

Oral Argument Has Not Been Scheduled

No. 15-1297

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

ALLIANCE OF NONPROFIT MAILERS, et al.,
Intervenors for Respondent.

On Petition for Review of Order No. 2623 of
the Postal Regulatory Commission

REPLY BRIEF OF THE UNITED STATES POSTAL SERVICE

THOMAS J. MARSHALL
Executive Vice President &
General Counsel

R. ANDREW GERMAN
Managing Counsel

DAVID C. BELT*
Office of the General Counsel
United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260
(202) 268-2945

Attorneys for the United States Postal Service

**FINAL BRIEF:
March 16, 2016**

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
GLOSSARY.....	iii
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. The Commission Cannot Shield Order No. 2623 from Appellate Review if that Order Altered the Test that this Court Upheld in the Previous Review Proceeding.....	3
II. The Commission Changed its Four-Part Test on Remand without Providing a Reasoned Explanation for its Alteration	8
A. The Commission on Remand Altered the Significance of the “Ability to Adjust” Element of its Test Relative to the Other Three Elements	8
B. The Commission on Remand Redefined the Phrase “Ability to Adjust” in a Way that Makes the Term Essentially Meaningless	15
C. By Changing the Meaning and Role of the “Ability to Adjust” Element of its “Due to” Test, the Commission Leaves in Place the Fundamental Inconsistency in its Factual Analysis	19
CONCLUSION	23
CERTIFICATE OF COMPLIANCE.....	24
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

CASES

* <i>Alliance of Nonprofit Mailers. v. Postal Regulatory Comm’n</i> , 790 F.3d 186 (D.C. Cir. 2015)	1, 2, 3, 4, 6, 7, 9,10, 13, 15, 17, 23
<i>Interstate Commerce Comm’n v. Brotherhood of Locomotive Eng’rs</i> , 482 U.S. 270 (1987)	4
* <i>LePage’s 2000, Inc. v. PRC</i> , 642 F.3d 225 (D.C. Cir. 2011)	4
<i>Sendra Corp. v. Magaw</i> , 111 F.3d 162 (D.C. Cir. 1997)	4

STATUTES

*39 U.S.C. § 3622(d)(1)(E)	1, 3, 20
----------------------------------	----------

DECISIONS OF THE COMMISSION

*Analysis of the United States Postal Service Financial Results and 10-K Statement for Fiscal Year 2013, Docket No. ACR2013 (P.R.C. Mar. 18, 2014)	18, 19, 20, 21
Order No. 547, <i>Order Denying Request for Exigent Rate Adjustments</i> , Docket No. R2010-4 (P.R.C. Sept. 30, 2010)	19
Order No. 1926, <i>Order Granting Exigent Price Increase</i> , Docket No. R2013-11 (P.R.C. Dec. 24, 2013) [Also found at JA1-219]	1, 2, 3, 4, 5, 7, 12, 15, 20, 21

**Authorities upon which we chiefly rely are marked with asterisks.*

GLOSSARY

FY Fiscal Year

JA Joint Appendix

SUMMARY OF THE ARGUMENT

The Commission's brief has completely mischaracterized the Postal Service's argument. The Postal Service does not challenge the four-prong test that the Commission advanced in Order No. 1926 and that this Court upheld in *Alliance of Nonprofit Mailers v. Postal Regulatory Commission*, 790 F.3d 186 (D.C. Cir. 2015), as reflecting a permissible construction of the "due to either extraordinary or exceptional circumstances" clause in 39 U.S.C. § 3622(d)(1)(E). The Postal Service also does not "ignore" the first three prongs of the Commission's test or give "undue prominence" to the "ability to adjust" prong. Instead, the Postal Service contends that the Commission changed the test on remand in Order No. 2623 by stripping the test's fourth element, which asked when the Postal Service gained the "ability to adjust" to the impact of the Great Recession, of its significance. The Commission cannot shield that argument from appellate review.

The Commission plainly changed the test. Under the version of the test that this Court upheld, an extraordinary event remained extraordinary until the Postal Service could adjust its operations in response to the harm that the event caused. That limitation was designed, in part, to ensure that an above-inflation rate increase would not continue in perpetuity simply because the event continued to cause ongoing financial harm *per se*. However, the "ability to adjust" limitation was also designed to protect the Postal Service by ensuring that it would be able to recover

losses during a period in which the exigent event overwhelmed the Postal Service's efforts to offset the harm. That is, the "ability to adjust" prong recognized the basic reality that the Postal Service faces a number of statutory constraints on its operations that will often prevent it from "adjusting" to an exigent event in the same manner as a private business. In *Alliance of Nonprofit Mailers*, this Court clearly understood the importance of the "ability to adjust" inquiry to the Commission's test. Indeed, it vacated other aspects of Order No. 1926 because they conflicted with the "ability to adjust" element by assuming that the Postal Service could adjust rapidly to volume losses caused by the Great Recession. On remand, however, the Commission essentially stripped the "ability to adjust" element of its significance, both by transforming it into a mere "factor" that could be ignored and by redefining the phrase to be so easily met that it is divested of any real meaning.

Because the Commission changed its test on remand, and failed to even acknowledge (let alone justify) its change of position, it offers no basis for this Court to uphold that change in position on review. Accordingly, the Commission's order should be reversed and the case remanded for further proceedings.

ARGUMENT

I. THE COMMISSION CANNOT SHIELD ORDER NO. 2623 FROM APPELLATE REVIEW IF THAT ORDER ALTERED THE TEST THAT THIS COURT UPHELD IN THE PREVIOUS REVIEW PROCEEDING.

Much of the Commission's brief is devoted to preventing this Court from reviewing Order No. 2623 on the merits, asserting that the order merely denied a request for reconsideration of Order No. 1926 (which this Court upheld in part in *Alliance of Nonprofit Mailers*) or that the Postal Service's arguments are a collateral attack on that earlier order. Resp. Br. at 18-24. These assertions mischaracterize the arguments presented in the Postal Service's opening brief.

The Postal Service did not seek on remand and does not seek in this review proceeding to revisit or alter the four-part test that the Commission introduced in Order No. 1926 and advanced in *Alliance of Nonprofit Mailers* to identify the period in time where, for a given class of mail, lost volume ceased being "due to" extraordinary or exceptional circumstances under 39 U.S.C. § 3622(d)(1)(E).¹ The Postal Service recognizes that this Court upheld that test as a permissible construction of the statute's "due to" clause. Instead, as discussed further in Part II

¹ Under that test, "mail volume loss [is] due to the Great Recession only until: (1) a sufficient number of relevant macroeconomic indicators demonstrate a return to positive trends; (2) the rate of change for Postal Service mail volumes is positive; (3) the Postal Service regains its ability to project mail volumes; and (4) the Postal Service demonstrates an ability to adjust operations to the lower volumes." JA6.

below, the Postal Service argues that the Commission altered that test on remand by changing both the meaning and the role of the test's "ability to adjust" element.

Accordingly, the cases on which the Commission relies are inapposite. Those cases provide that "an agency order stating only that it is denying reconsideration is conclusive, so long as the agency has not altered its original decision." *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997); accord *Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 280 (1987) (order denying reconsideration unreviewable where Commission "makes no alteration in the underlying order"). Here, the gravamen of the Postal Service's argument is that Order No. 2623 "altered its original decision" when it changed the four-part test that the Commission first announced in Order No. 1926 and that this Court upheld in *Alliance of Nonprofit Mailers*. And it is well-settled that this Court can review a claim that the Commission has changed position without a reasoned explanation. *E.g., LePage's 2000, Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225, 233 (D.C. Cir. 2011) (vacating Commission order that altered its analytic framework without justifying the change).²

The instant petition is also not a collateral attack on findings made in Order No. 1926. Contrary to the assertions in the Commission's brief, the Postal Service

² The intervenors' reliance on the law-of-the-case and law-of-the-circuit doctrines, *see* Intervenor Br. at 4-8, is similarly misplaced. The Postal Service is not bringing a "renewed challenge" to the Commission's test. *Id.* at 4. It is challenging the Commission's alteration of that test on remand.

does not seek to extend the date on which the volume of any class of mail settled at a “new normal” – *i.e.*, the date on which the situation stabilized and the Great Recession stopped causing mail volume to fall further – or otherwise revisit the Commission’s assessment of when the “new normal” arrived. *But see* Resp. Br. at 11, 13, 20. The Postal Service accepts those dates, as it must, but the new normal *test* as articulated in and upheld by this Court goes beyond asking when volumes have settled at a lower “new normal” level, and also asks when the Postal Service demonstrated an ability to adjust its operations to that new level of volume. Order No. 2623 changed that second inquiry on remand concerning when the Postal Service demonstrated an ability to adjust its operations, and that is what the Postal Service now challenges.

The Commission responds (at 23) that it made a finding concerning the “ability to adjust” in Order No. 1926 and the Postal Service should have challenged that finding previously. As an initial matter, the Postal Service maintains that it did challenge the Commission’s assessment extensively in the previous appeal – it devoted several pages of both its opening and reply briefs to arguing that, even if the “ability to adjust” inquiry is properly housed in the “due to” clause of the statute, the Commission’s finding on the Postal Service’s ability to adjust under the “due to” clause is in irreconcilable conflict with its finding on the same factual question under the “necessary” clause of the statute, which asks

(in part) whether the Postal Service has engaged in “best practices of honest, efficient, and economical management.”³ Tellingly, although this argument was addressed at length in the oral argument, neither the Commission’s counsel nor the mailers’ counsel suggested that the argument had been waived or had been inadequately presented in the Postal Service’s briefs. Indeed, the intervenors’ brief in the instant proceeding appears to concede that the Postal Service raised the argument in the earlier proceeding. *See* Intervenor Br. at 7.

Although this Court concluded – incorrectly, we respectfully submit – that the argument regarding the Commission’s inconsistent factual findings concerning the “ability to adjust” was “not properly before this court” because it was “not raised in the Postal Service’s briefs,” it nevertheless explicitly permitted the Commission to address the issue on remand. *Alliance of Nonprofit Mailers*, 790

³ *See, e.g., Alliance of Nonprofit Mailers*, U.S. Postal Serv. Opening Br. at 32 (Order is “internally inconsistent and self-contradictory” because the Commission’s discussion of the Postal Service’s ability to adjust under the “due to” prong is “flatly contrary” to its assessment of the same issue under the “necessary” prong, where the Commission “exhaustively explained why USPS needs an exigent rate increase because it *cannot* simply adjust to changed conditions”); *id.* at 34 (arguing that the “Commission got it right” under the latter prong); U.S. Postal Serv. Reply Br. 12-14 (arguing that the Commission failed to square its “ability to adjust” finding under the “due to” prong with its conclusion in Part V of the order that USPS was following ‘best practices of honest, efficient, and economical management’ to cut costs within the constraints of its statutory mandate,” and that “it was arbitrary and capricious for the Commission to base its ‘new normal’ rule on USPS’s purported ability to ‘adjust’ its operations to lower mail volumes without explaining what more USPS could or should have done to make those ‘adjustments.’”).

F.3d at 196 n.3. Rather than delay the ultimate resolution of the case by seeking panel rehearing on whether the argument had been raised, the Postal Service asked the Commission on remand to address and reconcile the factual conflict in its earlier order and to address how its “ability to adjust” finding can be squared with its factual analysis of the same issue in its Financial Analysis Report that it issued three months later. JA365-71; JA471-80. The Commission refused to reconcile its conflicting findings, but did so on the ground that, as it echoes repeatedly in its brief, the statute’s “due to” and “necessary” clauses are distinct, *see* Resp. Br. at 9, 12, 28-29, 32-33, and thus the separate tests implementing those two clauses need not be aligned. *Id.* at 28-29. This again misses the critical point that, although the tests themselves serve “two different functions” under the statute, *id.* at 29, both tests rely in part on the same factual question: what steps could the Postal Service have taken to adjust its operations in response to the lower level of mail volume that the Great Recession produced. Order No. 2623 sidestepped the conflict inherent in its earlier order, the Postal Service submits, by changing the meaning and role of the “ability to adjust” element of its test under the “due to” clause.

Thus, far from mounting a collateral attack on Order No. 1926, the Postal Service mounts a direct attack on Order No. 2623, arguing that the Commission changed the test that this Court upheld. As explained above, this Court has jurisdiction to review that argument.

II. THE COMMISSION CHANGED ITS FOUR-PART TEST ON REMAND WITHOUT PROVIDING A REASONED EXPLANATION FOR ITS ALTERATION.

As explained in the Postal Service's opening brief and as reiterated below, Order No. 2623 altered the Commission's four-part "new normal test" in two critical respects. First, the Commission fundamentally changed the role of the "ability to adjust" element in relation to the other three elements of the test, transforming it from the core question for assessing when the Great Recession ceased being an extraordinary or exceptional event into a mere "factor" that could be ignored if the other three elements – which are aimed at resolving a different factual issue – are met. Second, the Commission changed the meaning of "ability to adjust" so that it would be satisfied as soon as the Postal Service took any cost-cutting steps in response to the Great Recession, even where such steps could not even begin to catch up to the massive annual losses in contribution that the Commission concedes that the Great Recession produced. Because the Commission fails to acknowledge, let alone justify, these changes to its test, Order No. 2623 should be remanded.

A. The Commission on Remand Altered the Significance of the "Ability to Adjust" Element of its Test Relative to the Other Three Elements.

As understood and upheld by this Court, the Commission's "new normal" test implementing the statutory "due to" clause involved two distinct but equally

important inquiries: (1) when did the Great Recession stop producing new incremental mail-volume losses, *i.e.*, when did the recession cause mail volume to settle at a “new normal” level that was stable but lower than its pre-recession level; and (2) when did the Postal Service gain the ability to adjust to that “new normal” of mail volume. The first inquiry is focused on causation – on the degree to which the Great Recession caused demand for mail services to fall on a year-over-year basis and then to stabilize at a new and lower level. The second inquiry, by contrast, focuses on the point at which the Great Recession ceased being an “extraordinary or exceptional” event even though it was still causing mail volume to remain below the level it would have reached had the Great Recession not occurred. Under the Commission’s test, the Great Recession remained extraordinary or exceptional until the Postal Service could adjust its operations to that new and lower level of volume. *Alliance of Nonprofit Mailers*, 790 F.3d at 193.

In *Alliance of Non-Profit Mailers*, the Postal Service argued that the “due to” clause should focus solely on causation, *i.e.*, on the extent to which the Great Recession caused demand for postal services to fall and to remain at a “new normal” level, while the statute’s “necessary” clause should consider whether or when the Postal Service could adjust to the “new normal,” *i.e.*, the business environment that the Great Recession produced. This Court rejected that argument

and upheld the Commission's test, reasoning that the "due to" clause need not refer woodenly or exclusively to but-for causation but can also consider when the Great Recession, the event that caused the lost volume, stopped being an extraordinary or exceptional event. 750 F.3d at 194 (while the "effects" of the Great Recession on mail volume may "in some literal, but-for causal sense linger . . . [or] continue for the foreseeable future, that does not mean that those circumstances remain 'extraordinary' or 'exceptional' for just as long"). And, even though it continued to impact mail volume indefinitely, the Great Recession lost its character as an extraordinary or exceptional event once the Postal Service "had an opportunity to adjust to the 'new normal' in the mail economy." *Id.* at 193. After that point, the ongoing lower level of volume would no longer be "due to" an extraordinary or exceptional event (even though it was still "due to" the recession).

On remand, Order No. 2623 accurately summarized the Court's opinion as affirming that "the Great Recession constituted an exigent circumstance" and that "the circumstance remained exigent until the Postal Service had an opportunity to adjust to the 'new normal' in the mail economy," JA559, again recognizing that the Commission's test makes two discrete inquiries: (1) when was the "new normal" in the mail economy reached, and (2) when did the Postal Service gain an ability to adjust to it? However, in both Order No. 2623 and its brief to this Court, the Commission treats the second inquiry as essentially optional, and maintains that its

test can be satisfied regardless of whether the Postal Service was able to adjust to the “new normal” that the Great Recession caused. This is a dramatic change from the test that this Court upheld in *Alliance of Nonprofit Mailers*.

The Commission denies that it has departed from this Court’s understanding of the four-prong “new normal” test, arguing that it has never required all four elements to be present and instead can be satisfied when “most” elements are met. Resp. Br. at 6, 24, 27. Accordingly, the Commission appears to be saying, so long as the first three elements of the Commission’s “new normal” test are satisfied, the fourth element – the ability to adjust – can be jettisoned. This argument, however, misses the very different role that the fourth element plays in the Commission’s test. The first three elements are all devoted to the Commission’s first inquiry: when the Great Recession produced a “new normal” in mail volume that is stable and predictable going forward. It may make sense for the Commission to conclude that the “new normal” arrived when only “most” of those three elements are satisfied. But the fourth element is different in kind – it is the sole element that measures when the Great Recession ceased being an extraordinary or exceptional event, even though it continued to cause ongoing harm. Accordingly, the “ability to adjust” element is not merely one of many factors that should be balanced; it is a necessary component of the “due to” inquiry that this Court upheld.

The Commission's brief responds by suggesting that the "ability to adjust" is not really different in kind from the other three elements of the "new normal" test, but merely is one of the four factors that measures when the "new normal" was reached. *See* Resp. Br. at 19 (all four factors help ascertain when the "new normal" occurred); *id.* at 24 (volume losses cease being "due to" extraordinary circumstances "when the 'new normal' had arrived"); *id.* at 27 (the four factors all determine "the 'new normal' cutoff"). This suggestion, however, conflates the "new normal" (the stable and permanently lower level of volume produced by the Great Recession, as measured by the first three prongs of the Commission's test) and the "new normal test" (which, through the test's fourth prong, also asks when the Postal Service gained an ability to adjust to the "new normal"). The Postal Service's opening brief discusses the important distinction between those two similarly worded phrases. *See* Pet. Br. at 29-30. The Commission's brief does not dispute that the "new normal" and the "new normal test" are distinct, and portions of its brief appear to acknowledge the critical distinction. *See* Resp. Br. at 26 (quoting Order No. 1926 as recognizing that, "if the Postal Service is adjusting to the circumstances, then the circumstances are . . . more normal than extraordinary or exceptional"); *id.* at 30 (the "due to" clause addresses both "the Postal Service's ability to respond" and "the causal connection between the recession and financial losses"). Having persuaded this Court that its test addresses both the causal

relationship between the Great Recession and lower mail volume *and* the Postal Service's ability to adjust to such recession-caused volume losses, the Commission cannot now maintain that its test is really designed to measure only the former inquiry.

Indeed, if the Commission's test were designed solely to measure the extent to which the Great Recession caused a new and lower level of mail volume, this Court's justification in *Alliance of Nonprofit Mailers* for vacating the Commission's "count once" rule disappears. This Court concluded that the rationale underlying the "count once" rule, "that the Postal Service should have been able to identify and adjust to" downturns in mail volume "immediately," was "at war with the Commission's 'new normal' holding, which openly endorsed a longer period of time for such adjustments." *Alliance of Nonprofit Mailers*, 790 F.3d at 193. In other words, this Court understood the "new normal test" as being about more than when the Great Recession stopped causing additional incremental harm or when a "new normal" of operating levels was reached, but also (and separately) considers when the Postal Service could adjust to that "new normal" level.

The Commission next argues that the Postal Service seeks to accord "undue prominence" to the "ability to adjust" element, Resp. Br. at 30, and essentially converts the Commission's test into a "one factor" test by "ignoring" the three

factors that address when the “new normal” was reached and focusing exclusively on the Postal Service’s ability to adjust to the lower level of mail volume that the “new normal” represents. Resp. Br. at 17 (Postal Service “ignores the other three factors in the four-factor test”); *id.* at 26 (Postal Service “ignores” the three factors that “support the Commission’s ultimate conclusions about the timing of the ‘new normal’ for each class of mail” and instead “focuses exclusively on the fourth factor: the Postal Service’s ability to adjust to lower volumes”); *id.* at 27 (“the Postal Service ignores the first three factors in the ‘new normal’ test” and “effectively rewrite[s] the four-factor ‘new normal’ test as a one factor test”) (citation omitted); *id.* at 30 (“Postal Service’s apparent view [is] that the ‘ability to adjust’ factor should supersede all the others”). The Postal Service has not ignored the first three factors. It *concedes* them, but argues that the Commission’s test does not and cannot stop when those factors are met, because those factors do not address the critical question of when the Great Recession ceased being an extraordinary or exceptional event despite continuing to cause ongoing volume losses. In other words, the Postal Service contends merely that the “ability to adjust” is a necessary component of the test as advanced to and understood (and affirmed) by this Court.⁴

⁴ Indeed, it is the Commission, not the Postal Service, that appears to re-cast the four-prong test as a one-prong test. The dates chosen by the Commission for when ongoing losses stopped satisfying the statute’s “due to” clause correspond entirely

In sum, the test that this Court affirmed in *Alliance of Nonprofit Mailers* was designed to answer two separate, and equally important, questions in dealing with the extent to which ongoing financial harm is “due to” extraordinary or exceptional circumstances: (1) when did the extraordinary event cause mail volume to fall to and stabilize at a “new normal” level, and (2) when did the Postal Service gain the ability to adjust to the ongoing harm left in the event’s wake, thus ending the “extraordinary or exceptional” nature of the event. If the Commission’s view is now that the second inquiry is optional, it was required to explain its change of position. Because the Commission does not acknowledge even that it has in fact changed its position, its new iteration of the “due to” test must be set aside.

B. The Commission on Remand Redefined the Phrase “Ability to Adjust” in a Way that Makes the Term Essentially Meaningless.

In addition to altering the significance of the “ability to adjust” element of the Commission’s test, the Commission on remand also redefined what the phrase “ability to adjust” means. Order No. 1926 devoted a single paragraph to the “ability to adjust” element of its test and determined that the Postal Service gained such an ability sometime in FY2010. JA98. However, it did not explain what it means to “adjust,” stating only that, “if the Postal Service is adjusting to the circumstances, then the circumstances” are “more normal than extraordinary or

to when the second element – the date on which the Great Recession stopped driving mail volume further downward – was satisfied.

exceptional,” and that, “[o]nce [the] impact of a circumstance is normal, and the Postal Service has begun to adjust to it, additional impact cannot be said to be due to a past extraordinary or exceptional circumstance.” JA98. The Commission now appears to read this passage as establishing that, for purposes of determining when the Great Recession lost its extraordinary character, “adjusting” means having “begun to adjust,” Resp. Br. at 27-28, but the logic of the quoted passage is circular and confusing: the “begun to adjust” phrase does not appear until after the Commission has concluded that the circumstances have lost their extraordinary character.

In any event, the Commission clarified in the subsequent review proceedings that “adjust” does not mean “having begun to adjust” for purposes of its test. On appeal, the Commission stated that the “new normal” test was designed to ensure that the Postal Service would “respond[], over time,” to the impact of an extraordinary event, *Alliance of Nonprofit Mailers*, Commission Br. at 38, and identifies “the point when we expected [the Postal Service] to entirely adapt going forward.” *Alliance of Nonprofit Mailers*, Oral Argument Transcript at 53.

On remand, however, the Commission changed position, stating that the “ability to adjust” merely represents the point at which the Postal Service can “take steps to adjust to lower levels of mail volume once the ‘new normal’ is reached.” JA582. The Commission states that, notwithstanding what it told this Court during

the previous review proceeding, it has *always* viewed the “ability to adjust” as referring to the ability to begin to take steps in response to an extraordinary event. Resp. Br. at 27-28. That was not anyone else’s interpretation of the Commission’s view, however. If it were, this Court would not have vacated the “count once” rule for the reasons articulated in *Alliance of Nonprofit Mailers*. This Court vacated the “count once” rule because it was premised on the assumption that the Postal Service could adjust to volume losses immediately. *See* JA100 (explaining theory behind “count once” rule). That assumption, this Court observed, was “at war” with the “ability to adjust” prong of the Commission’s “new normal” test. *Alliance of Nonprofit Mailers*, 790 F.3d at 193. If “ability to adjust” meant merely the ability to take steps in response to the recession-produced volume losses, then the conflict that this Court recognized between the Commission’s “count once” rule and “new normal” test would not exist, as it is undisputed that the Postal Service was taking cost-cutting steps from the Great Recession’s inception. *See* Pet. Br. at 44-45; *Alliance of Nonprofit Mailers*, Oral Argument Transcript at 58.

Having waited until Order No. 2623 to articulate its interpretation of “ability to adjust” as meaning the point when the Postal Service “has begun to take steps to respond” to an extraordinary circumstance, Resp. Br. at 27, the Commission justifies that interpretation on the ground that the “ability to adjust” need not mean “fully” adjusting, an interpretation that the Commission now attributes to the

Postal Service. *Id.* at 17, 28. As an initial matter, it is the Commission (during the previous review proceeding), and not the Postal Service, that equated “the ability to adjust” with the ability to “entirely adapt going forward.” The Postal Service made clear on remand (and the Commission nowhere disputes) that, if “ability to adjust” meant the ability to adjust completely, then it has not satisfied that standard even now, as the losses caused by the Great Recession continue to overwhelm the Postal Service’s efforts to adjust its operations to mitigate such losses. JA369.

Moreover, the Commission’s argument rests on a false dichotomy: that the “ability to adjust” means either “fully adjusting” (a standard that would be nearly impossible to meet) or “beginning to take steps to adjust” (a standard so easy to meet that it is essentially meaningless). The Commission cannot justify one extreme interpretation of a statutory phrase solely by comparing it an equally extreme opposing interpretation where other alternatives are available. The Postal Service proposed one such reasonable alternative on remand, arguing that the “ability to adjust” should mean at least the ability to make meaningful inroads toward offsetting the massive loss of contribution that the Great Recession caused. Specifically, the Postal Service argued that it gained the ability to adjust at the end of FY2012 when, for the first time since the Great Recession’s onset, the Postal Service (in the Commission’s words) “began to realize noticeable savings” from the cost-cutting efforts it undertook starting in FY2008. Analysis of United States

Postal Service Financial Results and 10-K Statement for Fiscal Year 2013, Docket No. ACR2013, at 23 (P.R.C. Mar. 18, 2014), *available at* <http://tinyurl.com/z3esfh6>; *see* JA371-79, JA387-93; Pet. Br. at 38-45.

The Commission's brief hardly mentions the Postal Service's lengthy discussion of the "ability to adjust" issue or explains why it ignored the findings of its own Financial Analysis Report, which supports the proposition that "adjusting" can refer to the achievement of meaningful savings without requiring that the Postal Service fully recover from the impact of the extraordinary event. Instead, the Commission has chosen to adopt on remand a view of "ability to adjust" that effectively and unnecessarily writes that element out of the test without considering the available alternatives. This is not the version of the test that this Court accepted as a reasonable exercise of the Commission's discretion.

C. By Changing the Meaning and Role of the "Ability to Adjust" Element of its "Due To" Test, the Commission Leaves in Place the Fundamental Inconsistency in its Factual Analysis.

The Commission has long recognized, and does not now dispute, that the Great Recession's impact on the Postal Service was "unique in kind and severity." Order No. 547, *Order Denying Request for Exigent Rate Adjustments*, Docket No. R2010-4, at 50 (P.R.C. Sept. 30, 2010), *available at* <http://tinyurl.com/hbz2dhn>. It was so severe, in fact, that it produced a "new normal," a level of mail volume significantly and permanently lower than its pre-recession level, and thus left

behind a permanent annual revenue shortfall. To this day, even with the benefit of the above-inflation rate surcharge that the Commission allowed and despite dramatic cost-cutting efforts and operational changes, the Postal Service has been unable to break even on an annual basis, let alone to produce a profit that could be used to pay down the debt caused by recession-produced revenue shortfalls from previous years.

The safety valve in 39 U.S.C. § 3622(d)(1)(E) was designed to address precisely this situation: where an extraordinary event that was beyond the Postal Service's control overwhelms its efforts (despite following "best practices of honest, efficient, and economical management") to offset the damage that the event inflicted and thereby compromises the Postal Service's ability to generate sufficient revenue, consistent with the statutory price cap, to cover its costs and meet the needs of the mailing public. The Commission is well aware of the relevant facts. In Order No. 1926, the Commission recognized both the cost-cutting efforts that the Postal Service had undertaken in response to the Great Recession's financial impact and the statutory and regulatory obligations that would prevent further efforts. JA122-40. Nothing in either Order No. 1926 or Order No. 2623 identified any steps that the Postal Service could have taken, but failed to take, to further mitigate the financial harm caused by the Great Recession. In its 2013 Financial Analysis Report, the Commission recognized that the Postal

Service did not even begin “to realize noticeable savings” from its cost-cutting efforts before FY2013, and that, even with those savings, the Postal Service’s financial situation remained precarious, with a large and growing net deficit that has restricted the Postal Service’s “capital spending on assets that are necessary for the improvement and continuance of its operations.” FY2013 Financial Analysis Report at 1-2.

Those findings and observations should have led the Commission to the conclusion that, despite its best efforts, the Postal Service was *unable* to adjust to the impact of the Great Recession before the end of FY2012, when it first achieved some measurable amount of financial stability. At the very least, the Commission should have explained how its one-paragraph conclusion that the Postal Service gained the ability to adjust to the “new normal” for purposes of the “due to” clause sometime in FY2010 can be squared with the pages-long findings elsewhere in Order No. 1926 or in its Financial Analysis Report, or with its statement to this Court at oral argument that the “due to” clause considers “what could the Postal Service have been expected to do.” *Alliance of Nonprofit Mailers*, Oral Argument Transcript at 41. This Court’s opinion did not expressly require the Commission to reconcile those findings and observations, but it certainly did not permit the Commission to wipe the conflict away on remand by effectively reading the “ability to adjust” element of its test out of existence. Because the Commission’s

new version of “ability to adjust” is not the same one that it advanced previously and that this Court previously affirmed as a reasonable exercise of the Commission’s discretion, and because the Commission has not explained its departure, the case should be remanded.

CONCLUSION

On remand, the Commission accurately summarized this Court’s decision in *Alliance of Nonprofit Mailers* as upholding the proposition that the Great Recession remained an extraordinary or exceptional circumstance “until the Postal Service had an opportunity to adjust to the ‘new normal’ in the mail economy.” JA559. The Commission then proceeded to abandon that proposition by making the “ability to adjust” an optional factor or a factor so easily met as to render it essentially meaningless. Because the Commission altered its test without a reasoned explanation, and for the further reasons set forth in the Postal Service’s opening brief, this Court should grant the petition for review and remand the matter to the Commission for further proceedings.

Dated: March 16, 2016

Respectfully submitted,

THOMAS J. MARSHALL
Executive Vice President & General Counsel

R. ANDREW GERMAN
Managing Counsel

/s/ David C. Belt

DAVID C. BELT
Office of the General Counsel
United States Postal Service
475 L’Enfant Plaza, SW
Washington, DC 20260
(202) 268-2945
david.c.belt@usps.gov

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7), that the foregoing Brief of the United States Postal Service uses proportionately spaced, 14-point type, and contains 5,474 words as measured by Microsoft Word, a word processing system that includes footnotes and citations in word counts.

/s/ David C. Belt
Attorney for the U.S. Postal Service
Dated: March 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on March 16, 2016, the foregoing reply brief was electronically filed with the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that counsel for the respondent and the intervenor are registered as ECF filers and that they will be served by the CM/ECF system.

/s/ David C. Belt

DAVID C. BELT

Office of the General Counsel

United States Postal Service

475 L'Enfant Plaza, SW

Washington, DC 20260

(202) 268-2945

david.c.belt@usps.gov