or alternative ratemaking system are required to meet are the statutory objectives in subsection (b). Order No. 5337 at 39-40.

[51] Commenters have asserted that for purposes of paragraph (d)(3) "adopt such alternative system" does not meaningfully differ from "make such modification," and that "revise" in subsection (a) and "modify" in paragraph (d)(3) are synonymous—they are both ways to "adopt an alternative system." 2018 ANM *et al.* Comments at 16-17. However, to interpret "adopt such alternative system" as no different than a "modification" would drain the ordinary meaning from the phrase "alternative system," which connotes a far more fundamental degree of change than "modification." Order No. 5337 at 41. It would also ignore the use of "or," a disjunctive word separating the two phrases that connects terms with separate meanings. *Id.* at 41-42.

Likewise, to interpret "revise" in subsection (a) and "modify" in paragraph (d)(3) as synonymous would ignore the important textual differences between the provisions that provide necessary context to understanding their meaning. "Revise" in subsection (a) is joined to the "establishment" of the ratemaking system by the conjunction "and" and the use of a parenthetical. Hence, "revisions" under subsection (a) are revisions to the ratemaking system "established" under subsection (a). The "modification" and "alternative system" authorities in paragraph (d)(3), on the other hand, are not available unless the Commission has made a finding that the ratemaking system established under subsection (a) has not achieved the statutory objectives,

taking into account the statutory factors. *Id.* Hence, the power to "modify" the ratemaking system under paragraph (d)(3) is plainly broader than the power to "revise" it under subsection (a). Therefore, a plain reading of the PAEA does not support the contention that "adopt such alternative system" is synonymous with, or merely intended to explicate the meaning of, "make such modification," or that "revise" in subsection (a) is synonymous with "modify" in paragraph (d)(3). *Id.* at 42.

A large number of comments have cited the word "system" used throughout section 3622 and argued—invoking the presumption of consistent usage—that consistent use of the word "system," without any qualifiers on it in paragraph (d)(3) such [52] as "the first system" or "the initial system," implies that it should be given the same meaning in each instance in which it appears.[72] These commenters have maintained that the "system" established under subsection (a) is the same "system" subject to modification or replacement under paragraph (d)(3), and as such, it is bound by the same requirements, including those contained in paragraphs (d)(1) and (d)(2). *Id.* These commenters have viewed the "system" subject to modification or replacement under paragraph (d)(3) as consisting only of the implementing regulations that the Commission adopted pursuant to subsection (a), and they maintain that the Commission may alter those regulations only

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[72] 2014 ANM *et al.* White Paper at 10; 2017 ABA Comments at 8-10; 2018 ABA Comments at 5; 2018 ANM *et al.* Comments at 13, 23 n.8, 24; 2018 NPPC *et al.* Comments at 23-25.

to the extent that such alterations do not conflict with the text of section 3622, including paragraphs (d)(1) and (d)(2).[73] In sum, these commenters have argued that the scope of the Commission's authority under paragraph (d)(3) is limited to the scope of the Commission's authority under subsection (a).[74] ANM *et al.* and ABA continue to make these same arguments in response to Order No. 5337. ANM *et al.* Comments at 91-92; ABA Comments at 4-5.

These arguments are unpersuasive. First, the most straightforward reading of the consistent use of the word "system" is that all of the provisions of section 3622 are part of the "system" to be reviewed and potentially modified or replaced under paragraph (d)(3), including paragraphs (d)(1) and (d)(2). Order No. 5337 at 35-36. This reading takes into account the text and structure of section 3622 as a whole, and accords the word "system" its ordinary meaning, in which it refers to a set of connected things or parts forming a complete whole. *Id.* at 35. This reading gives equal recognition to each use of the word "system" in section 3622. Subsection (a) required [53] the Commission to establish the "system of ratemaking;" that "system" was initially required to include certain mandatory features, including those in paragraphs (d)(1) and (d)(2), and under

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[73] 2017 ABA Comments at 9; 2017 MMA *et al.* Comments at 14-15; 2017 GCA Comments at 3132; 2018 ANM *et al.* Comments at 2, 12-13; 2018 NPPC *et al.* Comments at 19.

[74] 2014 ANM *et al.* White Paper at 9-11; 2017 ABA Comments at 9; 2017 MMA *et al.* Comments at 14-15; 2018 ANM *et al.* Comments at 10-13; 2018 NPPC *et al.* Comments at 23-24.

paragraph (d)(3) that "system" in its entirety is subject to review and potential modification or replacement. In arguing that the scope of the Commission's authority under paragraph (d)(3) is limited to the scope of the Commission's authority under subsection (a), these commenters ignore the use of the word "system" in the other subsections within section 3622. Paragraph (d)(1) is expressly identified as part of the "system." 39 U.S.C. § 3622(d)(1). And the Commission has the authority to modify the "system" or adopt an "alternative system." 39 U.S.C. § 3622(d)(3).

Second, even if the matter were not so straightforward, there are clear textual and structural differences between subsection (a) and paragraph (d)(3), which indicate that the Commission's authority under paragraph (d)(3) is broader than under subsection (a). Order No. 5337 at 38. The presumption of consistent usage "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."[75] Had Congress intended only to

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[75] Order No. 5337 at 38-39 (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (internal citation omitted)). Applying the presumption mechanically would "ignore[] the cardinal rule that '[s]tatutory language must be read in context [since] a phrase 'gathers meaning from the words around it.' " Order No. 5337 at 39 (citing *Cline*, 540 U.S. at 596 (internal citation omitted)). It would also ignore the rule that statutes should be read as a whole. *United States v. All. Research Corp.*, 551 U.S. 128, 135 (2007) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)).

allow the Commission to revise the regulations implementing the CPI-U price cap to make them more consistent with the PAEA's statutory objectives, it would have been simpler (and [54] more natural) for Congress to have drafted the second sentence of paragraph (d)(3) accordingly. *Id.* at 42.

Several commenters have asserted that the purpose of paragraph (d)(3) was to mandatorily require (rather than simply permit at the Commission's discretion) a review of the performance of the implementing regulations the Commission adopted pursuant to subsection (a) after 10 years, followed by the making of any necessary changes to those. 2018 ANM *et al.* Comments at 19; 2018 NPPC *et al.* Comments at 27. These commenters have maintained that this interpretation would not render paragraph (d)(3) mere surplusage or an empty formality, because there are a number of regulatory options that the Commission could pursue while still retaining a CPI-U price cap.[76] Other

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Notably, the presumption "relents when a word used has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing." Order No. 5337 at 39 (citing *Cline*, 540 U.S. at 595-596 (noting that the word "age" can be readily understood to have different meanings depending on the context (internal footnote omitted))).

[76] 2018 ANM *et al.* Comments at 19 n.6; 2018 NPPC *et al.* Comments at 27 n.23. Examples these commenters have given include "using a Passche [i]ndex instead of a Laspeyres index]; changing how [the Commission] calculates CPI increases; modify[ing] the cap to subtract for periods of deflation; adopt[ing] an X-Factor to increase the incentive for cost reduction; modify[ing] the rules for below-cost products; defin[ing] more products and

commenters have argued that Congress must have concluded that the mandatory features such as the CPI-U price cap were necessary to achieve the statutory objectives since Congress established them all at the same time when it enacted the PAEA. 2017 MMA *et al.* Comments at 15-16; 2017 GCA Comments at 30-31.

However, the text of the relevant provisions does not support this interpretation. Subsection (a) and paragraph (d)(3) employ different language and feature different triggering mechanisms, which, in conjunction with the overall structure of section 3622 and the statutory context on which the Commission's authority under the second sentence of paragraph (d)(3) is premised (a finding that the system established under subsection (a) has not achieved the statutory objectives, taking into account the statutory factors), confirms that the two provisions serve different purposes. Order No. 4258 at 17-18; Order No. 5337 at 42. Moreover, the Commission has always had the [55] authority to revise its regulations under subsection (a). 39 U.S.C. § 3622(a). Given that, if the scope of the Commission's authority under paragraph (d)(3) were no greater than the scope of its authority under subsection (a), then paragraph (d)(3) would seem to serve no purpose. Likewise, if Congress had concluded that the mandatory features were necessary to achieve the statutory objectives and factors, then paragraph (d)(3) would seem to

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price points within classes and products; or us[ing] a quality-of-service adjusted price cap." 2018 NPPC *et al.* Comments at 27 n.23.

serve no purpose.[77] Such an interpretation would run counter to the fundamental principle that statutes should be read as a whole, and a statute should not be interpreted so as to render any part of it inoperative.[78] Construing paragraph (d)(3) as having no greater scope than subsection (a) would drain paragraph (d)(3) of any power independent of the standing discretionary authority the Commission already enjoys to change its implementing regulations under subsection (a). Order No. 5337 at 42-43.

Contrary to the arguments of commenters, both the text and structure of section 3622 make the purpose of paragraph (d)(3) clear. The Commission was provided general authority to set up and periodically recalibrate the ratemaking system in its initial form under subsection (a), which was required to include certain mandatory features. The Commission was also provided specific authority pursuant to paragraph

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[77] The Commission does not find that it is reasonable to conclude that Congress required the Commission to conduct a detailed review of the ratemaking system in light of the statutory objectives and factors and make written findings with respect to that review using notice-and-comment rulemaking procedures if Congress did not simultaneously envision the possibility of the ratemaking system in its initial form being subject to change.

[78] Order No. 5337 at 42 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59-60 (2007) (rejecting an interpretation that would render a word superfluous and incompatible with the statutory structure); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").

(d)(3) to review the ratemaking system established under subsection (a) after 10 years and modify or replace any part of it, including the mandatory features, as necessary to [56] achieve the PAEA's statutory objectives. Order No. 4258 at 17; Order No. 5337 at 3637.

Moreover, paragraph (d)(3) was the result of a legislative compromise intended to obtain 10 years of rate stability, followed by a Commission-led review of the ratemaking system and, if warranted, modification of the ratemaking system or the adoption of an alternative ratemaking system in order to achieve the statutory objectives. Order No. 4258 at 17; Order No. 5337 at 43. Reading paragraph (d)(3) to confer authority on the Commission that is no greater than the scope of the Commission's authority under subsection (a) would be contrary to this purpose. Order No. 4258 at 17-18. Any suggested interpretation of a statute's plain language must give way if it would conflict with Congress's manifest purposes.[79]

In disputing the Commission's authority under paragraph (d)(3) to modify or replace the CPI-U price cap, ANM *et al.* in response to Order No. 5337 assert that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary

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[79] Order No. 4258 at 18 (citing *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989) ("Congress cannot lightly be assumed to have intended" a result that would "frustrat[e] . . . the very purposes" of the statute); *Dep't of Revenue of Or. v. ACF Indus. Inc.*, 510 U.S. 332, 340 (1994) (No sound approach to statutory interpretation would attribute to Congress an intent to "subvert the statutory plan[.]").

provisions . . . ," and "[r]epeals by implication are very much disfavored."[80] However, for the reasons stated above, this characterization of paragraph (d)(3) and its role within the PAEA's regulatory scheme is fundamentally flawed. The text and structure of section 3622, as confirmed by its legislative history, demonstrate, quite to the contrary, that paragraph (d)(3) forms a central component of what Congress envisioned. As a result, the theoretical removal of the provisions contained in paragraphs (d)(1) and (d)(2) from the ratemaking system would not be a "repeal by implication." *See* ANM *et al.* Comments at 94-95. Paragraph (d)(3) does not [57] repeal anything; it expressly *authorizes* the Commission to take action to execute the law by remedying a failure to achieve the PAEA's statutory objectives, including, if necessary, by adopting an alternative to the existing CPI-U price cap system.

ANM *et al.* also criticize Order No. 5337's explanation of the relationship between subsection (a), subsections (b) and (c), and paragraph (d)(3), stating that "[t]here is . . . nothing in the statute that relegates the objectives and factors to a mere 'background role' under subsection (a) and promotes them to a 'primary role' during the ten-year review required by paragraph (d)(3)." *Id.* at 95-97. However, as explained above, the purpose of paragraph (d)(3) is to ensure that the statutory objectives appearing in subsection (b) are being

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[80] ANM *et al.* Comments at 94-95 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *Fogg v. Gonzalez*, 492 F.3d 447, 453 (D.C. Cir. 2007) (citation omitted)).

met. It was in this sense that the Commission in Order No. 5337 referred to the statutory objectives as occupying a more "primary" role in the paragraph (d)(3) context. See Order No. 5337 at 37.

In response to Order No. 5337, Mailers Hub LLC (Mailers Hub) suggests that while the Commission is legally required to develop remedial prescriptions if its paragraph (d)(3) review finds that the ratemaking system is not achieving the statutory objectives, taking into account the statutory factors, the Commission has discretion to defer implementation of those remedial measures if they "would be harmful and counterproductive." Mailers Hub Comments at 10-11. The Commission of course recognizes that by virtue of paragraph (d)(3)'s use of the word "may," the Commission has discretion as to whether to implement changes to the ratemaking system under paragraph (d)(3). However, the Commission disagrees with Mailers Hub's assertion that the modifications the Commission is adopting, which are relatively modest in scope, will be harmful or counterproductive. The Commission has appropriately balanced the statutory objectives and has considered arguments regarding the possibility that increased rate adjustment authority could lead to volume losses that could harm the Postal Service's finances. The Commission has found such concerns to be unwarranted. *See* Sections IV.C.1., V.C.1., and XIII.E., *infra.*

[58] In sum, given the overwhelming consensus of section 3622's text, structure, purpose, and legislative history as to what Congress intended and envisioned,

commenters opposing the Commission's interpretation of section 3622 have failed to demonstrate that their alternative interpretations are plausible at all, much less that they unambiguously foreclose the Commission's interpretation.[81]

Nevertheless, despite the Commission's clear legal authority to adopt an alternative ratemaking system,

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[81] *See, e.g.*, *Petit*, 675 F.3d at 781 (to prevail under *Chevron* step one, a challenger "must do more than offer a reasonable or, even the best, interpretation [of the statute in question]." (quoting *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011)) (internal marks omitted). "Instead, they 'must show that the statute *unambiguously* forecloses the [agency's] interpretation.'" *Petit*, 675 F.3d at 781 (emphasis in original) (quoting *Village of Barrington*, 636 F.3d at 661). "[T]hey must demonstrate that the challenged term is susceptible of only [one] possible interpretation." *Petit*, 675 F.3d at 781 (quoting *Shalala*, 192 F.3d at 1015 (internal marks and citation omitted)).

The Commission notes that other commenters have generally supported its interpretation of paragraph (d)(3), at least insofar as it pertains to section 3622's price cap provisions. *See* Comments of the United States Postal Service, March 20, 2017, at 19-20 (2017 Postal Service Comments); Comments of the Public Representative, March 21, 2017, at 29-30 (2017 PR Comments); Comments of the American Postal Workers Union, AFL-CIO, March 20, 2017, at 5-6 (2017 APWU Comments); Comments of the National Association of Letter Carriers, AFL-CIO, March 20, 2017, at 16-17 (2017 NALC Comments); Initial Comments of the United States Postal Service in Response to Order No. 4258, March 1, 2018, at 11-12 (2018 Postal Service Comments); Reply Comments of the United States Postal Service in Response to Order No. 4258, March 30, 2018, at 7-19 (2018 Postal Service Reply Comments); Reply Comments of the Public Representative, March 30, 2018, at 8-9 (2018 PR Reply Comments). In response to Order No. 5337, two separate commenters, NPMHU and the Postal Service, support the Commission's interpretation of paragraph (d)(3). NPMHU Comments at 2; Postal Service Reply Comments at 8.

the final rules implemented in this Order serve to modify, rather than replace, the existing ratemaking system. *See* Order No. 5337 at 33-35. The relatively narrow approach that the Commission has taken seeks to preserve the ratemaking system in its initial form to the greatest extent possible, while at the same time making modifications necessary to achieve the statutory objectives that are responsive to the system's failings. The Commission is not jettisoning the CPI-U price cap; it is implementing adjustments to the CPI-U price cap that remain consistent with price cap theory. *Id.* at 34. Price cap formulas have generally started with a measure of [59] inflation (called the inflation factor), such as the CPI-U index, which the final rules retain.[82] Many of these price cap formulas have also included various adjustments to the inflation factor, which the final rules for the first time introduce into the ratemaking system's design.[83] Based on the

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[82] *Id.* at 34 (citing United States Postal Service, Office of Inspector General, Report No. RARC-WP-13-007, Revisiting the CPI-Only Price Cap Formula, April 12, 2013, at 46, available at: https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-13-007_0.pdf (RARC-WP-13-007)).

[83] Order No. 5337 at 34. As explained in Order No. 5337, most price cap formulas include an "X-factor" to offset productivity growth. *See* RARC-WP-13-007 at 45; United States Postal Service, Office of Inspector General, Risk Analysis Research Center, Report No. RARC-WP-17-003, Lessons in Price Regulation from International Posts, February 8, 2017, Appendix A at 16, available at: https://www.uspsoig.gov/sites/default/files/document-library-files/2017/RARC-WP-17-003.pdf; David E.M. Sappington, *Price Regulation and Incentives*, Body of Knowledge on Infrastructure Regulation (December 2000), at 14, available at: http://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Sappington_

Commission's findings in Order No. 4257, the Commission has determined that adjustment factors are now necessary to remedy the existing ratemaking system's failure to achieve the statutory objectives, taking into account the statutory factors. Order No. 5337 at 34. The adjustments being adopted in this Order generally maintain an inflation-based price cap using the CPI-U index, while also remediating aspects of the existing ratemaking system that have proven to be inadequate to achieve the statutory objectives. *Id.* at 35. However, as explained *supra*, even if the Commission's proposal were to be construed as an "alternative system," the Commission has the authority under paragraph (d)(3) to implement such a change.

[60] 2. If any ambiguity exists, it is reasonable to construe the CPI-U price cap as part of the system subject to review and potential modification or replacement by the Commission.

In the alternative, the PAEA is at most ambiguous on the question of whether the adjustments to the CPI-U price cap proposed by the Commission are within the scope of the phrase "make such modification or adopt such alternative system for regulating rates and

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Price_Regulation_and.pdf. Price cap plans also may regulate service quality using a reward- or penalty-style "Q-factor." *See* Sappington (2000) at 14-15, 51; Copenhagen Economics, Postal Quality and Price Regulation, March 29, 2017, at 18 n.19 (Copenhagen Economics Report). Other adjustment factors include a "Y-factor" to address recurring exogenous costs, or a "Z-factor" to address an exogenous one-time cost. *See* RARC-WP-13-007 at 16.

classes for market-dominant products as necessary to achieve the objectives." *See* 39 U.S.C. § 3622(d)(3). At *Chevron* step two, courts "ask 'whether the agency's [interpretation] is based on a permissible construction of the statute.'" *Petit*, 675 F.3d at 785 (quoting *Chevron*, 467 U.S. at 843). Courts consider "whether the [agency] has reasonably explained how the permissible interpretation it chose is 'rationally related to the goals of the statute." *Petit*, 675 F.3d at 785 (quoting *Village of Barrington*, 636 F.3d at 665 (internal marks omitted)). "If the statute is ambiguous enough to permit the agency's reading, . . . [courts will generally] defer to that interpretation so long as it is reasonable."[84]

To the extent that paragraph (d)(3) may be ambiguous, the Commission's interpretation articulated above is reasonable and thus would be entitled to *Chevron* deference.[85] The same analysis set out above with regard to *Chevron* step one would be equally

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[84] *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009) (citing *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003)).

[85] An agency may argue in the alternative as to whether its reading of a statute is proper under Chevron step one or Chevron step two. *See, e.g., United Parcel Serv., Inc. v. Postal Reg. Comm'n*, 890 F.3d 1053, 1063 (D.C. Cir. 2018) ("Given our conclusion that the Commission's reading of 'institutional costs' is reasonable and so merits our deference [under Chevron step two], we need not consider the Commission's argument that, under Chevron [step one], its reading is not only permissible, but also unambiguously correct."); *Decatur Cty. Gen. Hosp. v. Johnson*, 602 F. Supp. 2d 176, 186 n.6 (D.D.C. 2009) (holding that agency's decision to apply cost reduction factors to base year costs was entitled to deference under Chevron step two, where the agency also provided an alternative justification under *Chevron* step one).

applicable to explain how the Commission's interpretation of section 3622 is [61] consistent with the statute's text, context, structure, purpose, and legislative history, and is thus reasonable.

Furthermore, to the extent that any ambiguity exists with regard to paragraph (d)(3), it is permissible to use Senator Collins' floor statement as an interpretative aid and reasonable to conclude from that statement that paragraph (d)(3) permits the Commission to modify or replace the price cap provisions. Order No. 5337 at 45. Following the passage of two different postal reform bills, key members of the House and the Senate (including Senator Collins) negotiated a compromise.[86] The final text of the PAEA was introduced in a new bill and was approved without amendment by both the House and the Senate.[87] As to the compromise nature of the PAEA, Senator Collins stated:

> This *compromise* is not perfect and, indeed, earlier tonight, there were issues raised by the appropriators—legitimate issues—that threatened at one point to derail the bill again. It has been a delicate *compromise* to satisfy all of the competing concerns.

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[86] 151 Cong. Rec. H6511, H6548-H6549 (daily ed. July 26, 2005) (Roll Call No. 430) (reflecting a vote of 410-20 in the House); 152 Cong. Rec. S898, S927-S942 (daily ed. Feb. 9, 2006) (reflecting approval by unanimous consent in the Senate); 152 Cong. Rec. H9160, H9179 (daily ed. Dec. 8, 2006) (statement of Rep. Tom Davis).

[87] 152 Cong. Rec. H9160-H9182 (daily ed. Dec. 8, 2006); 152 Cong. Rec. S11,821-S11,822 (daily ed. Dec. 8, 2006); *see* 152 Cong. Rec. D1153, D1162 (daily digest, Dec. 8, 2006).

> Everyone has had to *compromise*, but I think we have come up with a good bill. This *compromise* will help ensure a strong financial future for the U.S. Postal Service and the many sectors of our economy that rely on its services, and it reaffirms our commitment to the principle of universal service that I believe is absolutely vital to this institution.[88]

Senator Thomas Carper also confirmed that the final bill was "a difficult compromise."[89]

[62] Paragraph (d)(3) first appeared in this final version, and it was not addressed in any hearings or committee reports.[90] Neither the presidential signing statement nor any other floor statements addressed paragraph (d)(3).[91] Accordingly, Senator Collins' floor statement is the best source of legislative history to shed light on the purpose of paragraph (d)(3).[92] Specifically, Senator Collins remarked:

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[88] 152 Cong. Rec. S11,674, S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins) (emphasis added).

[89] 152 Cong. Rec. S11,674, S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Carper).

[90] H.R. 6407, 109th Cong., at 7 (2006); Order No. 4258 at 21; Order No. 5337 at 45-46.

[91] Statement on Signing the Postal Accountability and Enhancement Act, 42 Weekly Comp. Pres. Doc. 2196-2197 (Dec. 20, 2006), 2006 U.S.C.C.A.N. S76 (2006); 152 Cong. Rec. H9160-H9182 (daily ed. Dec. 8, 2006); 152 Cong. Rec. S11,674-S11,677, S11,821-S11,822 (daily ed. Dec. 8, 2006).

[92] Order No. 5337 at 46. Numerous commenters have expressed agreement with the Commission's interpretation of the PAEA's legislative history. *See* 2017 Postal Service Comments at 2122; 2017 NALC Comments at 16; 2017 APWU Comments at

> The Postal Service will have much more flexibility, but the rates will be capped at the CPI. That is an important element of providing 10 years of predictable, affordable rates, which will help every customer of the Postal Service plan. After 10 years, the Postal Regulatory Commission will review the rate cap and, if necessary, and following a notice and comment period, the Commission will be authorized to modify or adopt an alternative system.
>
> While this bill provides for a decade of rate stability, I continue to believe that the preferable approach was the permanent flexible rate cap that was included in the Senate-passed version of this legislation. But, on balance, this bill is simply too important, and that is why we have reached this compromise to allow it to pass. We at least will see a decade of rate stability, and I believe the Postal [Regulatory] Commission, at the end of that decade, may well decide that it is best to continue with a CPI rate cap in place. It is also, obviously, possible for Congress to act to reimpose the rate cap after it *expires*. But this legislation is simply too vital to our economy to pass on a decade of stability. The consequences of no legislation would be disastrous for the Postal Service, its employees, and its customers.[93]

5-6; 2018 Postal Service Comments at 1112; 2018 Postal Service Reply Comments at 14-15.

[93] 152 Cong. Rec. S11,674, S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins) (emphasis added).

Senator Collins' statement confirms that paragraph (d)(3) was a part of a legislative compromise that required the price cap "Requirements" to remain in place for 10 years, and then allowed the Commission the opportunity to review the effectiveness [63] of the ratemaking system and potentially design a modified or alternative ratemaking system.[94] Senator Collins' statement confirms that the congressional sponsors of the PAEA contemplated that the Commission would have broad discretion following its paragraph (d)(3) review—including deciding whether to maintain the price cap in its existing form, modify it, or replace it. Order No. 5337 at 46-47. That Senator Collins believed that Congress might need to "reimpose the rate cap after it expires" clearly evidences recognition that the Commission would have the authority following its paragraph (d)(3) review to eliminate the price cap through potential modification of the ratemaking system or through the adoption of an alternative ratemaking system. The statement also confirms that Congress did not consider the CPI-U price cap to be a permanent or immutable requirement of the ratemaking system.

Senator Collins' floor statement demonstrates that Congress contemplated the breadth of the Commission's authority to review and, if needed, to modify or replace the ratemaking system if the Commission

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[94] It is worth noting that it was Senator Collins who introduced the initial bill in the Senate which contained the "requirement" language with regard to the CPI-U price cap. As a result, her statement in the Congressional Record is particularly probative as to the intended meaning of paragraph (d)(3).

determined that the existing system was not achieving the statutory objectives. Order No. 4258 at 22-23; Order No. 5337 at 46-47. Senator Collins' statement confirms that Congress considered the CPI-U price cap to be a part of the system subject to the Commission's authority under paragraph (d)(3). Order No. 4258 at 22-23; Order No. 5337 at 46-47. Moreover, the statement negates any interpretation that paragraph (d)(3) was intended to deny the Commission the authority to modify or replace the CPI-U price cap. Senator Collins explained that the PAEA guaranteed that the CPI-U price cap would exist for a minimum of 10 years.[95] Senator Collins explained that the 10-year review would occur and discussed potential outcomes: either the Commission would decide to retain the CPI-U price cap in its current form; the Commission would decide to modify the CPI-U price cap; or the [64] Commission would decide to replace the CPI-U price cap system with an alternative system (subject, of course, to the possibility that Congress could elect to reinstate the CPI-U price cap through legislation). Order No. 5337 at 46-47. This statement directly rebuts any suggested interpretation that the drafters of the PAEA intended for the Commission's 10-year review to redress *only* technical or procedural issues with regard to implementing the CPI-U price cap, which would be the case if the scope of the Commission's rulemaking authority under paragraph (d)(3) were limited to the scope of its rulemaking authority under subsection (a).

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[95] 152 Cong. Rec. S11,674-S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins).

Id. at 47. Therefore, if section 3622 is deemed to be ambiguous, the legislative history confirms the reasonableness of the Commission's interpretation of its statutory authority to modify the ratemaking system or adopt an alternative ratemaking system. *Id.*

Commenters have asserted that Senator Collins' statement must be disregarded because it is not an authoritative expression of legislative intent (such as an official committee report).[96] They have also asserted that Senator Collins' statement is inconsistent with the longstanding role of Congress in managing the postal system. 2018 NPPC *et al.* Comments at 29. They have stated that the compromise embodied in the PAEA "could well have been to require the Commission to review the operation of the rate system after 10 years and evaluate how to modify it to improve performance while still retaining the CPI-based limitation." 2018 ANM *et al.* Comments at 25. In response to Order No. 5337, ANM *et al.* continue to argue that "regardless of what Senator Collins said on the Senate floor . . . [that] statement cannot override the plain text of the statute." ANM *et al.* Comments at 103.

However, floor statements by key individuals, such as legislative sponsors, especially where no legislators offered contrary views, help illuminate the purpose of a [65] piece of legislation.[97] Floor statements are

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[96] *See* 2018 ABA Comments at 6; 2018 ANM *et al*. Comments at 25-26; 2018 NPPC *et al*. Comments at 28-29.

[97] Order No. 5337 at 45; *see Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (finding that an uncontradicted floor statement by of one of the legislation's sponsors

particularly instructive in clarifying the purpose of language where no other evidence of legislative intent exists.[98] Moreover, "[s]ection 3622 fits within a history of Congressional delegations of decision-making authority concerning postal matters, including ratemaking." Order No. 5337 at 47 (quoting 2018 Postal Service Reply Comments at 16). Furthermore, as Senator Collins expressly stated, Congress may re-impose the CPI-U price cap at any time.[99] Particularly in this instance where the sole source of legislative history is uncontradicted and is consistent with the Commission's interpretation of the text and structure of section 3622, the Commission's interpretation must be accorded substantial deference.

Commenters have also asserted that the Commission's interpretation of paragraph (d)(3) conflicts with statements the Commission has made in the past.[100] In

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"deserves to be accorded substantial weight in interpreting the statute").

[98] Order No. 5337 at 45; *see North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982) (finding remarks on the Senate floor by "the sponsor of the language ultimately enacted[] are an authoritative guide to the statute's construction" where no committee report addressed the provisions at issue); *St. Louis Fuel & Supply* Co. *v. FERC*, 890 F.2d 446, 449 (D.C. Cir. 1989) (finding that sponsors' floor statements were "the only evidence of congressional intent," and concluding that such remarks "necessarily have some force" and "carry 'substantial weight' " (internal citation omitted)).

[99] Order No. 5337 at 47 (citing 152 Cong. Rec. S11,674-S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins)).

[100] 2014 ANM *et al.* White Paper at 12-14 (citing Docket No. RM2009-3, Order Adopting Analytical Principles Regarding Workshare Discount Methodology, September 14, 2010 (Order

[66] response to Order No. 5337, ANM *et al.* identify two additional such statements.[101] They contend that "[a]n agency cannot typically abandon an earlier position . . . , but is instead 'obligated to supply a reasoned analysis for the change.' "[102]

In terms of the two-step *Chevron* framework, if a court were to decide this issue at *Chevron* step one, prior orders of the Commission would not be dispositive.[103] In the alternative that a court were to evaluate this issue under *Chevron* step two to determine

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No. 536); Docket No. ACR2010, *Annual Compliance Determination*, March 29, 2011 (FY 2010 ACD); Docket No. ACR2010R, Order on Remand, August 9, 2012 (Order No. 1427); Docket No. ACR2011, *Annual Compliance Determination*, March 28, 2012, at 17 (FY 2011 ACD)); 2017 ABA Comments at 8 (citing Docket No. R2010-4, Order Denying Request for Exigent Rate Adjustments, September 20, 2010 (Order No. 547); 2017 MMA *et al.* Comments at 15-16 (citing FY 2010 ACD); 2018 ABA Comments at 5 n.4 (citing Order No. 547); 2018 ANM *et al.* Comments at 13-15, 18, 27-29 (citing Docket No. RM2007-1, Regulations Establishing System of Ratemaking, August 15, 2007 (Order No. 26); Order No. 536; Order No. 547; Order No. 1427; Docket No. R2010-4R, Order Resolving Issues on Remand, September 20, 2011 (Order No. 864)); 2018 NPPC *et al.* Comments at 26 (citing Order No. 547; Order No. 536; FY 2010 ACD).

[101] ANM *et al.* Comments at 103-104; ANM *et al.* Reply Comments at 16 (citing Order No. 547; Docket No. R2013-11, Order Granting Exigent Price Increase, December 24, 2013 (Order No. 1926)).

[102] ANM *et al.* Comments at 104 (citing *Trunkline LNG v. FERC*, 921 F.2d 313, 320 (D.C. Cir. 1990) (internal citations omitted)).

[103] Order No. 5337 at 47; *see Chevron*, 467 U.S. at 842-843 ("If the intent of Congress is clear, that is the end of the matter. . . .").

whether the Commission should be accorded deference, it is important to recognize that "[a]n initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863. Agencies "must consider varying interpretations and the wisdom of [their] polic[ies] on a continuing basis." *Id.* at 863-864. Nevertheless, the Commission has not changed its interpretation or its position because, as the Commission has explained in prior orders, none of the statements cited by commenters were an interpretation of paragraph (d)(3)—they were all statements addressing the contours of the ratemaking system promulgated under subsection (a) in its initial form. Order No. 4258 at 18; Order No. 5337 at 47-53.

This is also true of the two additional statements identified by ANM *et al.* They cite to statements from Order No. 547 and Order No. 1926 to the effect that changes in circumstances, such as volume declines, are generally to be accommodated within the CPI-U price cap "by reducing costs and increasing efficiencies." ANM *et al.* Reply Comments at 16 (quoting Order No. 1926 at 175). However, as with the other prior Commission statements that ANM *et al.* have cited to in this proceeding, these statements were not interpretations of the Commission's authority under paragraph [67] (d)(3). They were made in the context of ratemaking system as it was initially established under subsection (a). Therefore, the Commission has not changed its interpretation or its position.

ANM *et al.* also argue, in response to Order No. 5337, that even if the meaning of paragraph (d)(3) is

ambiguous, "[m]ere ambiguity in a statute is not evidence of congressional delegation of authority."[104] They assert that the Commission's interpretation will lead to "unprecedented" rate increases and volume losses, which cannot be what Congress intended.[105]

However, explicit delegations of authority are typically found where "Congress has expressly delegated to [an agency] the authority to prescribe regulations containing 'such . . . provisions' as, in the judgment of the [agency], 'are necessary or proper to effectuate the purposes of [the authorizing statute]. . . .' "[106] Paragraph (d)(3) empowers the Commission to "*by regulation*, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives." 39 U.S.C. § 3622(d)(3) (emphasis added). This is a clear delegation of authority by Congress. Furthermore, as with Mailers Hub's comments, the Commission disagrees with the assertion that the modifications the Commission is adopting, which are relatively modest in scope, will be harmful or counterproductive. The Commission has considered arguments regarding the possibility that increased rate adjustment authority

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[104] ANM *et al.* Comments at 100 (citing *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) (internal citation and marks omitted)).

[105] ANM *et al.* Comments at 101 (citing *Bechtel Constr., Inc. v. United Bhd. of Carpenters & Joiners of Am.*, 812 F.2d 1220, 1225 (9th Cir. 1987) (court should avoid construction establishing illogical, unjust, or capricious statutory scheme)).

[106] *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004) (internal citations omitted).

could lead to volume losses that could harm the Postal Service's [68] finances, and has found such concerns to be unwarranted. *See* Sections IV.C.1., V.C.1., and XIII.E., *infra.*

In sum, even if paragraph (d)(3) were construed to be ambiguous, the Commission's interpretation of section 3622 is reasonable and permissible and thus would be entitled to *Chevron* deference.

C. Workshare Discounts

In addition to price cap adjustments, the Commission is also adopting modifications to the workshare discount provisions set out in subsection (e) of section 3622. A number of commenters have argued that the workshare discount provisions are outside the scope of the "system" subject to modification or replacement under paragraph (d)(3).[107] These commenters have

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[107] *See, e.g.*, 2017 APWU Comments at 5; 2017 Postal Service Comments at 19, 28-30; 2017 GCA Comments at 36-37; Initial Comments of the Greeting Card Association, March 1, 2018 at 1 n.1 (2018 GCA Comments); 2018 Postal Service Reply Comments at 108 n.285, 111 n.292. Other commenters have supported the Commission's interpretation of its legal authority with regard to workshare discounts. *See* 2017 ABA Comments at 11; 2017 ANM *et al*. Comments at 11-12, 82; Comments of the Honorable Jason Chaffetz and the Honorable Mark Meadows of the U.S. House of Representatives Committee on Oversight and Government Reform, March 20, 2017, at 2 (2017 Chairman Chaffetz and Chairman Meadows Comments); 2017 MMA Comments at 19, 71; Comments of Pitney Bowes Inc., March 20, 2017, at 3-4 (2017 Pitney Bowes Comments); Comments of the Parcel Shippers Association Pursuant to Commission Order No. 3673, March 20, 2017, at 6 (2017 PSA Comments); 2018 ANM *et al.* Reply Comments at

argued that, structurally, the "system" subject to review and potential modification or replacement under section 3622 consists only of subsections (a) through (d), with paragraph (d)(3) coming at the tail end.[108] Because subsection (e) comes after paragraph (d)(3), they view it as being outside of that "system." *Id.* These commenters have also argued that the PAEA's legislative history demonstrates that Congress did not intend for the requirement that workshare discounts be prohibited from exceeding their avoided costs to be abrogated. 2017 [69] Postal Service Comments at 30-31; 2017 GCA Comments at 34. These commenters have cited prior statements by the Commission that they claim corroborate their view that the workshare discount provisions are separate and distinct from the other parts of the "system" under section 3622. 2017 Postal Service Comments at 32 (citing Order No. 536); 2017 GCA Comments at 36 (same).

However, subsection (e), like the other parts of section 3622, is part of the system subject to review and potential modification or replacement under paragraph (d)(3). Paragraph (d)(3) instructs the Commission to "review the system for regulating rates and classes for market-dominant products *established under this section*. . . ." 39 U.S.C. § 3622(d)(3) (emphasis added). This phrase clearly and unambiguously encompasses section 3622 in its entirety, including subsection (e). Order

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73-74; 2018 NPPC *et al.* Reply Comments at 5; 2018 Pitney Bowes Comments.

[108] 2017 Postal Service Comments at 19, 28-29; 2017 APWU Comments at 5; 2017 GCA Comments at 37-38.

No. 4258 at 18. This conclusion derives from both the plain meaning of the term "section," as well as the fact that within section 3622 there is a clear differentiation made between "sections" and "subsections."[109] If Congress had wished to limit the system subject to review and potential modification or replacement to subsections (a) through (d), it could have done so.

In addition, one of the statutory factors in subsection (c) that the Commission is required to consider when establishing or reviewing the ratemaking system is "the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service. . . ." 39 U.S.C. § 3622(c)(5). Subsection (e) defines workshare discounts as discounts mailers receive for additional preparation of mailpieces, such as "presorting, prebarcoding, handling, or transportation. . . ." *See* 39 U.S.C. § 3622(e)(1). It is clear that Factor 5 is referring to workshare discounts. Thus, contrary to the structural arguments advanced by [70] commenters, the workshare discount provisions are expressly recognized within subsections (a) through (d), which even under the commenters' interpretation are part of the "system." Therefore, the workshare discount provisions are plainly part of the ratemaking system subject to review and possible modification or replacement under

[109] Order No. 4258 at 18-29; *see* 39 U.S.C. § 3622(d)(3) ("[T]he Commission shall review the system for regulating rates and classes for market-dominant products established under *this section* to determine if the system is achieving the objectives in *subsection* (b), taking into account the factors in *subsection* (c).") (emphasis added).

paragraph (d)(3), and any analysis of the issue need go no further than *Chevron* step one. Order No. 4258 at 19; Order No. 5337 at 57. However, even if the question were found to be ambiguous, the Commission would still be entitled to deference under *Chevron* step two given its reasonable and permissible construction of the PAEA. Order No. 5337 at 57.

In addition, even if a court found that paragraph (d)(3) did not authorize the worksharing modifications, the changes to the workshare discount provisions that the Commission is adopting are within the scope of the Commission's standing rulemaking authority (under 39 U.S.C. §§ 3622(a) and 503) and are consistent with the Commission's specific authority to regulate excessive workshare discounts under section 3622, subsection *(e)*. *Id.* at 57-58. Subsection (e) is silent with regard to workshare discounts set lower than avoided costs and therefore does not clearly foreclose the regulation of workshare discounts set lower than avoided costs. *Id.* at 58. Furthermore, the Commission's interpretation "is 'rationally related to the goals of'" the PAEA. *Id.* (citing *Petit*, 675 F.3d at 781). Accordingly, the Commission has multiple sources of authority to support addressing workshare discounts in this proceeding. Order No. 5337 at 58.

D. Annual Compliance Reporting Requirements

The Commission is also modifying the reporting requirements codified at 39 C.F.R. parts 3050

(Periodic Reporting) and 3055 (Service Performance and Customer Satisfaction Reporting). These modifications both further the achievement of the PAEA's statutory objectives and conform with the changes proposed to 39 C.F.R. part 3030 (Regulation of Rates for Market Dominant Products). Additionally, they are [71] separately authorized under the Commission's specific authority to "prescribe the content and form of the public reports . . . to be provided by the Postal Service [as part of its ACR]." 39 U.S.C. § 3652(e)(1). These changes will ensure that the Commission can evaluate the Postal Service's compliance with the new regulations proposed in part 3030 and will further the public interest in transparency with respect to the Postal Service's finances, service standards, and efficiency. 39 U.S.C. § 3652(e)(2)(C).

* * *

APPENDIX C

ORDER NO. 5337

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

Before Commissioners: Robert G. Taub, Chairman;
Michael Kubayanda,
Vice Chairman;
Mark Acton;
Ann C. Fisher; and
Ashley E. Poling

Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products — Docket No. RM2017-3

REVISED NOTICE OF PROPOSED RULEMAKING

[LOGO]

Washington, DC 20268-0001
December 5, 2019

TABLE OF CONTENTS

Page

I. INTRODUCTION AND PROCEDURAL HISTORY 1

II. OVERVIEW 4

A. The Need for Modifications to the System of Ratemaking 4

B. Overview of Proposals in NPR 7

C. Overview of Proposals in Revised NPR.... 10

III. REVIEW OF COMMENTS CONCERNING STATUTORY AUTHORITY 16
A. Introduction 16
B. Comments 18
1. Introduction 18
2. Additional Rate Adjustment Authority 18
3. Workshare Discounts 31
C. Commission Analysis 32
1. Introduction 32
2. Additional Rate Adjustment Authority 32
3. Workshare Discounts 57
4. Annual Compliance Reporting Requirements 58
IV. SUPPLEMENTAL RATE AUTHORITY 59
A. Introduction 59
B. Comments 60
C. Commission Analysis 62
D. Density 63
1. Introduction 63
2. Comments 64
3. Commission Analysis 70
4. Commission Proposal 77
E. Retirement Obligations 81
1. Introduction 81
2. Comments 83

3. Commission Analysis..... 88
4. Commission Proposal 95
V. PERFORMANCE-BASED RATE AUTHORITY..... 104
A. Introduction..... 104
B. Comments..... 106
C. Commission Analysis 107
1. Justification for Performance-Based Rate Authority..... 107
2. Amount of Authority..... 118
3. Operational Efficiency Benchmark for Performance-Based Rate Authority 125
4. Service Standards as Benchmark.... 137
5. Split Between Operational Efficiency and Service Standards..... 143
6. Effect of Proposals 145
D. Commission Proposal 148
VI. NON-COMPENSATORY PRODUCTS AND CLASSES..... 151
A. Non-Compensatory Products..... 151
1. Introduction..... 151
2. Comments..... 154
3. Commission Analysis..... 156
4. Commission Proposal 163
B. Non-Compensatory Classes..... 163
1. Introduction..... 163
2. Comments..... 165

3. Commission Analysis 168
4. Commission Proposal 174
VII. WORKSHARE DISCOUNTS 175
A. Introduction 175
B. Comments 177
1. Overview 177
2. Workshare Discounts that are Below Avoided Costs 185
3. Workshare Discounts that Exceed Avoided Costs 187
4. Other Issues 190
C. Commission Analysis 192
1. Overview 192
2. Workshare Discounts that are Below Avoided Costs 195
3. Workshare Discounts that Exceed Avoided Costs 201
4. Other Issues 204
D. Commission Proposal 206
VIII. COST REDUCTION REPORTING REQUIREMENTS 212
A. Introduction 212
B. Comments 213
C. Commission Analysis 221
1. Overview 221
2. The Postal Service's Incentives to Reduce Costs 221

3. The Need for Increased Transparency and Accountability 223
D. Commission Proposal 227
1. Overview 227
2. Cost Reporting 227
3. Cost Reduction Initiative Report 229
4. Decision Analysis Reports 231
IX. PROCEDURAL IMPROVEMENTS 232
A. Introduction 232
B. Comments 233
C. Commission Analysis 236
D. Commission Proposal 238
X. 5-YEAR REVIEW (FORMERLY SAFEGUARDS) 241
A. Commission Proposal 241
B. Comments 242
C. Commission Analysis 243
XI. SECTION-BY-SECTION ANALYSIS OF THE PROPOSED CHANGES TO 39 C.F.R. PART 3010, AS REVISED 244
A. Proposed Subpart A of 39 C.F.R. Part 3010—General Provisions 244
B. Proposed Subpart B of 39 C.F.R. Part 3010—Rate Adjustments 245
C. Proposed Subpart C of 39 C.F.R. Part 3010—Consumer Price Index Rate Authority 251

D. Proposed Subpart D of 39 C.F.R. Part 3010—Density Rate Authority 252

E. Proposed Subpart E of 39 C.F.R. Part 3010—Retirement Obligation Rate Authority 252

F. Proposed Subpart F of 39 C.F.R. Part 3010—Performance-Based Rate Authority 254

G. Proposed Subpart G of 39 C.F.R. Part 3010—Non-Compensatory Classes or Products 255

H. Proposed Subpart H of 39 C.F.R. Part 3010—Accumulation of Unused and Disbursement of Banked Rate Adjustment Authority 256

I. Proposed Subpart I of 39 C.F.R. Part 3010—Rate Adjustments Due to Extraordinary and Exceptional Circumstances 260

J. Proposed Subpart J of 39 C.F.R. Part 3010—Workshare Discounts 260

XII. SECTION-BY-SECTION ANALYSIS OF THE PROPOSED CHANGES TO 39 C.F.R. PART 3020, AS REVISED 268

A. Proposed Conforming Changes to Supporting Justifications and Comment Opportunity 268

B. Proposed Subpart G of 39 C.F.R. Part 3020—Requests for Market Dominant Negotiated Service Agreements 270

XIII. SECTION-BY-SECTION ANALYSIS OF THE PROPOSED CHANGES TO 39 C.F.R. PART 3050, AS REVISED 273

XIV. SECTION-BY-SECTION ANALYSIS OF THE PROPOSED CHANGES TO 39 C.F.R. PART 3055, AS REVISED 276

XV. ADMINISTRATIVE ACTIONS 277

XVI. ORDERING PARAGRAPHS 278

Attachment A—Proposed Rules

* * *

[16] III. REVIEW OF COMMENTS CONCERNING STATUTORY AUTHORITY

A. Introduction

Section 3622 of title 39 of the United States Code established a system to regulate the rates and classes of Market Dominant postal products. In order to put this system into operation, subsection (a) required the Commission to complete the initial setup within 18 months of the PAEA's enactment, and it allows for periodic adjustments to be made thereafter. In taking regulatory action pursuant to subsection (a), the Commission must apply 9 statutory objectives in conjunction with one another, and must also consider 14 statutory factors. 39 U.S.C. § 3622(a)(b)(c). Paragraphs (d)(1) and (d)(2) set forth specific parameters for the Commission's implementation of the system, including an annual limitation on the percentage change in rates for each mail class set equal to the annual percentage change in the consumer price index for all urban

consumers (the CPI-U price cap). Subsection (e) codifies the basic parameters which had been developed by the former Postal Rate Commission to ensure that workshare discounts do not violate the ECP principle by offering too great a discount.[17] Subsection (f) allowed the Postal Service, within 1 year of the PAEA's enactment, to initiate a final rate proceeding in accordance with the pre-PAEA ratemaking system.

Paragraph (d)(3) of section 3622 requires the Commission to conduct a review of the Market Dominant ratemaking system 10 years after the PAEA's enactment. The purpose of the review is to determine whether the system is achieving the objectives appearing in subsection (b), taking into account the factors appearing in subsection (c). If, upon completion of the mandatory 10-year review, including an opportunity for notice [17] and public comment, the Commission determines that the system is not achieving the objectives (taking into account the factors), then specific statutory authority on the Commission's part is triggered. Paragraph (d)(3) grants the Commission discretion to "by regulation, make such modification or adopt such alternative system for regulating rates and

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[17] The Postal Rate Commission was the predecessor agency to the Postal Regulatory Commission. *Compare* Postal Reorganization Act (PRA), Pub. L. No. 91-375, § 3601, 84 Stat. 719, 759 (1970), *with* PAEA, Pub. L. No. 109-435, § 601, 120 Stat. 3198, 3238 (2006) (codified at 39 U.S.C. § 501). Under ECP, discounts for worksharing activity are set equal to the cost avoided by the Postal Service. *See*, *e.g.*, Docket No. RM2010-13, Order Resolving Technical Issues Concerning the Calculation of Workshare Discounts, April 20, 2012, at 3 (Order No. 1320).

classes for market-dominant products as necessary to achieve the objectives." 39 U.S.C. § 3622(d)(3). This specific authority expands on the Commission's standing authority to revise the existing ratemaking system pursuant to subsection (a). Additionally, the Commission has general authority to promulgate rules and regulations, establish procedures, and take any other action deemed necessary and proper to carry out its functions and obligations, as prescribed under title 39 of the United States Code. 39 U.S.C. § 503.

Order No. 4258 addressed comments positing that the Commission lacks statutory authority to modify or replace the CPI-U price cap. Order No. 4258 at 11-25. The Commission analyzed the three primary arguments raised by commenters in support of this position: (1) that the plain language of section 3622 clearly forecloses modification or replacement of the CPI-U price cap; (2) that modification or replacement of the CPI-U price cap would be inconsistent with the PAEA's legislative history; and (3) that modification or replacement of the CPI-U price cap would produce unconstitutional results. *Id.* The Commission also addressed comments objecting to the inclusion of workshare discounts as an issue in this proceeding. *Id.* at 18-19, 25. The Commission has concluded that its authority is broad enough to allow for the modification or replacement of all aspects of the existing Market Dominant ratemaking system, if necessary to achieve the objectives appearing in section 3622(b). *Id.* at 19. This includes making additional rate adjustment authority

available to the Postal Service, as well as limiting the setting of inefficient workshare discounts. *Id.* at 25.

[18] B. Comments

1. Introduction

The comments received in response to Order No. 4258 that discuss the Commission's statutory authority focus largely on the Commission's proposal to make additional rate adjustment authority available to the Postal Service. Comments were also received concerning the statutory authority underlying the Commission's proposal to limit the setting of inefficient workshare discounts. Many of the comments received in response to Order No. 4258 echo prior remarks submitted in this proceeding.[18]

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[18] For example, 2 years prior to the institution of this proceeding, eight entities submitted a joint white paper to the Commission stating their view that the Commission lacked statutory authority to rescind or substantially modify the CPI-U price cap under paragraph (d)(3). Alliance of Nonprofit Mailers; Association for Postal Commerce; Association of Marketing Service Providers; Direct Marketing Association; EMA; MPA—the Association of Magazine Media; National Association of Advertising Distributers, Inc.; and Saturation Mailers Coalition, Limitations on the Commission's Authority Under Section 3622(d)(3), October 28, 2014 (2014 ANM *et al.* White Paper). The joint comments submitted by three of those entities in response to Order No. 3673 referenced this document. *See* Order No. 3673; Comments of Alliance of Nonprofit Mailers, Association for Postal Commerce, and MPA—the Association of Magazine Media, March 20, 2017, at 9-10 n.2 (2017 ANM *et al.* Comments). The joint comments submitted by the same three entities (and two additional entities) in response to Order No. 4258 cite to the 2014 ANM *et al.* White Paper

2. Additional Rate Adjustment Authority

In discussing the Commission's proposal to make additional rate adjustment authority available to the Postal Service, multiple commenters restate their prior view as to whether the Commission has the statutory authority to modify or adopt an alternative [19] to the CPI-U price cap. Commenters ABA, ACI, Alliance of Nonprofit Mailers, American Catalog Mailers Association, Inc., Association for Postal Commerce, Idealliance, and MPA—the Association of Magazine Media (ANM *et al.*), GCA, and the National Postal Policy Council, the Major Mailers Association, and the National Association of Presort Mailers (NPPC *et al.*) posit that the PAEA does not authorize the provision of additional rate adjustment authority.[19] On the other

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at Appendix A. Comments of Alliance of Nonprofit Mailers, American Catalog Mailers Association, Inc., Association for Postal Commerce, Idealliance and MPA—the Association of Magazine Media, March 7, 2018, Appendix A (ANM *et al.* Comments); *see* Errata Notice of Alliance of Nonprofit Mailers, American Catalog Mailers Association, Inc., Association for Postal Commerce, Idealliance and MPA—the Association of Magazine Media, March 5, 2018.

Multiple other commenters also renew lines of argument originally advanced during the first round of comments in this docket in 2017, including ABA, MMA *et al.*, and the Greeting Card Association (GCA). *See* Order No. 4258 at 6-25 (citing Comments of American Bankers Association, March 20, 2017, at 8-10 (2017 ABA Comments); Comments of the Major Mailers Association, the National Association of Presort Mailers, and the National Postal Policy Council, March 20, 2017, at 12-17; Initial Comments of the Greeting Card Association, March 20, 2017, at 29-34 (2017 GCA Comments)).

[19] Comments of American Bankers Association, March 1, 2018, at 4-6 (ABA Comments); Comments of American Consumer

hand, the American Postal Workers Union, AFL-CIO (APWU), the National Postal Mail Handlers Union (NPMHU), the Postal Service, the Public Representative, and UPMA all counter that section 3622(d)(3) provides broad authority for the Commission to permit rate adjustments in excess of CPI-U.[20] The Commission summarizes the discussion provided by ABA, ANM *et al.*, and NPPC *et al.*, as well as the responses provided by the Postal Service and the Public Representative.[21]

Institute Center for Citizen Research Regarding Docket No. RM2017-3, February 23, 2018, at 1 (ACI Comments); ANM *et al.* Comments at 9-29; Initial Comments of the Greeting Card Association, March 1, 2018, at 1 (GCA Comments) (citing 2017 GCA Comments at 2934); Comments of the National Postal Policy Council, the Major Mailers Association, and the National Association of Presort Mailers, March 1, 2018, at 19-40 (NPPC *et al.* Comments).

[20] Reply Comments of the American Postal Workers Union, AFL-CIO on the Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products, March 30, 2018, at 2-3 (APWU Reply Comments); Comments of the National Postal Mail Handlers Union, March 1, 2018, at 2 (NPMHU Comments); Initial Comments of the United States Postal Service in Response to Order No. 4258, March 1, 2018, at 11-12 (Postal Service Comments); Comments of the United Postmasters and Managers of America, February 28, 2018, at 4; Initial Comments of the Public Representative, March 1, 2018, at 8 (refiled March 7, 2018) (PR Comments); *see also* Errata Notice of the Public Representative, March 7, 2018.

[21] The Commission focuses on these three commenters in particular because their comments contain detailed discussions on the issue of statutory authority.

[20] a. Discussion by ABA, ANM *et al.*, and NPPC *et al.*

ABA, ANM *et al.*, and NPPC *et al.* assert that the Commission's proposal to make additional rate adjustment authority available to the Postal Service contravenes the plain language of the PAEA.[22] Echoing prior remarks filed in this proceeding, these commenters contend that use of the word "shall" in paragraph (d)(1) of section 3622 unambiguously forecloses the Commission from adopting a system that would allow the Postal Service to adjust rates by more than the annual percentage change in CPI-U.[23] These commenters maintain their focus on the word "system," relying on the presumption that the word's usage throughout the PAEA implies that it has the same meaning in each instance.[24] These commenters also contend that the lack of qualifiers on the word "system" (such as, e.g., "the first system," "the initial system," "the system preceding the 10 year review," or "notwithstanding the requirements of § 3622(d)"), demonstrates that Congress intended for the CPI-U price cap to apply to *all* possible iterations of the ratemaking system.[25]

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[22] ABA Comments at 4-6; ANM *et al.* Comments at 10-28; NPPC Comments at 19-27.

[23] ABA Comments at 5; ANM *et al.* Comments at 11; NPPC *et al.* Comments at 20-22; *see* 2017 ABA Comments at 8-9; 2014 ANM *et al.* White Paper at 6-7.

[24] ABA Comments at 5; ANM *et al.* Comments at 13; NPPC *et al.* Comments at 23; *see* 2017 ABA Comments at 8-10; 2014 ANM *et al.* White Paper at 10.

[25] ABA Comments at 5; ANM *et al.* Comments at 23 n.8, 24; NPPC *et al.* Comments at 25; *see* 2017 ABA Comments at 9.

[21] The interpretation of section 3622 urged by ANM *et al.* and NPPC *et al.* posits that paragraph (d)(3) only authorizes the Commission to adopt rules which implement the statutory provisions appearing in paragraphs (d)(1) and (d)(2), including the CPI-U price cap.[26] More specifically, ANM *et al.* and NPPC *et al.* interpret the textual parallelism between subsection (a) and paragraph (d)(3) to mean that the Commission's authority to modify or replace regulations under paragraph (d)(3) mirrors the Commission's authority to establish implementing regulations under subsection (a).[27] The American Bankers Association (ABA) similarly asserts that "Congress instructed the Commission to review the system the *Commission* created, not the limitations on that system *Congress* created." 2017 ABA Comments at 9 (emphasis in original).

ANM *et al.* assert that the Commission relies on a flawed reading of the words "establish" and "revise,"

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[26] ANM *et al.* Comments at 2, 12-13; NPPC *et al.* Comments at 19.

[27] ANM *et al.* Comments at 12-13; NPPC *et al.* Comments at 23-24; *see* 2014 ANM *et al.* White Paper at 11. NPPC *et al.* argue that this result can be seen in Congress's use of the words "established" and "under" in paragraph (d)(3). NPPC *et al.* Comments at 23-24. Specifically, paragraph (d)(3) states that the Commission "shall review the system for regulating rates and classes for market-dominant products *established under* this section. . . ." 39 U.S.C. § 3622(d)(3) (emphasis added). NPPC *et al.* maintain that TN Congress intended the Commission's review authority to allow it to override the mandatory provisions of Section 3622(d)(1), one would have expected Congress to have written 39 U.S.C. § 3622(d)(3) to authorize the Commission to review the system '*created by* this section.'" NPPC *et al.* Comments at 24 (emphasis in original).

which appear in subsection (a), in relation to the phrase "make such modification or adopt such alternative system," which appears in paragraph (d)(3). ANM *et al.* Comments at 16-17. ANM *et al.* describe "revise" and "modify" as being synonymous. *Id.* at 17. ANM *et al.* construe "adopting an 'alternative' system" as a way to 'revise' or 'modify' the original system." *Id.*

[22] ANM *et al.* also state that "even if there were a meaningful difference between the option to 'make . . . modification to' and the option to 'adopt [an] alternative system,' neither option would allow the Commission to ignore the 'Requirements' of Section 3622(d)." *Id.* ANM *et al.* interpret the statutory objectives appearing in subsection (b) to be subordinate to the requirements of subsection (d). *Id.* at 18. ANM *et al.* assert that it is not necessary for paragraph (d)(3) to contain a textual modifier restricting the scope of the "alternative system" which the Commission may adopt, because the relevant restrictions appear in paragraphs (d)(1) and (d)(2). *Id.* at 21, 23.

NPPC *at al.* contend that if Congress had intended to enact a sunset date on the CPI-U price cap, then Congress would have done so explicitly, just as it explicitly stated the other limitations in paragraph (d)(2). NPPC *et al.* Comments at 25-26. NPPC *et al.* cite the general legal principle that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied."[28]

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[28] *Id.* at 26 (citing *Andrus v. Glover Constr.* Co., 446 U.S. 608, 616-617 (1980)).

NPPC *et al.* maintain that the failure to have done so indicates that Congress intended for the CPI-U price cap to apply to any rate structure created by the Commission. *Id.* at 25-26. NPPC *et al.* assert that the title of subsection (d)—"Requirements"—is consistent with their interpretation of the mandatory nature of the CPI-U price cap.[29] NPPC *et al.* contend that the Commission improperly dismissed this interpretation. NPPC *et al.* Comments at 22-23.

[23] ANM *et al.* and NPPC *et al.* submit that paragraph (d)(3) was included in section 3622 to require the Commission to reassess the performance of its implementing regulations with regard to the CPI-U price cap.[30] ANM *et al.* and NPPC *et al.* maintain that their interpretation of paragraph (d)(3) does not render it mere surplusage or an empty formality, because there are a number of options that the Commission could take while still retaining the CPI-U price cap.[31] NPPC *et al.*, in particular, assert that:

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[29] *Id.* at 22-23; *see also* ANM *et al.* Comments at 11 ("The 'Requirements' of the system of ratemaking are, indeed, required elements of the system of ratemaking.").

[30] ANM *et al.* Comments at 19; NPPC *et al.* Comments at 27.

[31] ANM *et al.* Comments at 19 n.6 (citing Docket No. RM2007-1, Second Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, May 17, 2007, at 2-5 (Order No. 15); Docket No. RM2007-1, Order Proposing Regulations to Establish a System of Ratemaking, August 15, 2007 (Order No. 26); Docket No. RM2007-1, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007 (Order No. 43); Docket No. RM2009-8, Order Amending the Cap Calculation in the System of Ratemaking, September 22, 2009 (Order No. 303); Docket No.

> There are numerous actions that the Commission might have proposed in this review, including: using a Passche [i]ndex instead of a [Laspeyres index]; changing how it calculates CPI increases; modify[ing] the cap to subtract for periods of deflation; adopt[ing] an X-Factor to increase the incentive for cost reduction; modify[ing] the rules for below-cost products; defin[ing] more products and price points within classes and products; or us[ing] a quality-of-service adjusted price cap.

NPPC *et al.* Comments at 27 n.23. On this basis, these commenters maintain that their interpretations would not reduce the 10-year review and any resulting rulemaking to an empty formality.[32]

ABA, ANM *et al.*, and NPPC *et al.* assert that the PAEA unambiguously precludes the Commission from making additional rate adjustment authority available to [24] the Postal Service.[33] Therefore, ANM *et al.*

RM2013-2, Order Adopting Final Rules for Determining and Applying the Maximum Amount of Rate Adjustments, July 23, 2013 (Order No. 1786); Docket No. RM2014-3, Order Adopting Final Rules on the Treatment of Rate Incentives and De Minimis Rate Increases for Price Cap Purposes, June 3, 2014 (Order No. 2086); Docket No. RM2016-6, Order Adopting Final Procedural Rule for Mail Preparation Changes, January 25, 2018 (Order No. 4393)); NPPC *et al.* Comments at 27 n.23.

[32] ANM *et al.* Comments at 19 n.6; NPPC *et al.* Comments at 27.

[33] *See* ABA Comments at 6; ANM *et al.* Comments at 11, 22, 24; NPPC *et al.* Comments at 28.

contend that a reviewing court would resolve this question in their favor under *Chevron* step one.[34]

Because it is their position that the text of the PAEA clearly forecloses the Commission from adopting its proposal, ABA, ANM *et al.*, and NPPC *et al.* contend that there is no need to look to the PAEA's legislative history.[35] With regard to the floor statement of Senator Susan Collins that the Commission discussed in Order No. 4258, they argue that it is not an authoritative interpretation of the PAEA.[36] These commenters observe that unlike a committee report, Senator Collins' statement represents the remarks of a single legislator.[37] NPPC *et al.* further assert that Senator Collins' statement is inconsistent with the longstanding role of Congress in managing the postal system. NPPC *et al.* Comments at 29-30. In response to the Commission's finding in Order No. 4258 that paragraph (d)(3) was the result of a legislative compromise, ANM *et al.* counter that the legislative compromise "could well have been to require the Commission to review the

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[34] *See* ANM *et al.* Comments at 17 n.4. Federal courts review an agency's interpretation of its governing statute under the two-step framework from *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc. ("Chevron")*, 467 U.S. 837 (1984).

[35] ABA Comments at 6; ANM *et al.* Comments at 24, 26; NPPC *et al.* Comments at 28.

[36] 152 Cong. Rec. S11674, S11675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins); ABA Comments at 6; ANM *et al.* Comments at 25-26; NPPC *et al.* Comments at 28; *see* Order No. 4258 at 2223.

[37] ABA Comments at 6; ANM *et al.* Comments at 25-26; NPPC *et al.* Comments at 28.

operation of the rate system after 10 years and evaluate how to modify it to improve performance while still retaining the CPI-based limitation."[38] For this reason, ANM *et al.* also assert that any ambiguity in the PAEA would be resolved in their favor under *Chevron* step two. *See* ANM *et al.* Comments at 17 n.4.

[25] Additionally, ABA, ANM *et al.*, and NPPC *et al.* cite prior Commission orders, which purportedly corroborate their interpretation that the qualitative pricing standards (such as the statutory objectives and factors) are subordinate to the quantitative pricing standards (such as the CPI-U price cap) in the hierarchy established by the PAEA.[39] These commenters assert that the statutory interpretation of paragraph (d)(3) put forth in Order No. 4258 is inconsistent with these prior rulings.[40] ANM *et al.* dismiss Order No. 4258's analysis distinguishing these prior statements,

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[38] ANM *et al.* Comments at 25; *see* Order No. 4258 at 20-23.

[39] ABA Comments at 5-6; ANM *et al.* Comments at 13-15, 18, 27-29 (citing Order No. 26); Docket No. RM2009-3, Order Adopting Analytical Principles Regarding Workshare Discount Methodology, September 14, 2010 (Order No. 536); Docket No. R2010-4, Order Denying Request for Exigent Rate Adjustments, September 30, 2010 (Order No. 547); Docket No. R2010-4R, Order Resolving Issus on Remand, September 20, 2011 (Order No. 864); Docket No. ACR2010-R, Order on Remand, August 9, 2012 (Order No. 1427)); NPPC *et al.* Comments at 26 (citing Order No. 536; Docket No. ACR2010, *Annual Compliance Determination*, March 29, 2011, at 18-19 (FY 2010 ACD)); *see* 2014 ANM *et al.* White Paper at 5-6, 12-15 (citing Order No. 536; Order No. 547).

[40] ABA Comments at 5-6; ANM *et al.* Comments at 13-15, 18, 27-29; NPPC *et al.* Comments at 26-27.

characterizing it as "a distinction without a difference."[41] ABA and ANM *et al.* assert that the Commission has failed to provide a reasoned basis for departing from its prior rulings.[42]

Finally, ANM *et al.* and NPPC *et al.* argue that the Commission's interpretation of paragraph (d)(3) produces unconstitutional results.[43] First, ANM *et al.* and NPPC *et al.* assert that the Commission's interpretation would violate the Constitution's Presentment Clause.[44] These commenters maintain that the Commission's interpretation would produce a result similar to that of the Line Item Veto Act, which was found to be impermissible by the Supreme Court in *Clinton v. City of New York*, 524 U.S. 417 [26] (1998).[45] NPPC *et al.* concede that Congress may authorize the executive branch to waive the application of statutory provisions in specified circumstances.[46] However, they argue that such an authorization must be expressly stated, and "Congress itself [must have] made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent

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[41] ANM *et al.* Comments at 28; *see* Order No. 4258 at 18.

[42] ABA Comments at 5-6; ANM *et al.* Comments at 27-29.

[43] ANM *et al.* Comments at 18 n.5; NPPC *et al.* Comments at 31-40.

[44] ANM *et al.* Comments at 18 n.5; NPPC *et al.* Comments at 31-35.

[45] ANM *et al.* Comments at 18 n.5; NPPC *et al.* Comments at 32-35.

[46] NPPC *et al.* Comments at 32-33 (citing *Republic of Iraq v. Beaty*, 556 U.S. 848, 861 (2009); *Marshall Field &* Co. *v. Clark*, 143 U.S. 649, 693 (1892); *Clinton*, 524 U.S. at 445).

to enactment, and . . . only left the determination of whether such events occurred up to [the executive branch]." *Id.* at 33. NPPC *et al.* maintain that the PAEA's statutory objectives and factors do not provide the required direction for purposes of the Presentment Clause, because while "[t]hey require the Commission to take action in ten years . . . and to review various policy considerations when they take that action . . . they don't cabin the bottom line at all. . . ." *Id.* at 34-35. Specifically, "[t]hey don't specify the 'particular events' that would call for the Commission to act; or instruct the Commission on how to act when those events occur." *Id.* Thus, NPPC *et al.* maintain, the statutory objectives and factors "are simply a set of policy considerations that do not, on their own, come close to providing the level of legislative direction that the Presentment Clause demands." *Id.* at 35. The result of the Commission's interpretation of paragraph (d)(3), according to NPPC *et al.*, would be the Commission "substitut[ing] its policy decisions for those of Congress." *Id.* at 32.

Second, NPPC *et al.* assert that the Commission's interpretation of paragraph (d)(3) would violate the Constitution's non-delegation doctrine, under which Congress may only confer decision-making authority upon an agency where it lays down an "intelligible principle" to guide the agency's discretion.[47] NPPC *et al.* contend that the PAEA's objectives and factors are too general and vague to provide limitations on the

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[47] *Id.* at 35-40 (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001)).

Commission's authority that would be sufficient to satisfy this doctrine. *Id.* at 37-39. [27] With respect to the non-delegation argument, NPPC *et al.* argue that "[o]nce the price cap and limitations found in Sections 3622(d)(1) and (2) are removed, there would be no policy, no standard, and no rule," because "[t]he [PAEA's] objectives and factors . . . are nothing more than general aims and a broad range of objectives . . . amongst which the Commission is not required to choose."[48]

b. Responses by the Postal Service and the Public Representative

The Postal Service and the Public Representative reject the view that the Commission's interpretation of paragraph (d)(3) of section 3622 contradicts the plain meaning of the PAEA.[49] Both maintain that the CPI-U price cap is included in the system subject to review and potential alteration or replacement under paragraph (d)(3).[50] The Postal Service asserts that the structural position of paragraph (d)(3)—as the final subparagraph of subsection (d)—should lead a reader to conclude that subparagraph (3) requires review of the general requirements and limitations appearing in

[48] *Id.* at 37-38 (internal punctuation omitted) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining* Co. *v. Ryan*, 293 U.S. 388 (1935)).

[49] Reply Comments of the United States Postal Service in Response to Order No. 4258, March 30, 2018, at 7-19 (Postal Service Reply Comments); Reply Comments of the Public Representative, March 30, 2019, at 7-9 (PR Reply Comments).

[50] Postal Service Comments at 12 n.16; Postal Service Reply Comments at 12; PR Reply Comments at 9.

subparagraphs (1) and (2), in addition to the regulations implemented and revised pursuant to subsection (a). Postal Service Reply Comments at 12.

The Postal Service and the Public Representative posit that any presumption that the word "system" has the same meaning in both subsection (a) and paragraph (d)(3) fails in this instance, because the words at issue in each respective provision are used in different contexts.[51] The Postal Service argues that the general term "system," as [28] used in paragraph (d)(3), can plausibly be read to refer to the overall framework for regulating Market Dominant rates, which encompasses both the PAEA's statutory provisions and the Commission's implementing regulations. Postal Service Reply Comments at 11. The Postal Service notes that this interpretation is consistent with dictionary definitions of "system." *See id.* at 12.

The Postal Service and the Public Representative both assert that because paragraph (d)(3) uses broader language than subsection (a), paragraph (d)(3) confers a broader degree of authority on the Commission than subsection (a) does.[52] The Public Representative deems ANM *et al.*'s interpretation of the phrase "adopting an 'alternative' system" as a mere variant of "'revise'" or "'modify'" to be "unsatisfying."[53] The Postal Service

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[51] Postal Service Reply Comments at 10-11; PR Reply Comments at 8.

[52] Postal Service Reply Comments at 13; PR Reply Comments at 8.

[53] PR Reply Comments at 9 (citing ANM *et al.* Comments at 17).

points out that paragraph (d)(3) juxtaposes "modification" with a more fundamental type of change—an "alternative system." Postal Service Reply Comments at 14.

The Postal Service notes that the CPI-U price cap could remain in place for more than 10 years after the PAEA's enactment, if, for example, the Commission's review had determined that the current ratemaking system was achieving the PAEA's objectives. *Id.* at 18. Hence, according to the Postal Service, the lack of an explicit sunset provision in the statute for the CPI-U price cap is not dispositive with regard to the question of whether Congress intended for the CPI-U price cap to be permanent. *Id.*

The Postal Service and the Public Representative contend that reading paragraph (d)(3) as merely directing the Commission to review and alter its implementing regulations would render paragraph (d)(3) redundant with subsection [29] (a).[54] With regard to ANM *et al.* and NPPC *et al.*'s counterargument that subsection (a) permits the Commission to review its regulations on its own initiative, whereas paragraph (d)(3) requires a review of those regulations after 10 years, the Public Representative notes that this fails to explain either the textual differences in the respective provisions or the differing triggering conditions contained in them. PR Reply Comments at 8. He also observes that this explanation fails to explain why

[54] Postal Service Comments at 12 n.16; PR Reply Comments at 8.

paragraph (d)(3) authorizes the Commission "to implement a remedy 'as necessary to achieve the objectives,'" without reference to the PAEA's other provisions (such as the CPI-U price cap). *Id.*

Emphasizing its agreement with the Commission that the PAEA unambiguously allows the Commission to replace the CPI-U price cap, the Postal Service asserts that the Commission's interpretation would be upheld by a federal court under *Chevron* step one. Postal Service Reply Comments at 9 n.10. In the alternative, the Postal Service asserts that "[a]t most the statute is ambiguous, and the Commission's interpretation is reasonable," and would therefore be upheld under *Chevron* step two. *Id.* The Public Representative maintains that ambiguities exist in the PAEA, and he disagrees that the issue would be resolved under *Chevron* step one. PR Reply Comments at 10-12. Instead, he argues that the Commission's interpretation is a permissible construction of a statutory ambiguity, and hence would be accorded deference under *Chevron* step two. *Id.*

The Postal Service asserts that to the extent that any ambiguity concerning the scope of an alternative system exists, the PAEA's legislative history confirms that the Commission is able to alter or eliminate the CPI-U price cap. Postal Service Reply Comments at 14-15. The Postal Service submits that the statement of Senator Collins, as the Senate sponsor of postal reform, should be accorded considerable weight. *Id.* [30] The Postal Service maintains that paragraph (d)(3) represented a compromise between the Senate version of

the bill, which contained a permanent CPI-U price cap, and the House version of the bill, which would have granted the Commission the discretion to select the appropriate mode of regulation from the outset. Postal Service Comments at 12. The Postal Service asserts that the final compromise reached by Congress provided that the CPI-U price cap would remain in effect for 10 years, after which the Commission would have the discretion to modify or replace that system with an alternative system if it was not achieving the PAEA's statutory objectives. *Id.* The Postal Service characterizes this choice as consistent with the historical trend of Congress shifting discretion over postal matters to the executive branch, as well as the more general trend of Congress establishing initial regulatory frameworks but allowing regulatory agencies to amend those frameworks as circumstances change.[55]

The Postal Service disagrees that Order No. 4258 represents an "unexplained departure" from any past position by the Commission with regard to its authority under paragraph (d)(3) or the policy value of the CPI-U price cap. Postal Service Reply Comments at 18-19. The Postal Service characterizes the prior

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[55] *Id.* at 16-17. The Postal Service cites as examples the Federal Communication Commission's (FCC's) ability to amend its statutory fee schedule, as well as Congress's requiring the Secretary of Transportation to prescribe standards regarding gas and hazardous liquid pipelines, while simultaneously enacting default risk-analysis and integrity-management requirements to apply to pipeline operators in the interim until the Secretary of Transportation's rules could be promulgated. *Id.* at 17-18 (citing 47 U.S.C. § 159; 49 U.S.C. § 60109).

Commission statements cited by the commenters as reflecting "Congress's policy decision to impose the price cap in effect at the time," rather than "a policy judgment about whether the same price cap would remain good policy in all circumstances going forward." *Id.* at 19.

The Postal Service asserts that the commenters fail to rebut the Commission's "reasoned rejection" of any constitutional concerns with regard to paragraph (d)(3). *Id.* at 8. Specifically with regard to the non-delegation doctrine, the Postal Service asserts [31] that NPPC *et al.* continue to base their arguments on two cases with limited precedential value. *Id.* The Postal Service points instead to more extensive and more recent case law upholding delegations to agencies based on intelligible principles. *Id.* at 8-9. The Postal Service argues that the PAEA's 9 statutory objectives and 14 statutory factors provide more-than-sufficient guidance to justify upholding the delegation in this case.[56]

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[56] Postal Service Comments at 12; Postal Service Reply Comments at 9. The Postal Service also asserts that "ultimately, NPPC *et al.*'s arguments are pointless[] since the Commission lacks jurisdiction to rule on the statute's constitutionality and cannot cure a constitutional defect through self-restraint." Postal Service Reply Comments at 9. Thus, "[t]he Commission's role is to . . . fulfill the statutory role that Congress clearly conferred on it . . . [and] [u]ltimately, it is [a] court's role to decide whether Congress's decision to confer that authority on the Commission is constitutional." *Id.* at 9 n.9.

3. Workshare Discounts

GCA and the Postal Service restate their position that workshare discounts are not within the scope of this proceeding (that is, subject to neither review nor potential regulatory action).[57] The Postal Service also asserts that setting a passthrough floor is contrary to the language, structure, and objectives of section 3622. Postal Service Reply Comments at 108 n.285.

ANM *et al.*, NPPC *et al.*, and Pitney Bowes Inc. (Pitney Bowes) counter that the Commission's workshare discount proposal is within the Commission's legal authority.[58] ANM *et al.* assert that the Commission's rules implementing section 3622(e) and governing workshare discounts are part of the "system." ANM *et al.* Reply Comments at 73. ANM *et al.* state that the Commission's workshare discount proposal must comply [32] with section 3622(e) and that the Commission's proposal meets this standard. *Id.* at 7374. Pitney Bowes asserts that section 3622(d)(3) mandates review of the system "established under this

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[57] GCA Comments at 1 n.1 (citing 2017 GCA Comments at sections V-VI); Postal Service Reply Comments at 111 n.292 (citing Postal Service Comments at 146-147).

[58] Reply Comments of Alliance of Nonprofit Mailers, American Catalog Mailers Association, Inc., Association for Postal Commerce, Data & Marketing Association, Idealliance, and MPA—the Association of Magazine Media, March 30, 2018, at 73-74 (ANM *et al.* Reply Comments); Reply Comments of the National Postal Policy Council, the Major Mailers Association, and the National Association of Presort Mailers, March 30, 2018, at 5 (NPPC *et al.* Reply Comments); Comments of Pitney Bowes Inc., March 1, 2018, at 4-9 (Pitney Bowes Comments).

section," which refers to the entirety of section 3622, including the workshare discount provisions appearing in subsection (e). Pitney Bowes Comments at 5. Pitney Bowes contends that nothing in the PAEA prevents the Commission from establishing a floor (or a band applicable to passthroughs under 100 percent), as proposed by Order No. 4258. *Id.* at 6. Pitney Bowes adds that the Commission's proposal concerning passthroughs over 100 percent would implement the qualitative considerations appearing in 39 U.S.C. § 3622(e) into a quantitative range. *Id.* at 8.

C. Commission Analysis

1. Introduction

First, this Section addresses the positions of commenters asserting that the Commission lacks the statutory authority to make additional rate adjustment authority available to the Postal Service. This includes issues pertaining to the PAEA's text, structure, and legislative history, as well as arguments that the Commission's current interpretation of paragraph (d)(3) of section 3622 is inconsistent with prior Commission statements and arguments concerning the constitutionality of the Commission's interpretation of paragraph (d)(3). Second, this Section addresses issues that exclusively pertain to the Commission's statutory authority to limit the setting of inefficient workshare discounts.

2. Additional Rate Adjustment Authority

Federal courts evaluate an agency's interpretation of its governing statute using the two-step framework set forth in *Chevron*. Under *Chevron* step one, the court considers whether "Congress has directly spoken to the precise question at issue." [33] *Chevron*, 467 U.S. at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If not, then the court proceeds to *Chevron* step two and considers whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* at 843. The court must defer to the agency's interpretation if it is "reasonable." *Id.* at 844.

a. The PAEA's Plain Language

At *Chevron* step one, a court must "'exhaust the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue[,] . . . [which] include examination of the statute's text, legislative history, and structure, as well as its purpose.'"[59] To prevail under *Chevron* step one, a challenger 'must do more than offer a reasonable or, even the best, interpretation [of the statute in question].'"[60] "Instead, they 'must show that the statute

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[59] *Petit v. United States Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012) (quoting *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997)).

[60] *Petit*, 675 F.3d at 781 (quoting *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011)).

unambiguously forecloses the [agency's] interpretation.' "[61] "[T]hey must demonstrate that the challenged term is susceptible of only [one] possible interpretation."[62]

The plain language of paragraph (d)(3) of section 3622 contemplates the modification or replacement of the existing Market Dominant ratemaking system, if necessary to achieve the statutory objectives appearing in subsection (b). As an initial matter, the Commission notes that the nature of the proposal it is putting forward is a [34] modification. The Commission is proposing adjustments to the CPI-U price cap that are consistent with price cap theory.

Price cap formulas generally start with a measure of inflation (called the inflation factor), such as the CPI-U index.[63] Most price cap formulas also include

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[61] *Id.* (emphasis in original) (quoting *Village of Barrington*, 636 F.3d at 661).

[62] *Petit*, 675 F.3d at 781 (quoting *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1015 (D.C. Cir. 1999) (internal marks and citation omitted)); *see also Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." (citations omitted)).

[63] *See, e.g.*, United States Postal Service, Office of the Inspector General, Report No. RARC-WP13-007, Revisiting the CPI-Only Price Cap Formula, April 12, 2013, at 46, available at: *https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-13-007 0.pdf* (RARC-WP13-007).

various adjustments to the inflation factor.[64] When establishing 39 C.F.R. part 3010 in accordance with section 3622(a) in 2007, the Commission considered, but ultimately opted to defer, applying adjustment factors to the CPI-U index.[65] This approach allowed the Postal Service latitude to operate with minimal regulation under the new ratemaking system. *See* Order No. 26 at ¶¶ 2067-2068. However, based on the Commission's findings in Order No. 4257, the Commission has determined that adjustment factors are now necessary to remedy the existing ratemaking system's failure to meet the objectives. *See* Order No. 4257.

When promulgating the initial implementing regulations after enactment of the PAEA, the Commission

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[64] For instance, most price cap formulas include an "X-factor" to offset productivity growth. *See* RARC-WP-13-007 at 45; United States Postal Service, Office of Inspector General, Risk Analysis Research Center, Report No. RARC-WP-17-003, Lessons in Price Regulation from International Posts, February 8, 2017, Appendix A at 16, available at: *https://www.uspsoig.gov/sites/default/files/document-library-files/2017/RARC-WP-17-003.pdf*; David E.M. Sappington, Price Regulation and Incentives, December 2000, at 14, available at: *http://regulationbodyofknowledge.org/wpcontent/uploads/2013/03/Sappington Price_Regulation_and.pdf* (Sappington, Price Regulations and Incentives). Price cap plans also may regulate service quality using a reward- or penalty-style "Q-factor." *See* Sappington, Price Regulations and Incentives at 14-15, 51; Copenhagen Economics, Postal Quality and Price Regulation, March 29, 2017, at 18 n.19 (Copenhagen Economics Report). Other adjustment factors include a "Y-factor" to address recurring exogenous costs, or a "Z-factor" to address an exogenous one-time cost. *See* RARC-WP-13-007 at 16.

[65] Order No. 26 at ¶ 2064-2068 (deferring the development of adjustments to the CPI-U price cap related to the quality of service); Order No. 43 at 31-32 (same).

stated that it would develop additional regulation if experience under the new system showed that additional regulation was necessary to achieve the [35] PAEA's statutory objectives. Order No. 26 at ¶ 2068. The proposed adjustments generally maintain an inflation-based price cap, while also recognizing the aspects of the initial ratemaking system that have proven to be inadequate to meet the statutory objectives, taking into account the statutory factors.

However, even if the Commission's proposal is construed to be an "alternative system," the Commission has the authority under paragraph (d)(3) to implement such a change. ABA, ANM *et al.*, and NPPC *et al.* assert that the Commission's proposal exceeds the Commission's statutory authority.[66] Fundamentally, these commenters disagree with the Commission's interpretation of paragraph (d)(3) as providing for a broad scope of review and permitting broad rulemaking action, if necessary to achieve the PAEA's statutory objectives.[67] Instead, these commenters assert that the authority provided by paragraph (d)(3) is limited to the type of initial regulatory setup and periodic improvements authorized by subsection (a) of section 3622.[68]

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[66] ABA Comments at 4-6; ANM *et al.* Comments at 9-29; NPPC *et al.* Comments at 19-40.

[67] ABA Comments at 4-6; ANM *et al.* Comments at 11-13; NPPC *et al.* Comments at 21, 23-27.

[68] ABA Comments at 5-6; ANM *et al.* Comments at 12-13; NPPC *et al.* Comments at 23-27.

The Commission continues to find that the scope of the system subject to review (and subject to potential change or replacement, if necessary to achieve the statutory objectives), includes all aspects of the rate-making system established under 39 U.S.C. § 3622.[69] This holistic interpretation properly gives the statutory language its ordinary meaning.[70] "System" is a general term referring to a set of connected things or parts forming a complex whole.[71] The PAEA expressly "include[s]" the CPI-U price cap in the [36] "system for regulating rates and classes for market-dominant products." 39 U.S.C. § 3622(d)(1)(A). Therefore, the CPI-U price cap is plainly a part of the system that is subject to review under paragraph (d)(3) and, if necessary to achieve the statutory objectives, subject to potential change or replacement.

The structure of subsection (d) of section 3622 confirms the Commission's interpretation. Subsection (d), titled "Requirements" is subdivided into three paragraphs: (d)(1) "In General;" (d)(2) "Limitations;" and (d)(3) "Review." Paragraph (d)(2) modifies the preceding text appearing in paragraph (d)(1). This structure reinforces the conclusion that the general provisions of paragraph (d)(1) and the limitations of paragraph

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[69] Order No. 4258 at 25; *see also* Order No. 4257 at 10.

[70] *See Smith v. United States*, 508 U.S. 223, 228 (1993) (in the absence of an express definition, a statutory phrase must be given its ordinary meaning).

[71] *See* Merriam-Webster Dictionary, available at: *http://www.merriamwebstercom/dictionary/system* ("system" defined as "a regularly interacting or interdependent group of items forming a unified whole").

(d)(2) are part of the system to be reviewed (and, if necessary to achieve the statutory objectives, changed or replaced) pursuant to paragraph (d)(3).[72]

The textual differences between subsection (a) "Authority Generally" and paragraph (d)(3) "Review," clearly demonstrate that the extent of action permissible under paragraph (d)(3) is plainly broader than the extent of the action authorized by subsection (a). Order No. 4258 at 17. The phrase "establish (and may from time to time thereafter by regulation revise)" appearing in subsection (a) plainly refers to two connected powers—the initial setup of the ratemaking system, which *must* be completed within a specific timeframe, and periodic adjustment, which *may* occur at any time thereafter at the Commission's discretion. On the other hand, the plain language of paragraph (d)(3) demonstrates that its specific authority, if triggered, is broader. The phrase "make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives" [37] appearing in paragraph (d)(3) plainly refers to two options with different meanings—either changes to, or the complete replacement

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[72] The Commission notes, however, that the provisions appearing in paragraphs (d)(1) and (d)(2) do not represent the entirety of the system established under section 3622 that is subject to review and possible change and/or replacement pursuant to paragraph (d)(3). *See* Order No. 4258 at 18-19, 25. As discussed in Order No. 4258, the structure of the PAEA does not preclude the inclusion of workshare discounts, which are described in subsection (e) of section 3622, as part of the overall system established under section 3622. *Id.* at 18-19.

of, any part of the system in order to remedy a failure to achieve the statutory objectives. Unlike subsection (a), the second sentence of paragraph (d)(3) contains specific triggering conditions. Any action authorized under paragraph (d)(3) is contingent on the Commission completing a mandatory review 10 years after the PAEA's enactment and issuing a determination (subject to notice and comment) that the ratemaking system did not achieve the PAEA's statutory objectives (taking into account the statutory factors).

The differing statutory context under which the Commission acts—subsection (a) versus paragraph (d)(3)—determines the extent of the Commission's rulemaking authority. *See* Order No. 4258 at 17-18. Reading the statute as a whole makes it clear that the statutory objectives and factors play different roles to effectuate the different purposes of subsection (a) and paragraph (d)(3). Subsection (a) does not mention the objectives and factors. Instead, subsections (b) and (c) explain the role of the objectives and factors during the course of any rulemaking undertaken pursuant to subsection (a). When performing the time-sensitive mandatory setup of the ratemaking system, and when making periodic discretionary adjustments to that system under subsection (a), the objectives and factors play a background role in implementing the general requirements and limitations specified in paragraphs (d)(1)-(2). By contrast, paragraph (d)(3) casts the objectives in the primary role (with a supporting role for the factors). The purpose of paragraph (d)(3) is plainly to ensure that the objectives are being met and, if needed,

to empower the Commission to remedy any failure to meet the objectives.

ANM *et al.* and NPPC *et al.* maintain that the Commission's authority under paragraph (d)(3) is subject to the provisions appearing in paragraphs (d)(1) and (d)(2), [38] such as the CPI-U price cap.[73] Essentially, these commenters posit that paragraph (d)(3) only affects the rules the Commission has promulgated in existing 39 C.F.R. part 3010, insofar as those rules conform with paragraphs (d)(1) and (d)(2).

However, nothing in paragraph (d)(3) states that the Commission's review of the system, and the range of action that can be taken in response to that review, is to be limited by the provisions appearing in paragraphs (d)(1) and (d)(2). If Congress had intended to restrict the scope of review or action authorized under paragraph (d)(3), it could have done so easily.[74] Instead, paragraph (d)(3) permits the Commission to "make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives." 39 U.S.C. § 3622(d)(3). This broad language militates

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[73] *See* ANM *et al.* Comments at 21, 23; NPPC *et al.* Comments at 23-24.

[74] *See* Order No. 4258 at 15; *see also Smith*, 508 U.S. at 229 (rejecting a *Chevron* step one challenge contending that the statutory phrase "use of a firearm" referred only to use as a weapon and did not include use of a firearm as an item of barter to receive drugs, holding that "[s]urely petitioner's treatment of his [firearm] can be described as 'use' within the everyday meaning of that term[,]" and "[h]ad Congress intended the narrow construction petitioner urges, it could have so indicated.").

against concluding that the commenters' narrow interpretation of paragraph (d)(3) must be unambiguously correct.

ABA, ANM *et al.*, and NPPC *et al.* rely on the presumption of consistent usage to assert that repetition of the phrase "system for regulating rates and classes for market-dominant products" results in the Commission's regulatory power as authorized by paragraph (d)(3) being restricted to the type of action authorized by subsection (a).[75] However, the presumption of consistent usage "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different [39] intent."[76] Applying the presumption mechanically would "ignore[] the cardinal rule that '[s]tatutory language must be read in context [since] a phrase 'gathers meaning from the words around it.'"[77] Notably, the presumption "relents when a word used has several commonly understood meanings among which a speaker can alternate in the course

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[75] ABA Comments at 5-6; ANM *et al.* Comments at 11-13; *see also* NPPC *et al.* Comments at 23.

[76] *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

[77] *Cline*, 540 U.S. at 596 (quoting *Jones v. United States*, 527 U.S. 373, 389 (1999) (internal citation omitted)).

of an ordinary conversation, without being confused or getting confusing."[78]

These important caveats demonstrate that the interpretation advanced by the commenters, which would apply the presumption of consistent usage in an isolated and mechanical fashion, lacks adequate support. *See Cline*, 540 U.S. at 595-596 n.8 (internal citations omitted). The repetition of a general phrase cannot override the clear differences in the nature and extent of the Commission's authority granted by the provisions at issue. The differences in both the text and the purposes of the provisions is evidence that it is improper to equate the general authority granted by subsection (a) with the specific authority granted by paragraph (d)(3). *See* Order No. 4258 at 16-18.

ABA, ANM *et al.*, and NPPC *et al.* reiterate their assertion that the term "shall," appearing in paragraph (d)(1), means that the inclusion of the CPI-U price cap in the ratemaking system cannot be reviewed, altered, or eliminated under paragraph (d)(3).[79] This interpretation ignores the fact that paragraph (d)(3) structurally follows paragraphs (d)(1) and (d)(2), which strongly suggests that the provisions of paragraphs (d)(1) and (d)(2) are subject to modification by paragraph (d)(3).

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[78] *Cline*, 540 U.S. at 595-96 (noting that the word "age" can be readily understood to have different meanings depending on the context) (internal footnote omitted).

[79] ABA Comments at 5; ANM *et al.* Comments at 11; NPPC *et al.* Comments at 20-22.

ANM *et al.* incorrectly assert that the provisions of paragraphs (d)(1) and (d)(2) take precedence over the statutory objectives appearing in subsection (b). ANM *et al.* [40] Comments at 18. Such an interpretation is contrary to the plain command of subsection (b), which requires the statutory objectives to be applied in conjunction with one another, rather than with any other provisions. Moreover, as discussed, the differing statutory context under which the Commission acts—subsection (a) versus paragraph (d)(3)—determines whether the objectives take on a primary versus a background role. The purpose of paragraph (d)(3) is to ensure that the objectives appearing in subsection (b)—not the provisions of paragraphs (d)(1) and (d)(2)—are being met. If needed, paragraph (d)(3) empowers the Commission to remedy any failure to meet the objectives.

NPPC *et al.* characterize the Commission's interpretation as "dismiss[ing]" the title of section (d)—"Requirements." NPPC *et al.* Comments at 22. They construe this title to be consistent with their position that the CPI-U price cap was intended to be permanent. *Id.* at 22-23. The Commission noted in Order No. 4258 that the section title alone is not dispositive as to whether the Commission may modify or replace the CPI-U price cap.[80] However, the Commission's interpretation that the general provisions of paragraph (d)(1) and the limitations of paragraph (d)(2) are parts

[80] Order No. 4258 at 16; *see* ANM *et al.* Comments at 21-22 (conceding that title *alone* does not mandate retaining the CPI-U price cap).

of the system that *must* be reviewed and *may* potentially be changed or replaced under paragraph (d)(3) is consistent with subsection (d)'s title. Specifically, the "Requirements" that were put in place for the first decade following the PAEA's enactment are what are subject to review and potential change or replacement.

NPPC *et al.* contend that the lack of any explicit sunset language means that the CPI-U price cap is permanent and must apply to any system—even an "alternative system" adopted pursuant to paragraph (d)(3). NPPC *et al.* Comments at 22, 25-26. However, no sunset provision was needed for the CPI-U price cap (or for any other aspect of the existing system) because paragraph (d)(3) does not *automatically* remove [41] or alter the CPI-U price cap (or any other aspect of the existing system). For instance, if the Commission's review had determined that the ratemaking system (including the CPI-U price cap) was achieving the statutory objectives, then the CPI-U price cap system could have continued in its existing form.

Additionally, with respect to NPPC *et al.*'s focus on the lack of explicit sunset language, they misapply the canon regarding narrow construal of statutory exceptions. NPPC *et al.* Comments at 26. It is true that generally speaking, where Congress specifically enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied. *See Andrus* 446 U.S. at 616-17. However, the Commission's interpretation does not rest on creating an *implied* exception to the CPI-U price cap. Section 3622 expressly

includes the CPI-U price cap as a part of the system subject to review and potential change or replacement.

ANM *et al.* assert that the phrase "adopt such alternative system" does not meaningfully differ from the phrase "make such modification." ANM *et al.* Comments at 17. However, the Commission's interpretation does not rely on an appreciable difference between these words alone. As the Commission explained in Order No. 4258, the surrounding words and the use of a parenthetical connote a connection between the regulatory powers "establish" and "revise" in subsection (a), while the text of paragraph (d)(3) plainly confers the discretion to choose between two options with different meanings—either "modify" or "adopt an alternative." Order No. 4258 at 14, 16-17. As a result, the text of the second sentence appearing in paragraph (d)(3) is more naturally interpreted as presenting a contrast. The interpretation advanced by ANM *et al.* would drain the ordinary meaning from the phrase "alternative system," which connotes a far more fundamental degree of change than "modification."[81] It [42] would also ignore the use of "or," a disjunctive that connects terms with separate meanings. Order No. 4258 at 14. Therefore, a plain reading of the text of the PAEA does not support the contention that "adopt such alternative

[81] Order No. 4258 at 15; *see* Postal Service Reply Comments at 13-14; Public Representative Reply Comments at 9. As the Postal Service states, "[t]he CPI-only price cap simply does not leave a wide enough range of unresolved issues for the Commission to make changes fundamental enough to qualify as being between 'alternative systems." Postal Service Reply Comments at 13.

system" is synonymous with, or merely intended to explicate the meaning of, "make such modification."

The interpretation that the types of procedural and technical issues considered during prior rulemakings under subsection (a) are the *sole* meaning of an "alternative system" that may be adopted under paragraph (d)(3) is inconsistent with the sweeping terms used to describe the remedial power provided by paragraph (d)(3).[82] Had Congress intended only to allow the Commission to recalibrate the regulations implementing the CPI-U price cap in order to make them more consistent with the PAEA's statutory objectives, it would have been simple (and more natural) for Congress to have drafted the second sentence of paragraph (d)(3) accordingly.

Moreover, the interpretation that the specific authority conferred by the second sentence appearing in paragraph (d)(3) is no greater than the authority conferred by subsection (a) would run counter to the fundamental principle that a statute should be interpreted so as not to render any one part of it inoperative.[83] This interpretation would emasculate the

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[82] *See Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 664-665 (D.C. Cir. 2009) (rejecting a *Chevron* step one challenge contending that the FCC's statutory authority was limited to a specific application where the plain language of the statute supported a broad application); *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 297-299 (2003) (same).

[83] *See Safeco Ins.* Co. *of Am. v. Burr*, 551 U.S. 47, 59-60 (2007) (rejecting an interpretation that would render a word superfluous and incompatible with the statutory structure); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to

specific authority conferred by paragraph (d)(3) of any power independent of the Commission's standing discretionary authority to change the implementing regulations promulgated pursuant to subsection (a). *See* 39 U.S.C. §§ 503, 3622(a). ANM *et al.* and NPPC *et al.* assert that the difference between [43] subsection (a) and paragraph (d)(3) is that subsection (a) allows the Commission to revise regulations on its own initiative, whereas paragraph (d)(3) *requires* that the Commission undertake a review and possibly make revisions after 10 years.[84] However, this fails to address how the discretionary regulatory authority triggered by the second sentence of paragraph (d)(3) would be distinct from the Commission's standing discretionary rulemaking authority under subsection (a).

NPPC *et al.* assert that "the Commission's ten-year review role is no more 'insignifican[t]' than its Section 3622(a) role," and "[i]f [section 3622(a)] were a mere formality, why would Congress have felt the need to enact Section 3622(a) at all?" NPPC *et al.* Comments at 27. The Commission addressed this issue in Order No. 4258.[85] To reiterate, subsection (a) empowered the Commission to promulgate the regulations necessary to implement the PAEA ratemaking system in its initial form, subject to the CPI-U price cap, among other

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give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").

[84] ANM *et al.* Comments at 19; NPPC *et al.* Comments at 27.

[85] *Compare* NPPC *et al.* Comments at 27, *with* Order No. 4258 at 17.

requirements and limitations. Order No. 4258 at 17. Historically, the Postal Rate Commission had not possessed such broad regulatory authority. *Id.* at 17 n.30. Paragraph (d)(3), on the other hand, embodied a legislative compromise that required the newly created Postal Regulatory Commission to review that initial ratemaking system after 10 years in order to determine if it was meeting the PAEA's statutory objectives, taking into account the statutory factors. *Id.* at 17. If the ratemaking system was found not to be meeting the statutory objectives, then paragraph (d)(3) empowered the new Commission to modify the ratemaking system or adopt an alternative ratemaking system. *Id.*

ANM *et al.* and NPPC *et al.* assert that the PAEA unambiguously precludes the Commission from making additional rate adjustment authority available to the Postal Service.[86] However, these commenters cannot prevail under *Chevron* step one [44] because they have not shown that the PAEA clearly forecloses the Commission's interpretation. They fail to demonstrate that the "system" may *only* be interpreted to refer to regulations that are subject to the provisions appearing in paragraphs (d)(1) and (d)(2). For the foregoing reasons, the Commission concludes that the plain language of paragraph (d)(3) permits the Commission to review and, if necessary to achieve the PAEA's statutory objectives, modify and/or replace all aspects of the ratemaking system, including the CPI-U price cap.

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[86] NPPC *et al.* Comments at 28; ANM *et al.* Comments at 11, 22, 24.

b. The Reasonableness of the Commission's Interpretation

In the alternative, for the reasons discussed in Order No. 4258 and amplified above, the PAEA is at most ambiguous on the question of whether the adjustments to the CPI-U price cap proposed by the Commission are within the scope of the phrase "make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives." 39 U.S.C. § 3622(d)(3). To the extent that paragraph (d)(3) may be ambiguous, the Commission's interpretation is reasonable and thus would be entitled to *Chevron* deference.[87] Under *Chevron* step two, courts "focus on whether the [agency] has reasonably explained how the permissible interpretation it chose is rationally related to the goals of the statute."[88] "If the statute is ambiguous enough to permit the agency's [45] reading, . . . [courts] defer to that interpretation so long as it is

[87] An agency may argue in the alternative as to whether its reading of a statute is proper under *Chevron* step one or *Chevron* step two. *See*, *e.g.*, *United Parcel Serv., Inc. v. Postal Reg. Comm'n*, 890 F.3d 1053, 1063 (D.C. Cir. 2018) ("Given our conclusion that the Commission's reading of 'institutional costs' is reasonable and so merits our deference [under *Chevron* step two], we need not consider the Commission's argument that, under *Chevron* [step one], its reading is not only permissible, but also unambiguously correct."); *Decatur County Gen. Hosp. v. Johnson*, 602 F. Supp. 2d 176, 186 n.6 (D.D.C. 2009) (holding that agency's decision to apply cost reduction factors to base year costs was entitled to deference under *Chevron* step two, where the agency also provided an alternative justification under *Chevron* step one).

[88] *Petit*, 675 F.3d at 785 (citing *Village of Barrington*, 636 F.3d at 665 (internal quotation marks omitted)).

reasonable."[89] Therefore, in the alternative, if paragraph (d)(3) is determined to be ambiguous, the foregoing plain language analysis would be equally applicable to explain how the Commission's reasonable interpretation is consistent with the text, context, structure, and purpose of the PAEA.

Furthermore, to the extent that any ambiguity exists with regard to paragraph (d)(3), it is also permissible for the Commission to use Senator Collins' floor statement as an interpretative aid and reasonable for the Commission to conclude that paragraph (d)(3) would allow the Commission to make additional rate adjustment authority available to the Postal Service. ABA, ANM *et al.*, and NPPC *et al.* assert that Senator Collins' statement must be disregarded because it is not an authoritative expression of legislative intent (such as an official committee report).[90] However, floor statements by key individuals, such as legislative sponsors, especially where no legislators offered contrary views, help illuminate the purpose of a piece of legislation.[91] Floor statements are particularly

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[89] *Nat'l Cable & Telecomm. Ass'n*, 567 F.3d at 663 (citing *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003)).

[90] *See* ABA Comments at 6; ANM *et al.* Comments at 25-26; NPPC *et al.* Comments at 28-29.

[91] *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (finding that an uncontradicted floor statement by of one of the legislation's sponsors "deserves to be accorded substantial weight in interpreting the statute").

instructive in clarifying the purpose of language where no other evidence of legislative intent exists.[92]

Paragraph (d)(3) did not appear in any prior version of the PAEA, nor was it addressed in any hearings or committee reports. Order No. 4258 at 21. Following the [46] passage of two different postal reform bills, key members of the House and the Senate (including Senator Collins) negotiated a compromise.[93] The final text of the PAEA was introduced in a new bill and was approved without amendment by both the House and the Senate.[94] Paragraph (d)(3) first appeared in this final version.[95] Neither the presidential signing statement nor any other floor statements addressed paragraph

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[92] *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982) (finding remarks on the Senate floor by "the sponsor of the language ultimately enacted[] are an authoritative guide to the statute's construction" where no committee report addressed the provisions at issue); *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 449 (D.C. Cir. 1989) (finding that sponsors' floor statements were "the only evidence of congressional intent," and concluding that such remarks "necessarily have some force" and "carry 'substantial weight' " (internal citation omitted)).

[93] 151 Cong. Rec. H6511, H6548-H6549 (daily ed. Jul. 26, 2005) (Roll Call No. 430) (reflecting a vote of 410-20 in the House); 152 Cong. Rec. S898, S927-S942 (daily ed. Feb. 9, 2006) (reflecting approval by unanimous consent in the Senate); 152 Cong. Rec. H9160, H9179 (daily ed. Dec. 8, 2006) (statement of Rep. Tom Davis).

[94] 152 Cong. Rec. H9160-H9182 (daily ed. Dec. 8, 2006); 152 Cong. Rec. S11821-S11822 (daily ed. Dec. 8, 2006); *see also* 152 Cong. Rec. D1153, D1162 (daily digest, Dec. 8, 2006).

[95] H.R. 6407, 109th Cong., at 7 (2006).

(d)(3).[96] Accordingly, Senator Collins' floor statement is the best source of legislative history to shed light on the purpose of paragraph (d)(3).

Senator Collins' floor statement demonstrates that Congress contemplated the breadth of the Commission's authority to review and, if needed, to change or replace the ratemaking system, if the Commission determined that the existing system was not achieving the statutory objectives. *See* Order No. 4258 at 22-23. Senator Collins' statement confirms that Congress considered the CPI-U price cap to be a part of the system subject to the Commission's authority under paragraph (d)(3). *See id.* Moreover, the statement eschews any interpretation that paragraph (d)(3) was intended to deny the Commission the authority to alter or replace the CPI-U price cap. In numerous places, Senator Collins explained that the PAEA guaranteed that the CPI-U price cap would exist for a *minimum* of 10 years.[97] Senator Collins explained that the 10-year review would occur and discussed potential outcomes: either the Commission would [47] decide to retain the CPI-U price cap in its current form; the Commission would decide to modify the CPI-U price cap; or the Commission would decide to replace the CPI-U price cap system with an alternative system (subject, of course, to

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[96] Statement on Signing the Postal Accountability and Enhancement Act, 42 Weekly Comp. Pres. Doc. 2196-2197 (Dec. 20, 2006), 2006 U.S.C.C.A.N. S76 (2006); 152 Cong. Rec. H9160-H9182 (daily ed. Dec. 8, 2006); 152 Cong. Rec. 511674-S11677, S11821-S11822 (daily ed. Dec. 8, 2006).

[97] 152 Cong. Rec. S11674-S11675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins).

the possibility that Congress could through legislation elect to reinstate the CPI-U price cap). *Id.* This statement directly contradicts any interpretation that the drafters of the PAEA intended for the Commission's 10-year review to redress *only* technical or procedural issues with regard to implementing the CPI-U price cap. Therefore, if the statute is deemed to be ambiguous, this legislative history confirms the reasonableness of the Commission's interpretation of its statutory authority to modify or adopt an alternative system.

Characterizing Congress as having a "longstanding role as the body that sets the benchmark for postal rates," NPPC *et al.* assert that the Commission's interpretation of paragraph (d)(3) would constitute an untenable abdication of power to the Commission by Congress. NPPC *et al.* Comments at 30. However, as the Postal Service observes, "[s]ection 3622 fits within a history of Congressional delegations of decision-making authority concerning postal matters, including ratemaking." Postal Service Reply Comments at 16. Further, as Senator Collins expressly contemplated, Congress may re-impose the CPI-U price cap at any time.[98]

Multiple commenters assert that the Commission's interpretation of paragraph (d)(3) conflicts with statements the Commission has made in the past. In terms of the two-step *Chevron* framework, if the issues are resolved at *Chevron* step one, prior orders of the

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[98] 152 Cong. Rec. S11674-S11675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins).

Commission would not be dispositive. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter. . . ."). In the alternative that the issues are evaluated to determine whether the Commission should be accorded deference under *Chevron* step two, it is important to recognize that "[a]n initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863-864. Agencies [48] "must consider varying interpretations and the wisdom of [their] polic[ies] on a continuing basis." *Id.*

ABA, ANM *et al.*, and NPPC *et al.* cite prior statements appearing in various Commission orders which purportedly corroborate their assertion that the qualitative pricing standards (such as the statutory objectives and factors) are subordinate to the quantitative pricing standards (such as the CPI-U price cap) in all possible iterations of the ratemaking system under the PAEA.[99] This premise, however, relies on the flawed position (rebutted above) that the scope of review and potential regulatory action under paragraph (d)(3) is limited to the scope of regulatory action authorized under subsection (a). As discussed in Order No. 4258 and detailed below, none of the statements at issue interpret the authority conferred on the Commission by paragraph (d)(3). *See* Order No. 4258 at 18.

ANM *et al.* assert that the Commission is bound in the instant proceeding by Order No. 26, in which the

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[99] ABA Comments at 5-6; ANM *et al.* Comments at 13-15, 18, 27-29; NPPC *et al.* Comments at 26; *see also* 2014 ANM *et al.* White Paper at 12.

Commission stated that "[s]ection 3622(d) of the PAEA, captioned 'Requirements,' addresses some of the mandatory features the Commission must include in the modern regulatory system."[100] This statement, included in the background discussion of the notice of proposed rulemaking to promulgate the initial ratemaking system after the PAEA was enacted, interpreted the Commission's duty to establish (and revise) the initial ratemaking system under subsection (a)—prior to the issuance of a determination pursuant to paragraph (d)(3) that the initial ratemaking system had not achieved the PAEA's statutory objectives. Order No. 26 at ¶ 2005. The rationale for interpreting paragraph (d)(3) more broadly than subsection (a) has been discussed in Order No. 4258 and further expounded upon in this Order. *See* Order [49] No. 4258 at 16-18. Prior statements in rulemakings conducted under subsection (a) do not limit the specific authority conferred by paragraph (d)(3).

ANM *et al.* assert that the Commission is bound in the instant proceeding by prior statements in Order No. 536, wherein the Commission purportedly recognized that the PAEA's objectives and factors were subordinate to the PAEA's quantitative pricing standards.[101] Again, those statements did not interpret the Commission's authority pursuant to paragraph (d)(3).

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[100] ANM *et al.* Comments at 13 (quoting Order No. 26 at ¶ 2005).

[101] Order No. 536 at 16-17, 35-36; ANM *et al.* Comments at 13-14 (citing Order No. 536 at 16-17, 35-36 (emphasis added)), Appendix A at 12-14 (quoting Order No. 536 at 16, 34, 36, 37).

Instead, they described the level of scrutiny to be applied by the Commission during pre-implementation review of rates (*i.e.*, Market Dominant rate adjustment proceedings), as opposed to post-implementation review (such as through annual compliance review proceedings).[102] With respect to pre-implementation review of Market Dominant rates, the Commission explained that its general focus would be on the quantitative pricing standards (such as the CPI-U price cap and the limitations on excessive workshare discounts), whereas its evaluation of the qualitative standards (*i.e.*, the statutory objectives and factors) would be light and preliminary in nature. Order No. 536 at 17, 34. This stood in contrast to the Commission's pricing role as it had existed under the PRA, which involved pre-implementation review of all rates proposed by the Postal Service according to a list of both quantitative and qualitative ratemaking factors in an omnibus 10-month proceeding. *Id.* at 16. Order No. 536 observed that generally under the PAEA, evaluation of the qualitative standards would be deferred to post-implementation review. *Id.* at 17, 34. Accordingly, the Commission noted that "the qualitative standards usually remain in the background when the Postal Service selects and implements market dominant rates."[103] Regardless, paragraph [50] (d)(3) gives rise to

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[102] Order No. 536 at 16; *see* 39 U.S.C. §§ 3652; 3653 (ACRs and ACD proceedings).

[103] *Id.* at 17. The Commission notes that its interpretation of the role of the quantitative pricing standards relative to the qualitative ones within the specific context of a rate adjustment proceeding, as embodied in Order No. 536, was recently rejected by

a different statutory context, in which the statutory objectives are cast as the focal point, with a supporting role for the statutory factors. Paragraph (d)(3) expressly authorizes the Commission to modify or replace the ratemaking system as necessary to achieve the statutory objectives. As such, the level of scrutiny to be applied in rate proceedings or during an annual compliance review proceeding is unrelated to the extent of the Commission's authority under paragraph (d)(3).

ANM *et al.* assert that the Commission is bound in the instant proceeding by prior statements to the effect that the price cap takes precedence over Factor 2 (39 U.S.C. § 3622(c)(2)), which requires coverage of attributable costs.[104] However, these statements were made in the context of ACDs concerning the non-compensatory status of the Periodicals mail class in FY 2010 and FY 2011.[105] In both of these years, the Commission directed the Postal Service to improve Periodicals' cost coverage through means other than rate increases that would be in excess of the CPI-U price cap, including through operational efficiency enhancements, cost controls, and improved pricing

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the United States Court of Appeals for the D.C. Circuit. *See Carlson v. Postal Reg. Comm'n*, 938 F.3d 337 (D.C. Cir. 2019).

[104] ANM *et al.* Comments at 14 (citing *U.S. Postal Serv. v. Postal Rate Comm'n*, 676 F.3d 1105, 1108 (D.C. Cir. 2012), on remand, Order No. 1427 at 17-19, Appendix A at 14-15 (quoting FY 2010 ACD at 18-19; Order No. 1427 at 17; Docket No. ACR2011, *Annual Compliance Determination*, March 28, 2012, at 17 (FY 2011 ACD)).

[105] *See* FY 2010 ACD at 18-19; FY 2011 ACD at 17.

signals.[106] This directive was consistent with the requirement that the Commission take into account Factor 2, which requires that each class of mail or type of mail service bear the direct and indirect postal costs attributable to it, when determining compliance for purposes of 39 U.S.C. § 3653.[107] These statements were made at an early stage of the PAEA ratemaking system, pursuant to the constraints of the system as it was initially established under subsection (a). The statement was, and remains, consistent with the Commission's interpretation of its authority under 39 U.S.C. § 3622(a).

However, after 10 years of experience with the initial ratemaking system, the Commission has determined that the initial ratemaking system is not achieving the PAEA's statutory objectives, taking into account the statutory factors. Order No. 4258 at 2. The Commission has also made specific findings concerning the impact of non-compensatory mail classes and products on the achievement of the statutory objectives. *Id.* at 74-76. The Commission has determined that

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[106] FY 2010 ACD at 17; Order No. 1427 at 17-18; FY 2011 ACD at 17. It is also worth noting that the Commission did not find the Periodicals class out of compliance in FY 2010 or FY 2011; therefore, the Commission did not address the scope of its remedial power under 39 U.S.C. § 3653(c). FY 2010 ACD at 17; FY 2011 ACD at 17.

[107] 39 U.S.C. § 3653 requires the Commission to determine annually "whether any rates or fees in effect during such year . . . were not in compliance with applicable provisions of this chapter. . . ." 39 U.S.C. § 3653(b)(1). One of the "applicable provisions of this chapter" is 39 U.S.C. § 3622(c)(2), which is the second of the PAEA's statutory factors.

improving the cost coverage of the Periodicals class, in part through additional rate adjustment authority, is necessary to achieve the statutory objectives. *Id.* at 77-81. Therefore, the authority to adopt the regulations which the Commission has proposed pursuant to paragraph (d)(3) is unaffected by prior statements made by the Commission during annual compliance reviews conducted before paragraph (d)(3) became applicable.

ABA and ANM *et al.* assert that the Commission is bound in the instant proceeding by prior statements that "the role of the price cap is central to ratemaking, and the integrity of the price cap is indispensable if the incentive to reduce costs is to remain effective."[108] These statements were made in the context of limiting exigent rate increases under 39 U.S.C. § 3622(d)(1)(E) to circumstances that qualified as extraordinary or exceptional.[109] Specifically, these statements were used by the Commission to support its interpretation of the causal nexus required by the phrase "due to" appearing in section 3622(d)(1)(E). Order No. 864 at 32. These statements [52] were made at an early stage of the PAEA ratemaking system, pursuant to the constraints of the system as it was initially established under subsection (a). Furthermore, the rules proposed by the Commission in this Order do not make any substantive

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[108] *See* 2017 ABA Comments at 8 n.14 (quoting Order No. 547 at 49-50); ABA Comments at 5 n.4 (same); *see also* ANM *et al.* Comments at 14-15 (citing Order No. 547 at 10-13, 49-50), (quoting Order No. 864 at 32-33).

[109] Order No. 547 at 49-50; *see* 39 U.S.C. § 3622(d)(1)(E).

changes to the PAEA's exigency provision.[110] Therefore, these out-of-context statements are misplaced in the instant proceeding.[111]

ABA and ANM *et al.* are incorrect in asserting that the Commission has made an "unexplained departure from the Commission's prior findings" concerning its policy of strictly enforcing the CPI-U price cap in order to protect captive mailers from abuse as a result of the postal monopoly.[112] "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[113] The agency must explain "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."[114]

As described in Order No. 4258 and in this Order, the proposal to make additional rate adjustment

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[110] Non-substantive changes are proposed to the existing rules governing rate adjustments due to extraordinary and exceptional circumstances, such as the simplification of terminology and reorganization. Order No. 4258 at 108, 126.

[111] Additionally, as discussed above, the rules that the Commission is proposing do not jettison the concept of a price cap altogether; rather they make adjustments to the CPI-U price cap in recognition of the fact that aspects of the current ratemaking system have failed to achieve the PAEA's statutory objectives.

[112] ANM *et al.* Comments at 28; *see also* ABA Comments at 5.

[113] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

[114] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012).

authority available to the Postal Service is permissible under the PAEA and is adequately justified. The Commission has determined that the current ratemaking system is not achieving the PAEA's statutory objectives, taking into account the statutory factors, and the Commission has provided extensive findings in support of [53] this conclusion. *See generally* Order No. 4257. The Commission has found that having an annual limitation on the percentage change in rates (*i.e.*, a price cap) is an aspect of the ratemaking system that furthers the achievement of some of the statutory objectives and factors.[115] However, the Commission has also determined that limiting the amount of that annual limitation solely to the percentage change in CPI-U frustrates the achievement of several other objectives and factors.[116] Accordingly, evaluating the objectives in conjunction with each other, the Commission has found that raising the amount of the annual limitation is necessary to achieve the objectives. Order No. 4258 at 26-81. In selecting the parameters for allowing such rate increases (such as using a phase-in allocation method for the retirement rate authority rather than a one-time rate increase), the Commission has carefully considered the impact on mailers. Order No. 4258 at 41-45. Several of this Order's revisions to the initial proposal incorporate the concerns of mailers.

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[115] *See* Order No. 4257 at 103; Order No. 4258 at 34.

[116] *See* Order No. 4257 at 178; Order No. 4258 at 33-35, 46-53.

c. The Constitutionality of the Commission's Interpretation

Finally, ANM *et al.* and NPPC *et al.* argue that the Commission's interpretation of paragraph (d)(3) raises constitutional concerns under the Constitution's Presentment Clause and non-delegation doctrine.[117]

With regard to the Presentment Clause, the promulgation of rules by an administrative agency pursuant to a statute does not constitute a legislative act. It is, rather, an exercise of an executive function properly entrusted to administrative agencies, and the Presentment Clause does not apply to it.[118] Paragraph (d)(3) does [54] not authorize the Commission to amend or repeal portions of the PAEA—it merely grants the Commission the power to promulgate new regulations as contemplated by the PAEA.

Nevertheless, even if the Presentment Clause were applicable, the authority cited by ANM *et al.* and NPPC *et al.* is distinguishable from the instant case. In *Clinton*, 524 U.S. 417, the Supreme Court struck down the Line Item Veto Act, which would have permitted the president to selectively cancel certain types of appropriations provisions that had been signed into law by Congress. In so doing, the Court distinguished the

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[117] NPPC *et al.* Comments at 31-40; ANM *et al.* Comments at 18 n.5; *see also* 2017 ANM *et al.* Comments at 9-10 n.2; 2014 ANM *et al.* White Paper at 17-21. In response to Order No. 4258, ANM *et al.* do not introduce additional argument in support of this position.

[118] *See*, *e.g.*, *American Trucking Assn's, Inc. v. United States*, 344 U.S. 298, 310-313 (1953).

Line Item Veto Act from the Court's earlier decision in *Marshall Field &* Co. *v. Clark*, 143 U.S. 649. *Field v. Clark* upheld the constitutionality of the Tariff Act of 1890, a tariff and import statute that provided for certain tariff exemptions but directed the president to suspend those exemptions in the future as to any country that he determined was imposing tariffs on U.S. products which were "reciprocally unequal and unreasonable." *Id.* at 680.

First, the *Clinton* Court noted that the President's suspension power under the Tariff Act was contingent on conditions that did not exist when the act was passed, whereas the 5-day limit for cancelling an appropriations line item under the Line Item Veto Act meant that the President's action would necessarily be based on the same conditions contemplated by Congress. *Clinton*, 524 U.S. at 443-444. In passing the PAEA, as with the Tariff Act, Congress anticipated that new conditions might be present 10 years after the law's passage, which would be materially different from the conditions contemplated by Congress. Congress also recognized that, regardless of any change in conditions, the ratemaking system that it was establishing might, for reasons both unintended and unforeseeable, prove to be less than fully satisfactory. Congress explicitly acknowledged these possibilities by mandating the paragraph (d)(3) review. Congress intended, if there were to be a material change in conditions, or if the ratemaking system were to prove less than fully satisfactory, for the Commission to be [55] empowered to promulgate revised regulations in order

to make the ratemaking system conform to the PAEA's statutory objectives.

Second, the *Clinton* Court noted that the Line Item Veto Act provided little constraint on the President's discretion to cancel a particular appropriations line item, whereas the President's discretion was much narrower under the Tariff Act. *Clinton*, 524 U.S. at 443-444. Under the PAEA, the Commission's discretion in promulgating new regulations is circumscribed by the nine statutory objectives contained in section 3622(b). These objectives constitute substantive requirements that govern any regulations modifying or replacing the ratemaking system. The PAEA also provides procedural requirements that govern any such regulations, such as the requirement that the Commission engage in notice and comment rulemaking.

Finally, the *Clinton* Court considered it important that the President was fulfilling Congress's policy under the Tariff Act when he suspended certain import duty exemptions, whereas he was clearly contravening Congress's policy judgment when he cancelled spending items under the Line Item Veto Act. *Clinton*, 524 U.S. at 444. With regard to the PAEA, it is clear that Congress intended to empower the Commission to modify or replace the initial ratemaking system if, after 10 years, the system was failing to achieve the PAEA's objectives and factors. Therefore, even if the Presentment Clause were applicable to the Commission's proposed rulemaking in this case, the instant situation is distinguishable from *Clinton* and is, in fact, more analogous to *Field v. Clark*.

With regard to the non-delegation doctrine, the Commission agrees with the Postal Service that NPPC *et al.* continue to rely on two cases with limited precedential value. *See* Postal Service Reply Comments at 8-9. In fact, "[o]nly twice in this country's history . . . ha[s] [the Supreme Court] found a delegation excessive—in each case because 'Congress had failed to articulate *any* policy or standard' to confine [56] discretion."[119] These are precisely the two cases NPPC *et al.* cite.[120] The more extensive and more recent body of case law has upheld broad delegations to agencies "so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority."[121] "[A] delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.' "[122] The Supreme Court has upheld "delegations to various agencies to regulate in the 'public interest.' "[123] It has upheld delegations to "agencies to set 'fair and equitable' prices and 'just and

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[119] *Gundy v. United States*, 139 S.Ct. 2116, 2129 (2019) (emphasis in original) (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989)).

[120] *See* NPPC *et al.* Comments at 36 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

[121] *Gundy*, 139 S.Ct. at 2129 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)); *see* Postal Service Reply Comments at 8-9; *see also* Order No. 4258 at 24.

[122] *Gundy*, 139 S.Ct. at 2129 (brackets in original) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

[123] *Gundy*, 139 S.Ct. at 2129 (quoting *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932)).

reasonable' rates."[124] It has "affirmed a delegation to an agency to issue whatever air quality standards are 'requisite to protect the public health.' "[125]

Paragraph (d)(3) easily meets this standard. The Commission is authorized to engage in rulemaking only if it determines that the initial ratemaking system is not meeting the PAEA's statutory objectives, taking into account its factors, and the Commission may only engage in rulemaking "as necessary to achieve the objectives." 39 U.S.C. § 3622(d)(3). The nine statutory objectives are more than sufficient to provide an intelligible principle to guide the Commission's discretion. They make clear [57] the general policy that is to be pursued and the boundaries of the Commission's authority. Therefore, NPPC *et al*.'s arguments with regard to the non-delegation doctrine are meritless.

3. Workshare Discounts

With respect to the Commission's workshare discount proposal, GCA and the Postal Service reiterate their position that workshare discounts should not be affected by this proceeding.[126] However, no additional support for their position was entered into the record.

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[124] *Gundy*, 139 S.Ct. at 2129 (quoting *Yakus v. United States*, 321 U.S. 414, 422, 427 (1944); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)).

[125] *Gundy*, 139 S.Ct. at 2129 (quoting *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001)).

[126] GCA Comments at 1 n.1 (citing 2017 GCA Comments at sections V-VI); Postal Service Reply Comments at 111 n.292 (citing Postal Service Comments at 146-147).

For the reasons discussed in its prior orders, the Commission interprets the scope of the review and regulatory action authorized under paragraph (d)(3) of section 3622 to include workshare discounts.[127] Accordingly, the Commission may adopt its workshare discount proposal under *Chevron* step one. Paragraph (d)(3) does not clearly foreclose the inclusion of workshare discounts in the "system" subject to review. Nor does this provision clearly foreclose the inclusion of the proposed changes in a modified or alternative system under paragraph (d)(3). In the alternative, if there is any ambiguity as to whether the paragraph (d)(3) would authorize the Commission to adopt this proposal, then the Commission has permissibly construed the PAEA and would be accorded deference under *Chevron* step two.

Even in the alternative that paragraph (d)(3) of section 3622 would not authorize the proposal, the Commission would still be entitled to deference under *Chevron* step two based on other sources of statutory authority. The Commission's workshare discount proposal is within the scope of the Commission's standing rulemaking authority (under 39 U.S.C. §§ 3622(a) and 503) and is consistent with the Commission's specific [58] authority to regulate excessive workshare discounts under subsection (e) of section 3622. Subsection (e) is silent with regard to workshare discounts lower than avoided costs. Order No. 4257 at 34. However, subsection 3622(e) does not clearly foreclose the regulation

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[127] Order No. 4257 at 12; Order No. 4258 at 18-19.

of workshare discounts lower than avoided costs. Further, the Commission's interpretation "is 'rationally related to the goals of'" the PAEA.[128] Accordingly, the Commission maintains that it has multiple sources of authority to support addressing workshare discounts in this proceeding.

4. Annual Compliance Reporting Requirements

The Commission also proposes to modify the reporting requirements codified at 39 C.F.R. parts 3050 (Periodic Reporting) and 3055 (Service Performance and Customer Satisfaction Reporting). These modifications both further the achievement of the PAEA's objectives and conform with the changes proposed to 39 C.F.R. part 3010 (Regulation of Rates for Market Dominant Products). Additionally, they are separately authorized under the Commission's specific authority to "prescribe the content and form of the public reports . . . to be provided by the Postal Service [as part of its *Annual Compliance Report* (ACR)]." 39 U.S.C. § 3652(e)(1). These proposed changes will ensure that the Commission can evaluate the Postal Service's compliance with the new regulations proposed in part 3010 and are necessitated by the public interest. 39 U.S.C. § 3652(e)(2)(C). These proposed reporting requirements relate to Retirement Obligation Rate Authority,

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[128] *Petit*, 675 F.3d at 781 (quoting *Village of Barrington, Ill.*, 636 F.3d at 665).

Performance-Based Rate Authority, workshare discounts, and cost reductions.

* * *

APPENDIX D

ORDER NO. 4258

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

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

Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products — Docket No. RM2017-3

NOTICE OF PROPOSED RULEMAKING FOR THE SYSTEM FOR REGULATING RATES AND CLASSES FOR MARKET DOMINANT PRODUCTS

[LOGO]

Washington, DC 20268-0001
December 1, 2017

TABLE OF CONTENTS

Page

I. INTRODUCTION AND PROCEDURAL HISTORY 1

II. STATUTORY AUTHORITY 4

A. Introduction 4

B. Comments 5

1. Authority to Eliminate or Modify the Price Cap 6
2. Authority to Modify Workshare Discount Provisions 12
C. Commission Analysis 14
III. PROPOSED REGULATORY CHANGES 26
A. Introduction 26
B. The Path to Financial Stability 27
1. Background 27
2. Comments 28
3. Commission Analysis 33
C. Supplemental Rate Authority 39
1. Background 39
2. Amount of Supplemental Rate Authority 40
3. Phase-in Mechanism 41
D. Performance-Based Rate Authority 46
1. Background 46
2. Amount of Performance-Based Rate Authority 53
3. Performance Incentive Mechanism ... 55
4. Operational Efficiency 57
5. Service 65
E. Non-Compensatory Classes and Products 73
1. Introduction 73
2. Non-Compensatory Products 74

3. Non-Compensatory Classes 81
F. Workshare Discounts 87
1. Introduction 87
2. Comments 90
3. Proposed Commission Solution 93
4. Commission Analysis of Alternatives 96
5. Proposed Regulatory Changes..... 97
6. Conclusion 98
G. Procedural Improvements 98
1. Introduction 98
2. Schedule for Regular and Predictable Rate Adjustments 99
3. Revised Procedural Schedule for Rate Adjustment Proceedings 102
IV. DESCRIPTION OF PROPOSED CHANGES TO RULES APPEARING IN THE CODE OF FEDERAL REGULATIONS 107
A. Introduction 107
1. Affected Sections 107
2. General Restructuring..... 107
3. Structure of the Proposed Rules 110
B. Line-by-Line Discussion of Changes 112
1. Section 3010, Subpart A—General Provisions 112
2. Section 3010, Subpart B—Rate Adjustments 113

3. Section 3010, Subpart C—Consumer Price Index Rate Authority 119
4. Section 3010, Subpart D—Supplemental Rate Authority..... 119
5. Section 3010, Subpart E—Performance-Based Rate Authority 120
6. Section 3010, Subpart F—Non-Compensatory Classes or Products 121
7. Section 3010, Subpart G—Accumulation of Unused and Disbursement of Banked Rate Adjustment Authority 122
8. Section 3010, Subpart H—Rate Adjustments Due to Extraordinary and Exceptional Circumstances 126
9. Section 3010, Subpart I—Workshare Discounts 126
10. Section 3020, Subpart G—Requests for Market Dominant Negotiated Service Agreements 127
11. Section 3050, Periodic Reporting 129
12. Section 3055, Subpart A—Annual Reporting of Service Performance ... 129

V. ADMINISTRATIVE ACTIONS 130
A. Assignment of Public Representative... 130
B. Request for Comments and Reply Comments..... 130

VI. ORDERING PARAGRAPHS..... 131

Supplemental Views of Vice Chairman Mark Acton

Supplemental Views of Commissioner Nanci E. Langley

Dissenting Views of Commissioner Tony Hammond

Attachment A—Proposed Rules

Appendix—List of Commenters and Comments

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[4] II. STATUTORY AUTHORITY

A. Introduction

Section 3622(d)(3) of title 39 of the United States Code directs the Commission to conduct a review of the market dominant ratemaking system 10 years after the enactment of the PAEA in order to determine whether the system is achieving the objectives enumerated at 39 U.S.C. 3622(b), taking into account the factors enumerated at 39 U.S.C. 3622(c). This provision prescribes a two-step process. First, the Commission must determine whether the current ratemaking system is achieving the PAEA's objectives, taking into account its factors.

> Ten years after the date of enactment of the [PAEA] and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). . . .

39 U.S.C. 3622(d)(3).

The Commission completed the first step of this process on December 1, 2017, when it issued an order

announcing its findings with regard to the current ratemaking system. *See* Order No. 4257. The Commission specifically determined that the ratemaking system has not achieved the objectives, taking into account the factors. *Id.* at 275.

The Commission now proceeds to the second step of the process established by section 3622(d)(3). This provision authorizes the Commission to promulgate rules either modifying the current ratemaking system or adopting an alternative ratemaking system, "as necessary to achieve the objectives."

> If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

[5] 39 U.S.C. 3622(d)(3). The Commission interprets this provision as providing broad authority to make changes to the market dominant ratemaking system.

The authority to make changes to the system provided by section 3622(d)(3) expands upon the statutory authority provided by section 3622(a).

> The Postal Regulatory Commission shall, within 18 months after the date of enactment of [the PAEA], by regulation establish (and may from time to time thereafter by

> regulation revise) a modern system for regulating rates and classes for market-dominant products.

39 U.S.C. 3622(a).

Finally, the Commission has general authority, pursuant to section 503, to promulgate rules and regulations and establish procedures.

> The Postal Regulatory Commission shall promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5, and take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people as prescribed under this title. . . .

39 U.S.C. 503.

B. Comments

The comments received in response to the ANPR that discuss the Commission's rulemaking authority primarily focus on two aspects of that authority pursuant to section 3622(d)(3): the authority to eliminate or modify the price cap and the authority to modify workshare discount provisions. The Appendix to this Order provides a list of commenters and citations to the comments filed in this docket in response to Order No. 3673.

[6] 1. Authority to Eliminate or Modify the Price Cap

a. Plain Language

With regard to the price cap, multiple commenters take the position that the plain language of 39 U.S.C. 3622 constrains the Commission's ability to eliminate, modify, or replace the price cap. ANM *et al.* contend that the mandatory "shall" language used by Congress in establishing the consumer price index (CPI) price cap and its central role in the PAEA ratemaking scheme forecloses any claim that the statute makes the price cap merely optional.[4]

Commenters also advance a number of structural arguments for why section 3622 precludes any changes to the price cap. ANM *et al.*, MMA *et al.*, and GCA all assert that the scope of section 3622(d)(3) is limited by the title of section 3622(d)—"Requirements."[5]

ABA focuses on the use of the word "system" throughout section 3622, arguing that "the consistent use of the word 'system' throughout the section, rather than qualifiers such as 'first system' or 'initial system' or 'system preceding the 10 year review,' suggests Congress contemplated the same requirements applying to

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[4] ANM *et al.* Comments at 9-10 n.2 (asserting that the Commission lacks authority to substantially modify the price cap) (citing ANM *et al.*, Limitations on the Commission's Authority Under Section 3622(d)(3), October 28, 2014, at 6 (ANM *et al.* 2014 White Paper)).

[5] ANM *et al.* 2014 White Paper at 4-7; MMA *et al.* Comments at 14-15; GCA Comments at 29-31.

any and all rate structures the Commission would create." ABA Comments at 8-10. GCA focuses on the use of the phrase "requirement," arguing that "[w]hen a particular phrase is used repeatedly in the same enactment, it is customary to give it the same meaning each time it appears . . . [which] suggests that . . . if a feature of the existing system is present because [section] 3622(d) makes it a 'requirement,' then it must remain in any modified or alternative system which emerges from the tenth-year review."[6]

[7] Other commenters focus on the purported primacy of quantitative pricing standards over other provisions of the PAEA. ANM at *al.* and MMA *at al.* assert that three quantitative pricing standards rest at the top of the hierarchy of PAEA provisions—the CPI-U based price cap imposed by section 3622(d)(1)(A) and (d)(2); the workshare discount provisions imposed by section 3622(e); and the constraints on rate relationships between regular and preferred mail imposed by section 3626—and that the objectives and factors enumerated in section 3622(b) and (c) are subordinate to these quantitative pricing standards.[7]

MMA *et al.* posit that because Congress created the objectives and factors at the same time as the price cap, it must be concluded that only a system utilizing the price cap can achieve the objectives and factors.

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[6] GCA Comments at 30 (citing *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)).

[7] ANM *et al.* 2014 White Paper at 12; MMA *et al.* Comments at 15-16.

MMA *et al.* Comments at 15-16. Similarly, GCA asserts that both section 3622(a) and section 3622(d)(3) are supposed to effectuate the objectives and factors, so Congress must have concluded that the price cap was necessary to effectuate the objectives and factors. GCA Comments at 30-31. ANM *et al.* assert that under general canons of statutory construction, specific provisions, such as the price cap provision at section 3622(d)(1)(A), trump general provisions, such as section 3622(d)(3).[8]

Finally, these commenters highlight prior instances where the Commission is alleged to have ratified this view. ABA cites a prior order by the Commission where the Commission observed that "the role of the price cap is central to ratemaking, and the integrity of the price cap is indispensable if the incentive to reduce costs is to remain effective."[9] ANM *at al.* also point to language from a prior Commission order purportedly recognizing that the PAEA's objectives and factors are subordinate to the [8] statute's quantitative pricing standards.[10] Additionally, ANM *et al.*

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[8] ANM *et al.* 2014 White Paper at 15 (citing *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003)).

[9] ABA Comments at 8 (citing Docket No. R2010-4, Order No. 547, Order Denying Request for Exigent Rate Adjustments, September 30, 2010, at 49-50).

[10] ANM *et al.* 2014 White Paper at 13 (citing Docket No. RM2009-3, Order Adopting Analytical Principles Regarding Workshare Discount Methodology, September 14, 2010, at 36 (Order No. 536)); *see also* MMA *et al.* Comments at 15-16 (citing Docket No. ACR2010, Annual Compliance Determination, March 29, 2011, at 19 (FY 2010 ACD)).

assert that the Commission is bound in the instant proceeding by prior holdings in its FY 2010 and FY 2011 Annual Compliance Determinations (ACDs) that the price cap takes precedence over the statutory factors.[11]

ABA, ANM *et al.*, and MMA *et al.* all take the position that the Commission's authority to review the ratemaking system and engage in rulemaking under section 3622(d)(3) is limited to the scope of the Commission's initial rulemaking authority under section 3622(a).[12] ANM *et al.* assert that section 3622(d)(3) mirrors section 3622(a), and as a result the Commission's authority to modify or replace regulations under section 3622(d)(3) is coextensive with the Commission's authority to establish those regulations in the first instance under section 3622(a). ANM *et al.* Comments at 10-11. Hence, according to ANM *et al.*, nothing in the language or structure of the PAEA suggests that the Commission's rulemaking authority under section 3622(d)(3) is broader than it was under section 3622(a). *Id.*

Based on this interpretation, MMA *et al.* assert that the Commission can modify regulations

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[11] ANM *et al.* 2014 White Paper at 14-15 (quoting FY 2010 ACD at 18-19; Docket No. ACR2010R, Order No. 1427, Order on Remand, August 9, 2012; Docket No. ACR2011, Annual Compliance Determination, March 28, 2012, at 17 (FY 2011 ACD)). The specific factor at issue was Factor 2 (39 U.S.C. 3622(c)(2)), which requires coverage of attributable costs.

[12] ABA Comments at 9; ANM *et al.* 2014 White Paper at 9-11; MMA *et al.* Comments at 14.

implementing the price cap but cannot change the fundamental requirements of the ratemaking system. MMA *et al.* Comments at 15. In MMA *et al.*'s view, "[a]s an administrative agency, the Commission already has inherent authority to revise regulations that it has previously promulgated . . . [and section 3622(d)(3)] merely directs the Commission to use its normal administrative powers." *Id.* at 14. GCA suggests that while the Commission cannot abolish the price cap, it can "identify and [9] specify features of the . . . price cap which do not adequately effectuate the objectives and factors, point out and analyze the particular shortcomings, identify the objective(s) or factor(s) they are hindering, and find ways to correct them in detail without hindering any other objective." GCA Comments at 31-32.

Other commenters assert that the plain language of section 3622 permits the Commission to modify or replace the price cap.[13] The Postal Service takes the position that the "system" for purposes of section 3622 includes all provisions within section 3622(d), including the price cap provision. Postal Service Comments at 19. The Postal Service asserts that "[s]ection 3622(d) plainly states at the outset that its provisions are part of the 'system for regulating rates and classes for market-dominant products." *Id.* Furthermore, the Postal Service asserts that "whatever the precise scope of 'modification' might be, the fact that the Commission is also authorized to adopt an 'alternative system'

[13] PR Comments at 29-30; NALC Comments at 16.

demonstrates that [s]ection 3622(d)(3) imposes no limitations on the Commission's authority regarding the design of a replacement regulatory system, other than the requirement that any such replacement achieve the objectives." *Id.* at 19-20.

b. Legislative History

Multiple commenters also base their arguments with regard to the price cap on the PAEA's legislative history. ANM *et al.* and GCA note that an early version of the PAEA had referred to the price cap as an "allowable provision," but that by the time the final bill was enacted it had become a "requirement."[14] ANM *et al.* assert that nothing in the PAEA's legislative history suggests that Congress intended for the Commission to have broader rulemaking authority under section 3622(d)(3) than it had under section [10] 3622(a). ANM *et al.* Comments at 11-12. ANM *et al.* and MMA *et al.* contend that elimination or relaxation of the price cap would be contrary to the spirit of the PAEA.[15]

On the other hand, the Postal Service, NALC, and APWU all cite to a floor statement by Senator Susan Collins to the effect that the PAEA would provide 10 years of rate stability, after which the Commission would review the ratemaking system and, if necessary,

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[14] ANM *et al.* 2014 White Paper at 16; GCA Comments at 30-31.

[15] ANM *et al.* 2014 White Paper at 5-7; MMA *et al.* Comments at 16.

modify it or adopt an alternative system.[16] The Postal Service asserts that the House version of what became the PAEA would have permitted the Commission to choose a regulatory system, while the Senate version contained a permanent price cap; hence, the final version of the PAEA was a compromise that contained elements of both. Postal Service Comments at 20-21. The Postal Service maintains that it is clear that Congress intended for the Commission to review the ratemaking system in order to determine if it was actually achieving the objectives and factors specified by Congress and, if not, to design a system which would achieve the objectives. *Id.* at 22-23. The Postal Service maintains that the purpose of section 3622(d)(3) was to give the Commission authority to respond to changed circumstances subsequent to the PAEA's enactment. *Id.* at 22-24. The Postal Service contends that it is clear from reviewing the legislative history that if Congress had desired to make the price cap irrevocable, it could have done so. *Id.* at 26-27.

[11] c. Constitutional Concerns

Multiple commenters take the position that interpreting section 3622(d)(3) broadly would produce unconstitutional results. ANM *et al.* and MMA *et al.* assert that a broad interpretation of section 3622(d)(3) would violate the Presentment Clause of the Constitution, which prohibits a bill from becoming law without

[16] Postal Service Comments at 21-22; NALC Comments at 16; APWU Comments at 5-6.

first passing both houses of Congress and then being "presented" to the President.[17] ANM *et al.* also assert that a broad interpretation of section 3622(d)(3) would violate the non-delegation doctrine, under which Congress may not delegate legislative power to an administrative agency where such delegation contains no standards to guide the agency's discretion.[18] MMA *et al.* echo this argument, asserting that the PAEA's objectives and factors do not provide an intelligible principle to guide the Commission's discretion which would be sufficient to permit such a delegation. MMA *et al.* Comments at 15-16.

MMA *et al.* assert that a broad interpretation of section 3622(d)(3) could potentially violate constitutional principles of separation of powers, based on the phrase "and as appropriate thereafter" in section 3622(d)(3). *Id.* at 16-17. MMA *et al.* maintain that "[i]f [the Commission] could change the fundamental nature of the system . . . anytime 'appropriate thereafter,' then it would have received an unprecedented grant to an Executive Branch agency of perpetual power to rewrite legislation." *Id.* at 16.

Based on all of the foregoing, ANM *et al.* contend that a broad interpretation of section 3622(d)(3) would violate the canon of constitutional doubt, which

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[17] ANM *et al.* 2014 White Paper at 18 (citing *Clinton v. City of New York*, 524 U.S. 417 (1998)); MMA *et al.* Comments at 15.

[18] ANM *et al.* 2014 White Paper at 20 (citing *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989); *Panama Ref.* Co. *v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-31 (1935)).

prohibits agencies from construing statutes in such a way as to raise serious doubts about their [12] constitutionality.[19] This is because, in ANM *et al.*'s view, "[t]here is a serious doubt that construing [s]ection 3622(d)(3) to authorize the Commission to rescind the CPI cap would pass muster under the Presentment Clause of the Constitution . . . or the constitutional limits on the delegation of legislative authority." ANM *et al.* 2014 White Paper at 18.

The Postal Service, on the other hand, disagrees that a broad interpretation of Commission authority would present a concern with regard to constitutional separation of powers principles. Postal Service Comments at 25. The Postal Service deems section 3622(d)(3)'s delegation of authority to the Commission to be "unremarkable." *Id.*

2. Authority to Modify Workshare Discount Provisions

The second major topic addressed is the workshare discount provisions contained in 39 U.S.C. 3622(e). Most commenters addressing workshare discounts presume worksharing is within the scope of this proceeding and suggest worksharing related changes.[20] In contrast, a handful of commenters object

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[19] ANM *et al.* 2014 White Paper at 17 (citing *United States v. Delaware & Hudson* Co., 213 U.S. 366, 408 (1909); *Lowe v. SEC*, 472 U.S. 181, 227 (1985); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

[20] *See*, *e.g.*, ABA Comments at 11; ANM *et al.* Comments at 11-12, 82; Chairman Chaffetz and Chairman Meadows

to the review of the workshare discount provisions of section 3622(e).[21] The Postal Service contends that the "system" of ratemaking subject to review and possible rulemaking under section 3622(d)(3) does not include the workshare discount provisions. Postal Service Comments at 19, 28. The Postal Service bases this argument, first, on the PAEA's plain language. The Postal Service asserts that "[s]ubsections (a) through (d) of [13] [s]ection 3622 expressly set forth the parameters of the 'system' . . . [and] [a]t the end of these provisions comes [s]ection 3622(d)(3), with its provision for the Commission's 10-year review of the 'system'. . . ." Postal Service Comments at 28-29. However, it states that "[t]he workshare discount standards in subsection (e) follow[ ] the 10-year review provision . . . [and] subsection (e) does not specify that its standards are an aspect of the 'system." *Id.* at 29. APWU similarly contends that the structure of the PAEA suggests Congress did not intend for workshare discount provisions to be subject to modification under section 3622(d)(3). APWU Comments at 5. GCA also takes the position that workshare provisions are not part of the "system" which section 3622(d)(3) authorizes the Commission to modify. GCA Comments at 37-38.

The Postal Service also asserts that the PAEA's legislative history demonstrates that Congress intended the requirement that workshare discounts not

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Comments at 2; MMA *et al.* Comments at 19, 71; Pitney Bowes Comments at 3-4; and PSA Comments at 6.

[21] *See*, *e.g.*, APWU Comments at 5; Postal Service Comments at 28-30; and GCA Comments at 36-37.

exceed avoided costs to apply regardless of the regulatory system promulgated by the Commission under section 3622(a). Postal Service Comments at 30-31. GCA likewise asserts that when enacting the PAEA, Congress codified the Commission's long-standing practice on workshare discounts into a set of statutory requirements, which GCA contends the Commission lacks authority to change. GCA Comments at 34.

Finally, the Postal Service and GCA assert that the Commission has previously affirmed the view that the workshare discount standards are separate and distinct from other provisions of section 3622, including the objectives and factors that underlie the review mandated by section 3622(d)(3).[22]

[14] C. Commission Analysis

The Commission's determination that the system has not achieved the objectives, taking into account the factors, triggered the applicability of the second step of the system review contemplated by section 3622(d)(3). *See* Order No. 4257 at 275. This provision grants the Commission discretion regarding whether and how to promulgate regulations as necessary to achieve the PAEA's objectives. 39 U.S.C. 3622(d)(3).

Section 3622(d)(3) provides the Commission with two discrete options. The Commission "*may*, by regulation, make such modification *or* adopt such alternative

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[22] Postal Service Comments at 32 (citing Order No. 536 at 16-19, 34-37); *see also* GCA Comments at 36.

system. . . ." 39 U.S.C. 3622(d)(3) (emphasis added). The use of "may," rather than "shall," demonstrates that Congress intended for the Commission to have discretion to decide whether to act at all.[23] Because "or" is disjunctive, the two options on either side of the "or" must have a different meaning from each other.[24] Therefore, the use of "may," followed by two options connected by "or," demonstrates that if the Commission does determine to act, then Congress granted the Commission the discretion to choose from two options with different meanings.

[15] The first option is to "make such modification . . . as necessary to achieve the objectives." 39 U.S.C. 3622(d)(3). This language connotes moderate change.[25] The second option grants authority to "adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives." 39 U.S.C. 3622(d)(3). This language contemplates replacement of the existing system.[26]

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[23] *See Lopez v. Davis*, 531 U.S. 230, 239 (2001) (if certain statutory prerequisites are met, the Bureau of Prisons "'may,' but also may *not*, grant early release." (emphasis in original)).

[24] *Chao v. Day*, 436 F.3d 234, 236 (D.C. Cir. 2006) (terms connected using the disjunctive "or" must be given separate meanings).

[25] *See MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994); *see also* Merriam-Webster Dictionary, available at *https://www.merriam-webster.com/dictionary/modification* ("modification" defined as "the making of a limited change in something").

[26] *See* Merriam-Webster Dictionary, available at *https://www.merriam-webster.com/dictionary/adopt* ("adopt" defined as

The scope of the term "alternative system" is given meaning by the statutory context in which the provision arises. For instance, section 3622(c)(4) limits the scope of "alternative means of sending and receiving letters and other mail matter at reasonable costs" to alternative means that are "available." 39 U.S.C. 3622(c)(4). By contrast, the only limit section 3622(d)(3) imposes on the Commission's ability to adopt an alternative system is that it must be "as necessary to achieve the objectives." 39 U.S.C. 3622(d)(3). This comparison confirms that the usage of the term "alternative system" is intentionally broad. Congress knew how to impose express limits on the scope of "alternative system" but chose not to do so with respect to the Commission's authority under section 3622(d)(3).

The plain language of section 3622(d)(3) leaves it to the Commission's discretion to determine what regulatory changes, if any, are logically required to achieve the PAEA's objectives.[27] Subsection (b) of section 3622 provides that the system "shall be designed to achieve the following objectives, each of which shall be applied in conjunction with the others. . . ." 39 U.S.C. 3622(b). If Congress intended to further limit the scope of the section 3622 review or any related

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"to accept formally and put into effect"); *https://www.merriam-webster.com/dictionary/aftemative* ("alternative" defined as "a proposition or situation offering a choice between two or more things only one of which may be chosen").

[27] *See* Merriam-Webster Dictionary, available at *https://www.merriam-webster.com/dictionary/necessary* ("necessary" defined as "logically unavoidable").

regulatory changes, it could [16] have prescribed it. Instead, the PAEA set forth nine objectives to be balanced by the Commission.

Although some commenters focus on the title of section 3622(d)—"Requirements"—as precluding changes to the existing price cap, the plain meaning of the statute confirms that section 3622(d)(3) confers broad authority. The "Requirements" title alone is not dispositive. A statute's title can aid in resolving ambiguity but has no power to enlarge the text or confer powers.[28]

The argument that the scope of subsection (a) limits the scope of subsection (d)(3) is contrary to the plain meaning and purpose of both subsections. First, the two subsections employ different language. The use of a parenthetical and the conjunction "and" in subsection (a) confirms the connection between the meanings of "establish" and "revise" as referring to the setup and periodic recalibration of the initial ratemaking system.[29] Subsection (a) requires the Commission to set up the initial regulatory system within a specific period. Subsection (a) also permits the Commission to improve or correct that system "from time to time thereafter" through normal rulemaking procedures.

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[28] *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998).

[29] *See* Merriam-Webster Dictionary, available at *https://www.merriamwebster.com/dictionary/establish* ("establish" defined as "to institute (something, such as a law) permanently by enactment or agreement"); *id.*, available at *https://www.merriamwebster.com/dictionary/revise* ("revise" defined as "to look over again in order to correct or improve").

When doing so, the Commission must apply the objectives in conjunction with each other and take into account the factors. 39 U.S.C. 3622(b) and (c).

By contrast, subsection (d)(3) is not triggered until several separate and specific requirements are met. Subsection (d)(3) requires a review of the ratemaking system to take place 10 years after the PAEA's enactment, following notice and an opportunity for comment. Additionally, no regulatory changes may be made under subsection (d)(3) unless the Commission first determines that the system has not achieved the objectives, taking into account the factors. The scope of permissible action under [17] subsection (d)(3), which is to "make such modification *or* adopt such alternative system," differs from the authority to "revise" the initial system.

The different language used demonstrates that Congress intended to create two separate but complementary processes: the Commission's general authority to set up and periodically recalibrate the initial ratemaking system under subsection (a); and the Commission's specific authority to review the initial system after 10 years and modify or replace any part of the system as necessary to achieve the objectives of the PAEA.

Moreover, the two subsections serve different purposes. Subsection (a) confers "authority generally" to the Commission regarding its duty to establish new regulations within a set timeframe and revise them as appropriate. Subsection (a) was necessary to address

the pre-PAEA view that the Postal Rate Commission had "a very important, but expressly limited, role."[30] The PAEA transformed the Postal Rate Commission into the Postal Regulatory Commission, a separate independent agency with regulatory oversight of the Postal Service.[31] As discussed below, subsection (d)(3) was the result of a legislative compromise to achieve 10 years of rate stability, followed by a Commission-led review of the ratemaking system and, if warranted, modification or adoption of an alternative system to achieve the PAEA's objectives. Reading section 3622(d)(3) to confer authority to the Commission that is limited to the scope of section [18] 3622(a) would be contrary to this purpose. And, any suggested interpretation of the plain language must give way if it would conflict with Congress' manifest purposes.[32]

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[30] *Gov. of U.S. Postal Serv. v. Postal Rate Comm'n*, 654 F.2d 108, 112 (D.C. Cir. 1981). Under the Postal Reorganization Act, the Postal Rate Commission's responsibilities were limited to "review of rate, classification, and major service changes, unadorned by the overlay of broad FCC-esque responsibility for industry guidance and of wide discretion in choosing the appropriate manner and means of pursuing its statutory objective." *Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 2 F.3d. 408, 415 (D.C. Cir. 1993) (quoting *Gov. of U.S. Postal Serv.*, 654 F.2d at 117). "As a 'partner' of the Board [of Governors of the United States Postal Service] the Postal Rate Commission was assigned the duty and authority to make recommendations with respect to rates and classifications." *Gov. of U.S. Postal Serv.*, 654 F.2d at 114.

[31] *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 717 F. 3d 209, 210 (D.C. Cir. 2013).

[32] *See Sullivan v. Hudson*, 490 U.S. 877, 890 (1989) ("Congress cannot lightly be assumed to have intended" a result that would "frustrat[e] . . . the very purposes" of the statute). No sound

The reliance commenters place on Commission precedent is misplaced. None of the cited precedent involved an interpretation of the scope of 39 U.S.C. 3622(d)(3). Because subsection (d)(3) is not even triggered until *after* the 10-year anniversary of the enactment of the PAEA, the cited precedent merely served to acknowledge the bounds of Commission authority during the first 10 years under the PAEA. The cited statements were made in accordance with the Commission's authority to "establish" and "revise" the initial ratemaking system promulgated under subsection (a). However, subsection (d)(3) confers broader rulemaking authority than subsection (a). In accordance with its authority under section 3622(d)(3), and with the benefit of having conducted an extensive review following 10 years of experience in the operation of the initial ratemaking system, the Commission has now determined that the system has not achieved the PAEA's objectives, taking into account the statutory factors. Order No. 4257 at 275. Therefore, these prior statements made in a separate context do not in any way serve to limit the Commission's broader authority under section 3622(d)(3) to promulgate proposed rules.

With regard to the workshare discount provisions contained within section 3622(e), which a handful of commenters assert are not part of the ratemaking system, the Commission finds that the phrase "established under this section" in section 3622(d)(3) refers

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approach to statutory interpretation would attribute to Congress an intent to "subvert the statutory plan." *Dep't of Revenue of Or. v. ACF Indus. Inc.*, 510 U.S. 332, 340 (1994).

to section 3622 in its entirety, including the workshare discount provisions in section 3622(e). This conclusion derives from both the plain meaning of the term "section," as well as the fact that within section 3622(d)(3) there is a clear [19] differentiation made between "sections" and "subsections."[33] Further, in its review of the system under section 3622(d)(3), the Commission is tasked with taking into account "the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service. . . ." 39 U.S.C. 3622(c)(5). Section 3622 defines workshare discounts as the discounts mailers receive for additional preparation of mailpieces, such as presorting, prebarcoding, handling, or transportation. *See* 39 U.S.C. 3622(e)(1). Therefore, workshare discount provisions are plainly part of the ratemaking system subject to review and possible rulemaking.

In sum, the plain meaning of the PAEA grants the Commission broad authority to engage in rulemaking in order to modify or replace the current ratemaking system. The scope of that authority is limited only by what is necessary to achieve the PAEA's objectives.

With regard to legislative history, the PAEA was designed to balance several objectives, including the Postal Service's financial needs and mailers' need for

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[33] *See* 39 U.S.C. 3622(d)(3) ("[T]he Commission shall review the system for regulating rates and classes for market-dominant products established under *this section* to determine if the system is achieving the objectives in *subsection* (b), taking into account the factors in *subsection* (c)." (emphasis added)).

predictable and stable rates. To achieve 10 years of rate stability, the ratemaking system was intended to operate in accordance with specific statutory requirements and limitations. As previously described, after 10 years, the initial system would be subject to Commission review. If the Commission determined that the system did not achieve the PAEA's objectives taking into account its factors, then the Commission would have the authority to modify or replace the system as necessary to achieve the objectives. The legislative history confirms this structured approach. Specifically, the final version of the PAEA, H.R. 6407, represented a compromise between two bills—H.R. 22 and S. 662.

[20] The first bill, H.R. 22, was introduced by Representative John McHugh on January 4, 2005, and reported back to the House with amendments on April 28, 2005. 151 Cong. Rec. H72 (daily ed. Jan. 4, 2005); 151 Cong. Rec. H2734 (daily ed. Apr. 28, 2005). On July 26, 2005, H.R. 22, as amended, was passed by the House of Representatives. 151 Cong. Rec. H6511, H6548-H6549 (daily ed. Jul. 26. 2005) (Roll Call No. 430). As discussed by GCA and ANM *et al.*,[34] under H.R. 22 as passed by the House of Representatives, proposed section 3622(d) was titled "Allowable Provisions." 151 Cong. Rec. H6523 (daily ed. Jul. 26. 2005). This bill provided that the ratemaking system could include one or more of several types of systems: incentive regulation (e.g., price caps, revenue targets); cost-of-service regulation; or any other form of

[34] ANM *et al.* 2014 White Paper at 16; GCA Comments at 30-31; ANM *et al.* Comments at 21.

regulation that the Commission considered appropriate to achieve the objectives, consistent with the factors. *Id.* Proposed section 3622(e) under this bill was titled "Limitation." *Id.* This provision would have prohibited the Commission from permitting the average rate for any product to increase at an annual rate greater than the comparable increase in the CPI unless the Commission determined, after public notice and comment, that the increase was reasonable, equitable, and necessary. *Id.*

The second bill, S. 622, was introduced by Senator Collins on March 17, 2005, and reported back to the Senate with amendments on July 14, 2005. 151 Cong. Rec. S2994, S3012-S3031 (daily ed. Mar. 17, 2005); 151 Cong. Rec. S8301 (daily ed. Jul. 14, 2005). On February 9, 2006, the Senate considered those amendments and additional amendments to S. 662 by unanimous consent. 152 Cong. Rec. S898 -S927 (daily ed. Feb. 9, 2006). Under this bill, proposed section 3622(d) was titled "Requirements," and was subdivided into subsections titled "In general" and "Limitations." *Id.* at S913-S914. The content of proposed section 3622(d)(1) and (2) under S. 662 employed similar language to that which was eventually used in the final version of the PAEA. *Compare id. with* 39 U.S.C. 3622(d)(1) and (2).

[21] Also on February 9, 2006, through unanimous consent, the Senate passed H.R. 22,[35] by replacing the text of H.R. 22 with all the text of S. 662. 152 Cong. Rec.

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[35] H.R. 22 had been pending in the Senate since July 27, 2005. 151 Cong. Rec. S9155, S9156 (daily ed. Jul. 27, 2005).

at S927-S942 (daily ed. Feb. 9, 2006). Therefore, as passed by the Senate, H.R. 22 contained the same title structure as S. 662, with proposed section 3622(d)—titled "Requirements"—being subdivided into two subsections titled "In General" and "Limitations." *Id.* at S929. Then, the Senate sent H.R. 22, as amended and passed by the Senate, back to the House and requested a conference to resolve the differences between the two versions. *Id.* at S927, S942. For instance, as passed by the House on July 26, 2005, H.R. 22 provided for the ratemaking system to achieve seven objectives and for the Commission to take into account 11 factors. 151 Cong. Rec. H6523 (daily ed. Jul. 26, 2005). By contrast, as passed by the Senate on February 9, 2006, H.R. 22 provided for the ratemaking system to achieve 8 objectives and for the Commission to take into account 13 factors. 152 Cong. Rec. at S928-S929 (daily ed. Feb. 9, 2006).

None of the versions of the bills described above included the review provision that would eventually be codified at 39 U.S.C. 3622(d)(3). Nor was this provision referenced in hearings, committee reports, or the presidential signing statement. Instead, 39 U.S.C. 3622(d)(3) was included only in the final version of the PAEA introduced on December 7, 2006. H.R. 6407, 109th Cong., at 7 (2006). Pursuant to a compromise between the Senate and the House, H.R. 6407 blended together concepts appearing in the separate versions of the bills described above, including combining the objectives and factors.

[22] There is only one statement in the Congressional Record about the review provision, and it was made upon receipt of the final version of the postal reform bill on December 8, 2006. Senator Collins, the Senate sponsor of postal reform, remarked:

> The Postal Service will have much more flexibility, but the rates will be capped at the CPI. That is an important element of providing 10 years of predictable, affordable rates, which will help every customer of the Postal Service plan. After 10 years, the Postal Regulatory Commission will review the rate cap and, if necessary, and following a notice and comment period, the Commission will be authorized to modify or adopt an alternative system.
>
> While this bill provides for a decade of rate stability, I continue to believe that the preferable approach was the permanent flexible rate cap that was included in the Senate-passed version of this legislation. But, on balance, this bill is simply too important, and that is why we have reached this compromise to allow it to pass. We at least will see a decade of rate stability, and I believe the Postal Rate Commission, at the end of that decade, may well decide that it is best to continue with a CPI rate cap in place. It is also, obviously, possible for Congress to act to reimpose the rate cap after it expires. But this legislation is simply too vital to our economy to pass on a decade of stability. The consequences of no legislation would be disastrous for the Postal Service, its employees, and its customers.

152 Cong. Rec. S11674, S11675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins).

This statement confirms that section 3622(d)(3) was a part of a legislative compromise that required the price cap "Requirements," as contained in the PAEA, to remain in place for 10 years, and then allowed the Commission the opportunity to review the effectiveness of this ratemaking system and potentially design a modified or alternative system.[36] This statement also confirms that the congressional sponsors of the PAEA contemplated that the Commission would have broad discretion after the section 3622 review—including deciding whether to continue the price cap in its current form, modify it, or replace it. That Congress believed it might need to "reimpose the rate cap after it expires" clearly evidences its intent that the Commission had the authority, [23] after its review, to eliminate the price cap through the potential modification or adoption of an alternative system. The statement also confirms that Congress did not consider the current price cap to be a permanent or immutable requirement of the system. Senator Collins further stated:

> This *compromise* is not perfect and, indeed, earlier tonight, there were issues raised by the appropriators—legitimate issues—that

[36] It is worth noting that Senator Collins introduced the initial bill in the Senate which contained the "requirement" language with regard to the price cap. As a result, the statement in the Congressional Record is particularly probative as to the existence of a compromise.

> threatened at one point to derail the bill again. It has been a delicate *compromise* to satisfy all of the competing concerns. Everyone has had to *compromise*, but I think we have come up with a good bill. This *compromise* will help ensure a strong financial future for the U.S. Postal Service and the many sectors of our economy that rely on its services, and it reaffirms our commitment to the principle of universal service that I believe is absolutely vital to this institution.

Id. (emphasis added). Senator Thomas Carper also confirmed that the final bill was "a difficult compromise." 152 Cong. Rec. S11675 (daily ed. Dec. 8, 2006) (statement of Sen. Carper).

Congress passed the PAEA, amending title 39, to ensure the financial viability of the Postal Service.[37] Senator Collins stated that "With this landmark reform legislation, we will put the Postal Service on a firm financial footing." 152 Cong. Rec. S11674 (daily ed. Dec. 8, 2006) (statement of Sen. Collins). The legislative history confirms that Congress intended to empower the Commission to modify or replace the system following the section 3622 review as necessary to achieve the objectives.

Finally, with regard to the constitutional infirmities alleged by some commenters, the scope of the Commission's authority under section 3622(d)(3) does not

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[37] *See Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1217 (D.C. Cir. 2013) (citing S. Rep. No. 108-318, at 2-4 (2004)).

raise separation of powers issues because section 3622(d)(3) meaningfully constrains the Commission's authority.

[24] Under the nondelegation doctrine, Congress cannot delegate legislative power to the Executive Branch.[38] However, Congress does not violate the nondelegation doctrine merely because it legislates in broad terms and leaves a certain degree of discretion to an Executive Branch actor, so long as Congress sets forth "an intelligible principle" to which the actor must conform.[39] The Supreme Court has routinely upheld delegations to the Executive Branch "under standards phrased in sweeping terms." *See Loving*, 517 U.S. at 771. Congress may permissibly delegate authority to the Executive Branch to regulate in a manner that is necessary to adhere to policy objectives in a statute.[40] In this instance, the statute gave clear direction to the Commission about how to exercise its legal authority to make modifications or adopt an alternative system. Any modifications or the adoption of an alternative

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[38] *See*, *e.g.*, *Loving v. United States*, 517 U.S. 748, 758 (1996).

[39] *Id.* at 771-72 (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *Touby v. United States*, 500 U.S. 160, 165 (1991)).

[40] *See, e.g.*, *Touby v. United States*, 500 U.S. at 163, 165 (statute authorizing Attorney General to schedule controlled substance on temporary basis as "necessary to avoid an imminent hazard to the public safety" did not violate nondelegation doctrine because it contained an intelligible principle); *National Broadcasting Co. v. United States*, 319 U.S. 190, 217, 225-26 (1943) (upholding delegation to the Federal Communications Commission to regulate radio broadcasting according to "public interest, convenience, or necessity").

system must be necessary for the system to achieve the objectives in 39 U.S.C. 3622(b), and it is with those objectives in mind that the Commission proposes the regulations below.

With regard to the Presentment Clause, the comparison made by some commenters to the Line Item Veto Act which was struck down in *Clinton v. City of New York* is inapt. First, the President's exercise of cancellation authority under the Line Item Veto Act, 5 days after legislation's enactment, was "necessarily [] based on the same conditions that Congress evaluated when it passed those statutes." *Clinton*, 524 U.S. at 443. By contrast, Congress' delegation to the Commission under section 3622(d)(3) is meaningfully constrained by several separate conditions that must occur after the enactment of the PAEA: the passage of 10 years; a comprehensive [25] review of the ratemaking system by the Commission; notice to the public and an opportunity for comment; and a determination by the Commission that the system is not achieving the PAEA's objectives, taking into account the statutory factors.

Second, whereas the impermissible Line Item Veto Act required the President to make certain determinations before cancelling a provision, those determinations did not qualify his discretion as to whether to cancel or not. *Id.* at 443-44. By contrast, the Commission's discretion under section 3622(d)(3) to either modify the ratemaking system, adopt an alternative system, or do neither is contingent on a determination that the system did not achieve the PAEA's objectives, taking into account the statutory factors. If the

Commission determined that the system had achieved the objectives, taking into account the factors, the Commission's authority under section 3622(d)(3) to either modify the system or adopt an alternative system would not have been triggered.

Third, the impermissible Line Item Veto Act allowed the President to override the policy objectives contained in a cancelled statute, which were developed by Congress, with his own policy objectives, which were developed unilaterally. *Id.* at 444. By contrast, section 3622(d)(3)'s delegation of rulemaking authority to the Commission is limited because it is required to effectuate the nine objectives embodied in the PAEA, which were developed by Congress.

Therefore, the Commission's authority to modify or adopt an alternative system under section 3622(d)(3) remains within the permissible bounds of the separation of powers between the Legislative Branch and the Executive Branch.

In conclusion, the Commission has broad authority to either modify or replace the existing market dominant ratemaking system. This authority extends to modification of regulations currently in place and the statutory rate setting requirements of section 3622 (including those applicable to workshare discounts in 39 U.S.C. 3622(e)). The constraint on the Commission's authority is that the system as implemented must be designed to achieve the objectives of section 3622(b).

* * *

APPENDIX E

39 U.S. Code § 3622 – Modern rate regulation

(a) AUTHORITY GENERALLY.—
The Postal Regulatory Commission shall, within 18 months after the date of enactment of this section, by regulation establish (and may from time to time thereafter by regulation revise) a modern system for regulating rates and classes for market-dominant products.

(b) OBJECTIVES.—Such system shall be designed to achieve the following objectives, each of which shall be applied in conjunction with the others:

(1) To maximize incentives to reduce costs and increase efficiency.

(2) To create predictability and stability in rates.

(3) To maintain high quality service standards established under section 3691.

(4) To allow the Postal Service pricing flexibility.

(5) To assure adequate revenues, including retained earnings, to maintain financial stability.

(6) To reduce the administrative burden and increase the transparency of the ratemaking process.

(7) To enhance mail security and deter terrorism.

(8) To establish and maintain a just and reasonable schedule for rates and classifications, however the objective under this paragraph shall not be construed to prohibit the Postal Service from

making changes of unequal magnitude within, between, or among classes of mail.

(9) To allocate the total institutional costs of the Postal Service appropriately between market-dominant and competitive products.

(c) FACTORS.—In establishing or revising such system, the Postal Regulatory Commission shall take into account—

(1) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(2) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to each class or type of mail service through reliably identified causal relationships plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(3) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(4) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(5) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(6) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(7) the importance of pricing flexibility to encourage increased mail volume and operational efficiency;

(8) the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classifications and services of mail;

(9) the importance of providing classifications with extremely high degrees of reliability and speed of delivery and of providing those that do not require high degrees of reliability and speed of delivery;

(10) the desirability of special classifications for both postal users and the Postal Service in accordance with the policies of this title, including agreements between the Postal Service and postal users, when available on public and reasonable terms to similarly situated mailers, that—

(A) either—

(i) improve the net financial position of the Postal Service through reducing Postal Service costs or increasing the overall contribution to the institutional costs of the Postal Service; or

(ii) enhance the performance of mail preparation, processing, transportation, or other functions; and

(B) do not cause unreasonable harm to the marketplace.

(11) the educational, cultural, scientific, and informational value to the recipient of mail matter;

(12) the need for the Postal Service to increase its efficiency and reduce its costs, including infrastructure costs, to help maintain high quality, affordable postal services;

(13) the value to the Postal Service and postal users of promoting intelligent mail and of secure, sender-identified mail; and

(14) the policies of this title as well as such other factors as the Commission determines appropriate.

(d) REQUIREMENTS.—

(1) IN GENERAL.—The system for regulating rates and classes for market-dominant products shall—

(A) include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal variation over the most recent available 12-month period preceding the date the Postal Service files notice of its intention to increase rates;

(B) establish a schedule whereby rates, when necessary and appropriate, would change at regular intervals by predictable amounts;

(C) not later than 45 days before the implementation of any adjustment in rates under this section, including adjustments made under subsection (c)(10)—

(i) require the Postal Service to provide public notice of the adjustment;

(ii) provide an opportunity for review by the Postal Regulatory Commission;

(iii) provide for the Postal Regulatory Commission to notify the Postal Service of any noncompliance of the adjustment with the limitation under subparagraph (A); and

(iv) require the Postal Service to respond to the notice provided under clause (iii) and describe the actions to be taken to comply with the limitation under subparagraph (A);

(D) establish procedures whereby the Postal Service may adjust rates not in excess of the annual limitations under subparagraph (A); and

(E) notwithstanding any limitation set under subparagraphs (A) and (C), and provided there is not sufficient unused rate authority under paragraph (2)(C), establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances, provided that the Commission determines, after notice and opportunity for a public hearing and comment, and within 90 days after any request by the

Postal Service, that such adjustment is reasonable and equitable and necessary to enable the Postal Service, under 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.

(2) LIMITATIONS.—

(A) Classes of mail.—
Except as provided under subparagraph (C), the annual limitations under paragraph (1)(A) shall apply to a class of mail, as defined in the Domestic Mail Classification Schedule as in effect on the date of enactment of the Postal Accountability and Enhancement Act.

(B) Rounding of rates and fees.—
Nothing in this subsection shall preclude the Postal Service from rounding rates and fees to the nearest whole integer, if the effect of such rounding does not cause the overall rate increase for any class to exceed the Consumer Price Index for All Urban Consumers.

(C) Use of unused rate authority.—

(i) Definition.—In this subparagraph, the term "unused rate adjustment authority" means the difference between—

(I) the maximum amount of a rate adjustment that the Postal Service is authorized to make in any year subject to the annual limitation under paragraph (1); and

(II) the amount of the rate adjustment the Postal Service actually makes in that year.

(ii) Authority.—
Subject to clause (iii), the Postal Service may use any unused rate adjustment authority for any of the 5 years following the year such authority occurred.

(iii) Limitations.—In exercising the authority under clause (ii) in any year, the Postal Service—

(I) may use unused rate adjustment authority from more than 1 year;

(II) may use any part of the unused rate adjustment authority from any year;

(III) shall use the unused rate adjustment authority from the earliest year such authority first occurred and then each following year; and

(IV) for any class or service, may not exceed the annual limitation under paragraph (1) by more than 2 percentage points.

(3) REVIEW.—
Ten years after the date of enactment of the Postal Accountability and Enhancement Act and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this

section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

(e) WORKSHARE DISCOUNTS.—

(1) DEFINITION.—
In this subsection, the term "workshare discount" refers to rate discounts provided to mailers for the presorting, prebarcoding, handling, or transportation of mail, as further defined by the Postal Regulatory Commission under subsection (a).

(2) SCOPE.—The Postal Regulatory Commission shall ensure that such discounts do not exceed the cost that the Postal Service avoids as a result of workshare activity, unless—

(A) the discount is—

(i) associated with a new postal service, a change to an existing postal service, or with a new work share initiative related to an existing postal service; and

(ii) necessary to induce mailer behavior that furthers the economically efficient operation of the Postal Service and the portion of the discount in excess of the cost that the Postal Service avoids as a

result of the workshare activity will be phased out over a limited period of time;

(B) the amount of the discount above costs avoided—

(i) is necessary to mitigate rate shock; and

(ii) will be phased out over time;

(C) the discount is provided in connection with subclasses of mail consisting exclusively of mail matter of educational, cultural, scientific, or informational value; or

(D) reduction or elimination of the discount would impede the efficient operation of the Postal Service.

(3) LIMITATION.—Nothing in this subsection shall require that a work share discount be reduced or eliminated if the reduction or elimination of the discount would—

(A) lead to a loss of volume in the affected category or subclass of mail and reduce the aggregate contribution to the institutional costs of the Postal Service from the category or subclass subject to the discount below what it otherwise would have been if the discount had not been reduced or eliminated; or

(B) result in a further increase in the rates paid by mailers not able to take advantage of the discount.

(4) REPORT.—Whenever the Postal Service establishes a workshare discount rate, the Postal

Service shall, at the time it publishes the workshare discount rate, submit to the Postal Regulatory Commission a detailed report that—

(A) explains the Postal Service's reasons for establishing the rate;

(B) sets forth the data, economic analyses, and other information relied on by the Postal Service to justify the rate; and

(C) certifies that the discount will not adversely affect rates or services provided to users of postal services who do not take advantage of the discount rate.

(f) TRANSITION RULE.—

For the 1-year period beginning on the date of enactment of this section, rates and classes for market-dominant products shall remain subject to modification in accordance with the provisions of this chapter and section 407, as such provisions were last in effect before the date of enactment of this section. Proceedings initiated to consider a request for a recommended decision filed by the Postal Service during that 1-year period shall be completed in accordance with subchapter II of chapter 36 of this title and implementing regulations, as in effect before the date of enactment of this section.