

**ARGUED ON NOVEMBER 20, 2015**

No. 15-1018

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

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UNITED STATES POSTAL SERVICE,  
*Petitioner,*

v.

POSTAL REGULATORY COMMISSION,  
*Respondent.*

GAMEFLY, INC., and NETFLIX, INC.,  
*Intervenors for Respondent.*

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On Petition for Review of an Order of the  
Postal Regulatory Commission

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**SUPPLEMENTAL BRIEF OF  
GAMEFLY, INC. AND NETFLIX, INC.,  
INTERVENORS FOR RESPONDENT**

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**SUPPLEMENTAL BRIEF OF  
GAMEFLY, INC. AND NETFLIX, INC.,  
INTERVENORS FOR RESPONDENT**

GameFly, Inc., and Netflix, Inc., jointly submit this brief on whether the Court has jurisdiction over the case “in the absence of any indication that Petitioner has concrete plans to raise the price of the Round-Trip Mailer.” The Court has jurisdiction and should proceed to a decision on the merits.

**BACKGROUND**

To establish standing under Article III, Petitioner, the U.S. Postal Service, must show that: (1) the refusal of the Postal Regulatory Commission to reclassify DVD mail as a competitive product has caused the Postal Service to suffer a “concrete and particularized” injury that is “actual or imminent, not ‘conjectural’ or ‘hypothetical’”; (2) the injury is “traceable” to the Commission’s action, and not “the result [of] the independent action of a some third party not before the court”; and (3) a favorable decision by the Court is likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 23 (D.C. Cir. 2015).

To establish standing under 39 U.S.C. § 3663, the Postal Service must show that it is ‘adversely affected or aggrieved’ by the Commission’s action. *Id.* To be “aggrieved,” a party must suffer an “injury in fact” to an interest “arguably

within the zone of interests to be protected or regulated” by the statutory provisions at issue. *Pennington v. USPS*, 627 F.2d 534, 538 (D.C. Cir. 1980), quoting *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970).

The Postal Service has alleged that it is injured in two independent respects by the Commission’s decision not to reclassify DVD mail service as competitive. First, continued classification of DVD mail service as a market-dominant product perpetuates substantive and procedural regulatory burdens on the Postal Service that reclassification of DVD mail service as competitive would avoid. These burdens, the Postal Service contends, confer standing on it whether or not it “would have raised the price of DVD delivery” within any concrete period if the Commission had reclassified the service as competitive. USPS Br. at 24 (citing *Int’l Brotherhood of Elec. Workers v. ICC*, 862 F.2d 330, 334 (D.C. Cir. 1988), and *Ass’n of American Railroads v. Dept. of Transp.*, 38 F.3d 582, 585 (D.C. Cir. 1994)).

Second, the Postal Service alleges that continued regulation of DVD mail service as a market dominant product “generally forecloses” the USPS from raising the rates charged for DVD mail service “above the rate of inflation.” USPS Br. 6. “As a result, if the market place changes or if the unit cost of delivering DVDs rises, the Postal Service cannot respond to such events without

reducing the prices charged for other postal products, which will result in a reduction of needed revenue.” *Id.* at 24. The Postal Service asserts that it probably would impose above-inflation rate increases on DVD mail service if permitted to do so because the decline in the volume of this mail “is expected to accelerate in the future.” J.A.132, 162-63, ¶¶ 25-26.

The Court asks, however, whether the Postal Service’s injury claims are undermined by its disclaimer that it “cannot say that it would have raised the price of DVD delivery had the Commission” reclassified that service as a competitive product. USPS Br. 24; *cf.* Order entered Jan. 13, 2016 (noting “the absence of any indication that Petitioner has concrete plans to raise the price of the Round-Trip Mailer”). For the reasons explained here, the injury alleged by the Postal Service is sufficient for Article III and statutory standing.

## ARGUMENT

### **I. THE COURT HAS JURISDICTION BECAUSE THE POSTAL SERVICE HAS ALLEGED INJURY SUFFICIENT FOR STANDING.**

The Postal Service’s failure to be more specific about its pricing plans does not render the injury it allegedly suffers merely “conjectural” or “hypothetical.” The USPS has Article III and statutory standing to challenge the Commission decision for three reasons. First, the added regulatory burdens borne by market dominant mail products—but not competitive products—give the Postal Service

standing even without a specific showing that the Commission’s decision has had any concrete effect on the level of rates for DVD mail service. Second, the history of product transfers since 2006 makes clear that reclassification of DVD mail service as competitive almost certainly would lead quickly to above-inflation price increases, an outcome thwarted by the Commission decision to continue classifying DVD mail service as market dominant. Third, the decision under review, by subjecting DVD mail to continued regulation as a market dominant product, will have the effect of forcing the Postal Service to *reduce* the rates charged for DVD mail by approximately 4.1 percent in April 2016, a separately mandated reduction that applies across-the-board to market dominant products but not to competitive products.<sup>1</sup>

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<sup>1</sup> The second and third *Lujan* requirements for Article III standing—that the injury alleged by the Postal Service be “traceable” to the Commission’s action, and not “the result of the independent action of a some third party not before the court”; and that a favorable decision by the Court is likely to redress the injury—are also satisfied here. The continued classification of DVD mail as market dominant is “directly traceable” to the Commission order challenged by the Postal Service; and a decision by this Court overturning the order and remanding the case to the Commission would redress the alleged injury. To be sure, the relief ultimately sought by the Postal Service would also require a favorable Commission ruling on other issues that the Commission left unresolved—*e.g.*, whether DVDs are “letters” within the meaning of the postal monopoly, thereby triggering the prohibition of 39 U.S.C. § 3642(b)(2) against classifying as competitive any mail product that is covered by the postal monopoly. This fact, however, is immaterial. An injury caused by an agency decision made in reliance on an improper ground is “traceable” to the decision, and redressable by a court order invalidating the decision, even if the agency might

**A. The Commission’s decision perpetuates significant substantive and procedural regulatory burdens on the USPS that go beyond restrictions on the overall price level of DVD mail.**

The Postal Service has standing to challenge the Commission’s denial of the product transfer request whether or not the Postal Service has any current plan to raise its rates for DVD mail service faster than inflation. Continued regulation of DVD mail service as market dominant results in substantial compliance obligations that the Postal Service would avoid if the service were classified as competitive.<sup>2</sup>

To be sure, the prohibition against above-inflation rate increases is a major part of this regulatory regime. The system of regulation “generally forbids the Postal Service from raising the rates on its market-dominant products faster than the rate of inflation” as measured by the Consumer Price Index. *USPS v. PRC*, 785 F.3d 740, 744-45 (D.C. Cir. 2015) (citing 39 U.S.C. § 3622(d)(1)(A)). The CPI-based cap on rate increases applies to each market-dominant class of mail as a whole. 39 U.S.C. § 3622(d)(2)(A). Hence, the Postal Service may “raise

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ultimately “reach the same result for a different reason.” *Federal Election Comm’n v. Akins*, 524 U.S. 11, 25 (1998).

<sup>2</sup> At the risk of belaboring the obvious, GameFly and Netflix believe that all of the regulatory burdens identified in this brief are necessary and appropriate to guard against the abuse of market power resulting from the lack of effective competition for DVD mail service.

the price of one product in a mail ‘class’ by more than the rate of inflation [only] if that over-inflation increase is offset by lower rises or reductions in other products in the class.” *USPS v. PRC*, 785 F.3d at 745. By contrast, the Postal Service is free to set rates on competitive products as high as it pleases. The only legal restrictions are that rates may not be too *low*, 39 U.S.C. §§ 3631(b) and 3633, or unduly discriminatory, 39 U.S.C. § 403(c).

But the CPI cap on class-wide increases is only one of the many extra regulatory burdens imposed on market-dominant products. Requests for Commission approval of rate changes on market dominant products require submission of elaborate documentation and work papers regardless of the size of the increases. 39 C.F.R. §§ 3010.10, 3010.12; see Docket No. R2015-4, *Notice of Market-Dominance Price Adjustment*, USPS Notice filed Jan. 15, 2015 (available at [www.prc.gov/docs/91/91164/Notice.pdf](http://www.prc.gov/docs/91/91164/Notice.pdf)); USPS work papers for same request ([www.prc.gov/dockets/doclist/R2015-4/Library-References/](http://www.prc.gov/dockets/doclist/R2015-4/Library-References/)).

The Postal Service must file its request at least 45 days before the rate changes are to take effect, so that interested parties can file comments on the proposed changes, and the Commission can evaluate the proposal and any objections to it. 39 C.F.R. §§ 3010.10 and 3010.11. The Commission typically requires the Postal Service to answer multiple rounds of discovery. *See, e.g.,*

[www.prc.gov/dockets/doclist/R2015-4/Chairman%27s-Information-Request-%28CHIR%29/](http://www.prc.gov/dockets/doclist/R2015-4/Chairman%27s-Information-Request-%28CHIR%29/) (discovery requests in Docket No. R2015-4).

The substantive grounds for challenging rate changes on market dominant products include not only the overall class-average level of the increases (and their relationship to the CPI cap), but also the rate relationships *within* each class and product. The Commission may require the Postal Service to change intra-class rate relationships if the Commission finds that the discounts offered by the Postal Service for presorting and other forms of mailer work are too deep, *USPS v. PRC*, 717 F.3d 209 (D.C. Cir. 2013), or if the rate design fails to “address in a meaningful fashion” the pricing “objectives and factors” of 39 U.S.C. §§ 3622(b) and (c). Docket No. R2009-2, *Notice of Price Adjustment* (Mar. 16, 2009) at 72 (available at [http://www.prc.gov/docs/62/62705/Order\\_No\\_191.pdf](http://www.prc.gov/docs/62/62705/Order_No_191.pdf)). If the Commission finds that any aspect of the request fails to comply with the statute or the rules, the Commission may require the Postal Service to file an amended request. 39 C.F.R. § 3010.11(f)–(j).

The resulting litigation can be protracted. The CPI-based rate increases proposed by the Postal Service in September 2013 were not fully implemented until January 26, 2014. Docket No. R2013-10, *Notice of Market-Dominant Price Adjustment* (Dec. 11, 2013) (available at [www.prc.gov/docs/88/88538/Order%20No.%201902.pdf](http://www.prc.gov/docs/88/88538/Order%20No.%201902.pdf)). The litigation

generated by that case has continued into 2016, and may not have ended. *USPS v. PRC*, 785 F.3d 740 (D. C. Cir. 2015) (remanding case to Commission), on remand, Docket No. R2013-10R, Order Resolving Issues on Remand (Jan. 22, 2016) (available at [www.prc.gov/docs/94/94797/Order%20No.%203047.pdf](http://www.prc.gov/docs/94/94797/Order%20No.%203047.pdf)). Likewise, the index-based rate increases proposed by the USPS in January 2015 were not fully approved by the Commission until May 2015, after the USPS made several extensive revisions to its request required by the Commission. Docket No. R2015-4, *Notice of Market-Dominant Price Adjustment* (May 7, 2015) (available at [www.prc.gov/docs/92/92217/Order%20No.%202472.pdf](http://www.prc.gov/docs/92/92217/Order%20No.%202472.pdf)).

By contrast, lighter standards and streamlined procedures apply to rate changes for competitive products. The Postal Service may implement rate increases on competitive products 30 days after publishing notice of the rate changes in the Federal Register. 39 U.S.C. § 3632(b); 39 C.F.R. § 3015.2. Although the statute and the Commission's rules require that the notice include "an explanation and justification for the change," *id.*, in practice the explanation for domestic mail products is brief. *See, e.g.*, Docket No. CP2016-9, *Competitive Products Price Changes—Rates of General Applicability*, USPS Notice filed Oct. 16, 2015 (seven page discussion of domestic products) (available at <http://www.prc.gov/docs/93/93564/Notice%20CP2016-9.pdf>).

The extra regulatory burdens borne by DVD mail service because of its continued regulation as market dominant are concrete and actual, not merely hypothetical. For example, on January 15, 2015, less than a month after the Commission issued the decision under review, the Postal Service filed a request for approval of CPI-based rate increases on market-dominant mail products, including DVD mail service. Docket No. R2015-4, *Notice of Market-Dominant Price Adjustment* (USPS Notice filed Jan. 15, 2015). Eleven days after that, the Postal Service filed a notice of changes in its competitive mail products of general applicability. Docket No. CP2015-33, *Competitive Products Price Changes—Rates of General Applicability* (USPS Notice filed Jan. 26, 2015). The Postal Service specifically stated that it would have included DVD mail service in the latter case, not the former, if the product transfer request had been approved. *Id.* at 4.

This Court has repeatedly held that regulatory burdens comparable to those imposed on market dominant postal products are sufficient to confer Article III and statutory standing. A firm has standing to challenge the applicability of those burdens even when lessened regulatory scrutiny would not necessarily change the outcome of the particular case at issue. For example, in *International Brotherhood of Elec. Workers v. ICC*, 862 F.2d 330, 334 (D.C. Cir. 1988), the Court held that a rail labor union had standing to challenge the exercise of

jurisdiction by the Interstate Commerce Commission to review arbitration awards, even though the ICC had “upheld the union’s position on the merits of the arbitration award.” *Id.* The Court reasoned that the ICC’s assertion of jurisdiction, unless overturned, would subject the union to “agency review in future cases involving disputes over employee protective conditions.” *Id.* This would force the union “to litigate future arbitration awards before the ICC,” an injury “sufficient to confer appellate standing on an otherwise prevailing party.” *Id.*

In *Ass’n of American Railroads v. Dept. of Transp.*, 38 F.3d 582 (D.C. Cir. 1994), a pair of railroad trade associations challenged a Federal Railroad Administration decision that set safety standards for railroad employees working on bridges. The railroads objected to a particular rule which applied the safety regulations of the Occupational Safety and Health Administration to any practices not covered by a provision of the FRA rules. The FRA contended that the railroads lacked standing because they “would be subject to OSHA standards” even without the FRA rule. 38 F.3d at 585. The Court disagreed, holding that “the necessity of complying with two sets of regulations enforced by two federal agencies compounds the railroads’ compliance burden regardless of the content of either set of regulations,” and thus constitutes an injury sufficient for Article III standing. *Id.*

Similarly, in *Burlington Northern & Santa Fe Ry. Co. v. STB*, 403 F.3d 771, 775-76 (D.C. Cir. 2005), the Court held that the railroad had standing to challenge a Surface Transportation Board decision to vacate an existing maximum rate prescription for a coal transportation service. The Court found that the STB action, by exposing the railroad to “increased litigation over the reasonableness of its rates,” inflicted enough injury on the railroad to confer standing even though there was no certainty that the shipper’s renewed challenge to the rates would prevail. *Id.*

Likewise, in *Turlock Irrigation District v. FERC*, 786 F.3d 18, 23 (D.C. Cir. 2015), the Court held that a pair of irrigation districts in the Central Valley of California had standing to challenge a decision of the Federal Energy Regulatory Commission subjecting a hydroelectric project operated by the two districts to the licensing requirements of the Federal Power Act. The irrigation districts failed to allege that FERC regulation would require the districts to shut down the hydroelectric system and did not quantify any additional compliance costs caused by FERC oversight. The Court nonetheless held that there “is no question that the Districts have standing to bring their current petition.” *Id.* “They are entities regulated by the order under review, and the relief prayed would alleviate the harm asserted”—“that is, that they must subject to licensure.” *Id.*

Finally, in *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015), the Court held that a bank regulated by the Consumer Financial Protection Bureau had standing to challenge the constitutionality of the legislation that created the agency. The Court reasoned that the bank's obligation to comply with additional disclosure requirements, or incur the costs of "monitor[ing] its remittances" to avoid those disclosure requirements, were harms sufficient to establish standing. *Id.*

**B. The Commission's decision prevents above-inflation rate increases on DVD mail service that the Postal Service almost certainly would impose if the product were exempt from maximum rate regulation.**

The Postal Service would have standing even if the case law required a showing that the Commission's decision has prevented a rate increase that otherwise would have occurred since December 2014 (or would occur in the near future). Despite the Postal Service's reticence about acknowledging any "concrete plans to raise the price of the Round-Trip Mailer" if the product were exempted from maximum rate regulation (January 13 Order), denial of the product transfer request almost certainly has prevented price increases that would have occurred quickly after approval of the transfer. The history of rate increases on newly exempted products demonstrates this point, which alone is sufficient grounds for standing.

Nine years have passed since Congress divided postal services into market-dominant and competitive products, established different regulatory systems for each, and authorized the Postal Service to seek Commission approval to reclassify market-dominant products as competitive. Postal Accountability and Enhancement Act of 2006, Pub. L. No. 109-435, §§ 101, 201-203, 120 Stat. 3199-3207, 3209-10 (Dec. 20, 2006) (enacting 39 U.S.C. § 3642). During this period, the Postal Service has filed eight requests with the Commission to reclassify domestic market-dominant mail products of general availability as competitive. Six of these requests have been approved by the Commission.<sup>3</sup> In only two of the six cases—both involving products whose existing rates were too low to cover even “attributable” (essentially, marginal) cost—did the Postal Service acknowledge any “concrete plans to raise the price of” the products at issue. To the contrary, the USPS insisted that, beyond the minimum rate increases needed to raise rates to 100 percent of attributable cost, the “availability of private” competitors “limits the Postal Service’s ability to ... raise prices

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<sup>3</sup> PRC Docket MC2008-4, *Premium Forwarding Service* (July 16, 2008); MC2010-36, *Commercial Standard Parcels* (Mar. 2, 2011); MC2011-22, *Lightweight Commercial Parcels* (Apr. 6, 2011); MC2012-13, *Parcel Post* (July 19, 2012); MC2010-20, *Selected Post Office Box Service Locations* (June 17, 2010); MC2011-25, *Selected Post Office Box Service Locations* (July 29, 2011). The decisions are available at <http://www.prc.gov/dockets/type/MailClassification>.

significantly without losing a significant level of business.” Docket No. MC2008-4, *Premium Forwarding Service*, USPS Request (May 30, 2008), Attachment D at 3. The USPS made similar statements in the other product transfer dockets.<sup>4</sup>

In all six cases in which the Commission approved the product transfers, however, the Postal Service quickly began imposing rate increases on the newly-exempted product(s). The cumulative increases have far outstripped inflation, as public filings by the USPS over the past eight years confirm:<sup>5</sup>

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<sup>4</sup> Docket No. MC2008-4, USPS Reply Comments, *Modification of Mail Classification Schedule Product Lists Regarding Premium Forwarding Service* (June 20, 2008) at 3; Docket No. MC2010-20, *Transferring Selected Post Office Box Service Locations to the Competitive Product List*, USPS Request (Mar. 12, 2000), Attachment B at 5; Docket No. MC2010-36, *Transferring Commercial Standard Mail Parcels to the Competitive Product List*, USPS Request (Aug. 16, 2010), Attachment B at 6; *id.*, USPS response of Chairman’s Information Request 1, Question 9 (Sept. 13, 2010); *id.*, USPS reply comments (Oct. 15, 2010) at 4-6; Docket No. MC2011-22, *Restructuring First-Class Mail Parcel Product Offerings*, USPS Request (Feb. 24, 2011), Attachment B at 6; Docket No. MC2011-25, *Transferring Selected Post Office Box Service Locations to the Competitive Product List*, USPS Request (May 13, 2011), Attachment B at 9; Docket No. MC2012-13, *Transfer of Parcel Post to the Competitive Product List*, USPS Request (Apr. 26, 2012), Attachment B at 3, 5-6, 8. All of these USPS filings are available at <http://www.prc.gov/dockets/type/MailClassification>.

<sup>5</sup> Rate increase percentages in the following table are taken from USPS Governors’ decisions attached to USPS initial notices in the CP dockets, which are all available at [www.prc.gov/dockets/type/CompetitiveProducts](http://www.prc.gov/dockets/type/CompetitiveProducts). Specific CP dockets for rate increases by product are indicated in footnotes 8-12, *infra*. Cumulative rate increases for all products are multiplicative, not additive (*i.e.*, two 20 percent increases produce a total increase of 44 percent, not 40 percent).

<b>Current Product Name<sup>6</sup></b>	<b>Time Period</b>	<b>Cumulative Average Rate Increase</b>	<b>Cumulative Inflation (CPI-Urban)<sup>7</sup></b>
Premium Forwarding Service	2008 - 2016	58.2% <sup>8</sup>	11.3%
Parcel Select Lightweight	2011 - 2016	78.5% <sup>9</sup>	6.5%
First-Class Package Service	2011 - 2016	33.0% <sup>10</sup>	6.5%
Standard Post	2012 - 2016	56.0% <sup>11</sup>	4.4%
Competitive Post Office Box	2012 - 2016	13.8% <sup>12</sup>	4.4%

The Postal Service's reticence about disclosing in advance the price increases that followed quickly after the requested product transfers may be due

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<sup>6</sup> See *supra*, at 13 n.3 for the PRC dockets in which these products were reclassified as competitive. The Competitive Post Office Box product involved two separate cases (MC2010-20 and MC2011-25). In some cases, products were renamed.

<sup>7</sup> See [http://data.bls.gov/timeseries/CUUR0000SA0?output\\_view=pct\\_12mths](http://data.bls.gov/timeseries/CUUR0000SA0?output_view=pct_12mths).

<sup>8</sup> CP2009-23 (May 11, 2009), CP2010-8 (Jan. 4, 2010); CP2011-26 (Jan. 2, 2011); CP2012-2 (Jan. 22, 2012); CP2013-3 (Jan 27, 2013); CP2014-5 (Jan. 26, 2014); CP2015-33 (May 31, 2015); CP2016-9 (Jan. 17, 2016).

<sup>9</sup> CP2012-2 (Jan. 22, 2012); CP2013-3 (Jan 27, 2013); CP2014-5 (Jan. 26, 2014); CP2015-33 (May 31, 2015); CP2016-9 (Jan. 17, 2016).

<sup>10</sup> CP2012-2 (Jan. 22, 2012); CP2013-3 (Jan 27, 2013); CP2014-5 (Jan. 26, 2014); CP2015-33 (May 31, 2015); CP2016-9 (Jan. 17, 2016).

<sup>11</sup> CP2013-3 (Jan 27, 2013); CP2014-5 (Jan. 26, 2014); CP2015-33 (May 31, 2015); CP2016-9 (Jan. 17, 2016).

<sup>12</sup> CP2013-3 (Jan 27, 2013); CP2014-5 (Jan. 26, 2014); CP2015-33 (May 31, 2015); CP2016-9 (Jan. 17, 2016). The average percentage increases in CP2011-26 and CP2012-2 did not appear in the USPS notices in those cases, so we conservatively assumed that the increases were zero.

to two reasons. First, the Postal Service may be unwilling to invest the time needed to determine the precise timing and amount of the price increases until the Commission has approved the proposed product transfer and above-inflation price increases become possible. Second, the Postal Service may be concerned that candor about the timing and magnitude of the contemplated price increases would serve as an admission that the Postal Service still has market dominance over the product(s) at issue. 39 U.S.C. § 3642(b)(1) defines market dominance as market power sufficient, *inter alia*, to “raise prices significantly . . . without risk of losing a significant level of business to other firms offering similar products.” Indeed, in the most recent product transfer case, after the Postal Service admitted that it contemplated a price increase of approximately 22 percent if the transfer request were granted, the Commission denied the request in part on this ground. Docket No. MC2015-7, *Transferring First-Class Mail Parcels to the Competitive Product List*, Order No. 2686 (Aug. 26, 2015) at 22, petition for review pending *sub nom. USPS v. PRC*, No. 15-1338 (D.C. Cir.).

Regardless of the actual reasons for the Postal Service’s reticence, in practice, price increases have followed quickly after each Commission decision reclassifying a market-dominant product of general applicability as competitive. This demonstrates that the Commission’s denial of a product transfer request has

prevented the Postal Service from imposing price increases that otherwise would have occurred soon after approval of the product transfer.

**C. Continued classification of DVD mail service as market dominant inflicts concrete and imminent injury on the Postal Service because it must *reduce* the average price of all market dominant mail (including DVD mail) by 4.1 percent in April 2016.**

The Commission order under review will subject the Postal Service to concrete, imminent injury in another respect. Unless overturned, the order has the effect of requiring the Postal Service to make a 4.1 percent *reduction* in the price of DVD mail in April, as part of a separately mandated rollback of an across-the-board rate surcharge on all market dominant mail.

The 2006 legislation that created the CPI cap on market-dominant rate increases included an escape hatch: the Commission may authorize an above-inflation rate increase if it finds that the extra increase “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.” 39 U.S.C. § 3622(d)(1)(E). In September 2013, the Postal Service, asserting that the volume losses caused by the 2007-2009 recession justified relief under this section, requested permission from the Commission to impose a permanent across-the-board increase of 4.3 percent on all market-

dominant rates. The Commission, finding that the Postal Service had failed to justify a permanent increase, authorized the Postal Service to keep the increase in effect only long enough to yield \$2.8 billion in extra contribution. *Alliance of Nonprofit Mailers v. PRC*, 790 F.3d 186, 191-93 (D.C. Cir. 2015).

On review, the Court remanded the case, holding that one of the grounds offered by the Commission for disallowing a portion of the requested increase was arbitrary. *Id.* at 195-96. On remand, the Commission allowed recovery of the amounts initially disallowed on the ground disapproved by the Court, thereby increasing the total allowed recovery of extra contribution from \$2.8 billion to \$4 billion. Docket No. R2013-11R, *Rate Adjustment Due to Extraordinary or Exceptional Circumstances* (July 29, 2015), petition for review pending *sub nom.* *USPS v. PRC*, No. 15-1297 (D.C. Cir.). Since then, the Commission has found that the Postal Service is likely to recover the entire \$4 billion of extra contribution by the beginning of the third quarter of the Postal Service's fiscal year (*i.e.*, by early April 2016). The Commission has ordered the Postal Service to rescind the 4.3 percent surcharge on all market dominant products as soon as full recovery of the \$4.0 billion has occurred. Docket No. R2013-11, Order No. 3030 (Jan. 15, 2016) (available at [www.prc.gov/docs/94/94693/Order%20No.%203030.pdf](http://www.prc.gov/docs/94/94693/Order%20No.%203030.pdf)).

Rescission of the 4.3 percent surcharge will require a rate reduction of approximately 4.1 percent (the reciprocal of an increase of 4.3 percent). The Commission has ruled that, because the 4.3 percent surcharge was applied across the board on all market dominant products, the 4.1 percent rollback likewise must be taken across the board from all market-dominant products, including First-Class Mail, the class of service to which DVD mail service belongs. Docket No. R2013-11, Order No. 2319 (Jan. 12, 2015) at 9 (available at [www.prc.gov/docs/91/91149/Order%20No.%202319.pdf](http://www.prc.gov/docs/91/91149/Order%20No.%202319.pdf)). On February 5, 2016, the Postal Service published a schedule of rate rollbacks in compliance with the Commission's orders:

Absent Congressional or Court action to make the existing exigent surcharge for Market Dominant Products and Services part of the rate base or to otherwise extend it, the Postal Service will be providing notice to the Postal Regulatory Commission of the adjusted prices that are contained in the pricing files set forth below. The Postal Service intends to provide such notice of the adjusted prices to the Commission 45 days before it is anticipated that the exigent surcharge revenue target will be reached.

“Spring 2016 Rollback Pricing Files,” USPS Postal Explorer (available at <http://pe.usps.gov/>).

The Commission order under review in the present case keeps DVD mail service as market dominant instead of transferring it to the competitive product list; as a result, the Postal Service must apply the April 2016 rollback of market

dominant rates to DVD mail service. The resulting loss of revenue resulting from the rollback in DVD mail rates will be a concrete, particularized, and imminent harm resulting from the Commission's December 23, 2014 decision not to reclassify DVD mail as competitive.

### CONCLUSION

The Court should find that the Postal Service has standing, proceed to a decision on the merits of the petition for review, and deny the petition.

Respectfully submitted,

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February 10, 2016

**CERTIFICATE OF COMPLIANCE  
WITH FED. R. APP. P. RULE 32(a)**

This brief complies with the volume limitations set forth in the Court's Order of January 13, 2016 because the brief contains 20 pages, excluding the parts of the brief that are exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ David M. Levy

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February 10, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of this brief were served today by filing electronically with the Court through the appellate CM/ECF system.

/s/ David M. Levy

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David M. Levy

February 10, 2016

# Supplemental Statutory Addendum

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**39 U.S.C. § 403(c)**

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

**39 U.S.C. § 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.

### **39 U.S.C. § 3631. Applicability; definitions and updates**

(a) **APPLICABILITY.**—This subchapter shall apply with respect to—

- (1) priority mail;
- (2) expedited mail;
- (3) bulk parcel post;
- (4) bulk international mail; and
- (5) mailgrams;

subject to subsection (d) and any changes the Postal Regulatory Commission may make under section 3642.

(b) **DEFINITION.**—For purposes of this subchapter, the term “costs attributable”, as used with respect to a product, means the direct and indirect postal costs attributable to such product through reliably identified causal relationships.

(c) **RULE OF CONSTRUCTION.**—Mail matter referred to in subsection (a) shall, for purposes of this subchapter, be considered to have the meaning given to such mail matter under the mail classification schedule.

### **39 U.S.C. § 3632. Action of the Governors**

(a) **AUTHORITY TO ESTABLISH RATES AND CLASSES.**—The Governors, with the concurrence of a majority of all of the Governors then holding office, shall establish rates and classes for products in the competitive category of mail in accordance with the requirements of this subchapter and regulations promulgated under section 3633.

(b) PROCEDURES.—

(1) IN GENERAL.—Rates and classes shall be established in writing, complete with a statement of explanation and justification, and the date as of which each such rate or class takes effect.

(2) RATES OR CLASSES OF GENERAL APPLICABILITY.—In the case of rates or classes of general applicability in the Nation as a whole or in any substantial region of the Nation, the Governors shall cause each rate and class decision under this section and the record of the Governors' proceedings in connection with such decision to be published in the Federal Register at least 30 days before the effective date of any new rates or classes.

(3) RATES OR CLASSES NOT OF GENERAL APPLICABILITY.—In the case of rates or classes not of general applicability in the Nation as a whole or in any substantial region of the Nation, the Governors shall cause each rate and class decision under this section and the record of the proceedings in connection with such decision to be filed with the Postal Regulatory Commission by such date before the effective date of any new rates or classes as the Governors consider appropriate, but in no case less than 15 days.

(4) CRITERIA.—As part of the regulations required under section 3633, the Postal Regulatory Commission shall establish criteria for determining when a rate or class established under this subchapter is or is not of general applicability in the Nation as a whole or in any substantial region of the Nation.

(c) TRANSITION RULE.—Until regulations under section 3633 first take effect, rates and classes for competitive products shall remain subject to modification in accordance with the provisions of this chapter and section 407, as such provisions were as last in effect before the date of enactment of this section.

**39 C.F.R. § 3010.10****Notice**

(a) The Postal Service, in every instance in which it determines to exercise its statutory authority to make a Type 1-A, Type 1-B, or Type 1-C rate adjustment for a class shall:

(1) Provide public notice in a manner reasonably designed to inform the mailing community and the general public that it intends to adjust rates no later than 45 days prior to the intended implementation date of the rate adjustment; and

(2) Transmit a notice of rate adjustment to the Commission no later than 45 days prior to the intended implementation date of the rate adjustment.

(b) The Postal Service is encouraged to provide public notice and to submit its notice of rate adjustment as far in advance of the 45-day minimum as practicable, especially in instances where the intended rate adjustments include classification changes or operations changes likely to have a material impact on mailers.

**39 C.F.R. § 3010.11****Proceedings for Type 1-A, Type 1-B, and  
Type 1-C rate adjustment filings**

(a) The Commission will establish a docket for each notice of Type 1-A, Type 1-B, or Type 1-C rate adjustment filing, promptly publish notice of the filing in the FEDERAL REGISTER, and post the filing on its Web site. The notice shall include:

(1) The general nature of the proceeding;

(2) A reference to legal authority under which the proceeding is to be conducted;

(3) A concise description of the planned changes in rates, fees, and the Mail Classification Schedule;

(4) The identification of an officer of the Commission to represent the interests of the general public in the docket;

(5) A period of 20 days from the date of the filing for public comment; and

(6) Such other information as the Commission deems appropriate.

(b) Public comments should focus primarily on whether planned rate adjustments comply with the following mandatory requirements of 39 U.S.C. chapter 36, subchapter I:

(1) Whether the planned rate adjustments measured using the formula established in §3010.23(c) are at or below the annual limitation calculated under §§3010.21 or 3010.22, as applicable; and

(2) Whether the planned rate adjustments measured using the formula established in §3010.23(c) are at or below the limitation established in §3010.29.

(c) Public comments may also address other relevant statutory provisions and applicable Commission orders and directives.

(d) Within 14 days of the conclusion of the public comment period the Commission will determine, at a minimum, whether the planned rate adjustments are consistent with the annual limitation calculated under §3010.21 or §3010.22, as applicable, the limitation set forth in §3010.29, and 39 U.S.C. 3626, 3627, and 3629 and issue an order announcing its findings.

(e) If the planned rate adjustments are found consistent with applicable law by the Commission, they may take effect pursuant to appropriate action by the Governors.

(f) If planned rate adjustments are found inconsistent with applicable law by the Commission, the Postal Service will submit an amended notice of rate adjustment that describes the modifications to its planned rate adjustments that will bring its rate adjustments into compliance. An amended notice of rate adjustment shall be accompanied by sufficient explanatory information to show that all deficiencies identified by the Commission have been corrected.

(g) The Commission will post any amended notice of rate adjustment filing on its Web site and allow a period of 7 days from the date of the filing for public comment. Comments in the amended notice of rate adjustment should address the subjects identified in paragraph (b) of this section and may address the subjects identified in paragraph (c) of this section.

(h) The Commission will review any amended notice of rate adjustment together with any comments filed for compliance and within 14 days issue an order announcing its findings.

(i) If the planned rate adjustments as amended are found to be consistent with applicable law, they may take effect pursuant to appropriate action by the Governors. However, no rate shall take effect until 45 days after the Postal Service files a notice of rate adjustment specifying that rate.

(j) If the planned rate adjustments in an amended notice of rate adjustment are found to be inconsistent with applicable law, the Commission shall explain the basis of its determination and suggest an appropriate remedy.

(k) A Commission finding that a planned Type 1-A, Type 1-B, or Type 1-C rate adjustment is in compliance with the annual limitation calculated under §3010.21 or §3010.22, as applicable; the limitation set

forth in §3010.29; and 39 U.S.C. 3626, 3627, and 3629 is decided on the merits. A Commission finding that a planned Type 1-A, Type 1-B, or Type 1-C rate adjustment does not contravene other policies of 39 U.S.C. chapter 36, subchapter I is provisional and subject to subsequent review.

**39 C.F.R. § 3010.12**  
**Contents of notice of rate adjustment**

(a) A Type 1-A, Type 1-B, or Type 1-C notice of rate adjustment must include the following information:

- (1) A schedule of the planned rates;
- (2) The planned effective date(s) of the planned rates;
- (3) A representation or evidence that public notice of the planned changes has been issued or will be issued at least 45 days before the effective date(s) for the planned rates; and
- (4) The identity of a responsible Postal Service official who will be available to provide prompt responses to requests for clarification from the Commission.

(b) The notice of rate adjustment shall be accompanied by the following information:

- (1) The annual limitation calculated as required by §3010.21 or §3010.22, as appropriate. This information must be supported by workpapers in which all calculations are shown and all input values, including all relevant CPI-U values, are listed with citations to the original sources.
- (2) A schedule showing unused rate adjustment authority available for each class of mail displayed by class and available

amount for each of the preceding 5 years. This information must be supported by workpapers in which all calculations are shown.

(3) The percentage change in rates for each class of mail calculated as required by §3010.23. This information must be supported by workpapers in which all calculations are shown and all input values, including current rates, new rates, and billing determinants, are listed with citations to the original sources.

(4) The amount of new unused rate adjustment authority, if any, that will be generated by the rate adjustment calculated as required by §3010.26 or §3010.27, as applicable. All calculations are to be shown with citations to the original sources. If new unused rate adjustment authority will be generated for a class of mail that is not expected to cover its attributable costs, the Postal Service must provide the rationale underlying this rate adjustment.

(5) A schedule of the workshare discounts included in the planned rates, and a companion schedule listing the avoided costs that underlie each such discount. This information must be supported by workpapers in which all calculations are shown and all input values are listed with citations to the original sources.

(6) Separate justification for all proposed workshare discounts that exceed avoided costs. Each such justification shall reference applicable reasons identified in 39 U.S.C. 3622(e)(2) or (3). The Postal Service shall also identify and explain discounts that are set substantially below avoided costs and explain any relationship between discounts that are above and those that are below avoided costs.

(7) A discussion that demonstrates how the planned rate adjustments are designed to help achieve the objectives listed in 39 U.S.C. 3622(b) and properly take into account the factors listed in 39 U.S.C. 3622(c).

(8) A discussion that demonstrates the planned rate adjustments are consistent with 39 U.S.C. 3626, 3627, and 3629.

(9) For a notice that includes a rate incentive:

(i) If the rate incentive is a rate of general applicability, sufficient information to demonstrate that the rate incentive is a rate of general applicability; and

(ii) Whether the Postal Service has excluded the rate incentive from the calculation of the percentage change in rates under §3010.23(e) or §3010.24.

(10) For a Type 1-C rate adjustment, whether the Postal Service elects to generate unused rate adjustment authority.

(11) A schedule identifying every change to the Mail Classification Schedule that will be necessary to implement the planned rate adjustments.

(12) Such other information as the Postal Service believes will assist the Commission to issue a timely determination of whether the planned rate adjustments are consistent with applicable statutory policies.

(c) Whenever the Postal Service establishes a new workshare discount rate, it must include with its filing:

(1) A statement explaining its reasons for establishing the discount;

(2) All data, economic analyses, and other information relied on to justify the discount; and

(3) A certification based on comprehensive, competent analyses that the discount will not adversely affect either the rates or the service levels of users of postal services who do not take advantage of the discount.

(d) Whenever the Postal Service establishes a new discount or surcharge it does not believe is a workshare discount, it must include with its filing:

(1) An explanation of the basis for its belief that the discount or surcharge is not a workshare discount; and

(2) A certification that the Postal Service applied approved analytical principles to the discount or surcharge.

(e) The notice of rate adjustment shall identify for each affected class how much existing unused rate adjustment authority is used in the planned rates calculated as required by §3010.28. All calculations are to be shown, including citations to the original sources.

(f) All cost, avoided cost, volume, and revenue figures submitted with the notice of rate adjustment shall be developed from the most recent applicable Commission approved analytical principles.

### **39 C.F.R. § 3015.2**

#### **Changes in rates of general applicability**

(a) When the Postal Service determines to change a rate or rates of general applicability, it shall file notice of the change with the Commission no later than the date of publication of the decision in the Federal Register concerning such change, but at least 30 days before the effective date of the change.

(b) The notice filed with the Commission shall include an explanation and justification for the change, the effective date, and a schedule of the changed rates.