(ORAL ARGUMENT SCHEDULED FOR MAY 10, 2019)

Case No. 18-1328

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOUGLAS F. CARLSON
Petitioner

v.

POSTAL REGULATORY COMMISSION
Respondent

UNITED STATES POSTAL SERVICE
PITNEY BOWES INC.
Intervenors

Petition for Review

Postal Regulatory Commission

REPLY BRIEF OF PETITIONER DOUGLAS F. CARLSON

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PERTINENT STATUTES AND REGULATIONS

Applicable statutes and regulations appear in the addendum in Brief of Petitioner Douglas F. Carlson.

SUMMARY OF THE ARGUMENT

On March 25, 2019, the Postal Regulatory Commission ("Commission") filed its brief. Intervenors United States Postal Service ("Postal Service") and Pitney Bowes Inc. did not file briefs.

The Commission's brief does not refute the arguments in my initial brief. In fact, the Commission's brief confirms the Commission's disregard for the congressional requirement for the Commission to create a modern system for regulating market-dominant rates that properly takes into account the nine statutory objectives in 39 U.S.C. § 3622(b) and the 14 statutory factors in section 3622(c). The Commission's flawed system led to the Commission's erroneous decision to allow the Postal Service to implement a five-cent stamp price increase on January 27, 2019.

Order No. 4875 also is arbitrary and capricious and reflects an abuse of discretion because the Commission should have reviewed section 3622(b) and (c) issues but did not. The Commission also did not reasonably explain its decision. Finally, the record does not support the Postal Service's five-cent increase in the stamp price, and the Commission abused its discretion when it accepted the Postal Service's deficient explanation for this price increase.

I. THE COMMISSION'S REGULATORY SYSTEM CANNOT RELY ON THE ANNUAL DETERMINATION OF COMPLIANCE AND THE COMPLAINT PROCESS TO IMPLEMENT THE STATUTORY REQUIREMENT TO CONSIDER SECTION 3622(b) AND (c).

Elevating the single statutory objective and statutory factor of pricing flexibility above all others, the Commission asserts that it generally cannot consider qualitative section 3622(b) and (c) issues during the 45-day pre-implementation review period before rate adjustments under the price cap take effect. PRC Br. 19. The Commission further asserts that Congress intended for the Commission to focus on quantitative issues, such as compliance with the price cap, during the 45-day review period. *Id.* 13, 19. Therefore, in establishing its system for regulating market-dominant rates, the Commission deferred consideration of qualitative issues until the annual determination of compliance a year later or until a concerned person files a complaint. *Id.* 13. The plain language of the statute and the legislative history confirm that the Commission erred in deferring consideration of section 3622(b) and (c) issues until the annual determination of compliance.

A. The statutory structure is clear.

A close review of the statutory structure reveals the deficiency in the Commission's system of regulating market-dominant rates.

The statute has three separate and distinct components. First, Congress created the annual determination of compliance. 39 U.S.C. § 3653. This process shall determine "whether any rates or fees in effect during such year (for products

individually or collectively) were not in compliance with applicable provisions of this chapter (or regulations promulgated thereunder)[.]" *Id.* § 3653(b). Second, Congress created the complaint process. *Id.* § 3662. Third, Congress directed the Commission to establish, by regulation, a system for regulating market-dominant rates. *Id.* § 3622(a). Congress required the Commission's system to consider the objectives and factors in section 3622(b) and (c). Logically, and as the statute unambiguously provides, the annual determination of compliance and the complaint process are *separate and distinct* from the system that Congress required the Commission to establish by regulation.

Per section 3622(a), this court must look to the Commission's regulations, and nowhere else, to find the Commission's system for regulating market-dominant rates — and to evaluate how or whether the Commission's system properly takes into account the nine objectives in section 3622(b) and the 14 factors in 3622(c).[1] Section 3622(b) specifically requires the Commission to apply each of the nine objectives in conjunction with the others. Pricing flexibility, the

[1] Factor 14 includes "the policies of this title as well as such other factors as the Commission determines appropriate." 39 U.S.C. § 3622(c)(14). I noted in my brief that the five-cent increase in the stamp price conflicts with the policies in § 101(a), § 101(d), and § 403(c) of Title 39. In its brief, the Commission claims that my arguments do not have merit because the "appropriate mechanism through which a private party can allege that the Postal Service is not operating in conformance with these provisions is by lodging a complaint with the Commission" pursuant to § 3662. However, in Order No. 536, the Commission agreed that "rates should also be consistent with the more general qualitative standards" found in these three sections. Order No. 536 at 17.

objective and factor on which the Commission almost exclusively focused, is only one of nine objectives and only one of 14 factors. However, by almost always deferring consideration of qualitative factors until the annual determination of compliance a year or more later, by design and in practice, except for pricing flexibility, the Commission's system ignores the nine objectives in section 3622(b) and 14 factors in section 3622(c). The Commission cannot defer review of section 3622(b) and (c) issues until the separately established, one-year-late annual determination of compliance.

As I noted in my initial brief, the Commission's system correctly requires, in the Postal Service's notice of rate adjustment, 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)." 39 C.F.R. § 3010.12(b)(7); Carlson Br. 8. However, the system does not require the Commission to *consider* any of these objectives or factors. *Id.* § 3010.11(d). The Commission admits in its brief that the Commission rarely exercises its discretion to consider section 3622(b) and (c) issues during the 45-day pre-implementation review period. PRC Br. 27.

The Commission states in its brief that "petitioner misapprehends the role of the Section 3622 objectives and factors under the PAEA. That statute directs the Commission to account for the qualitative factors that previously dominated the

rate-review process in the course of designing the overall 'system' for regulating postal rates, 39 U.S.C. § 3622(a)-(c), rather than during each individual rate-review case." PRC Br. 19–20. While the Commission is correct that the *system* must consider section 3622(b) objectives and section 3622(c) factors, under the Commission's system, the only opportunity to consider these statutory objectives and factors is during an individual rate review case, such as the one at issue here, even though the Commission admits that it is unlikely to consider these questions. *See* 39 C.F.R. §§ 3010.11(d) and 39 C.F.R. § 3010.12(b)(7); *see also* PRC Br. 27.

Thus, the Commission's system for regulating market-dominant rates, published in 39 C.F.R. Part 3010, does not help achieve the objectives listed in 39 U.S.C. 3622(b) or properly take into account the factors listed in 39 U.S.C. 3622(c). Instead, the Commission promises to review rates for compliance with section 3622(b) and (c) one year later, after postal users have already paid those rates, or if a concerned party files a complaint. Mailers cannot seek reimbursement for rates that are later determined to be unlawful. 39 U.S.C. § 3681.

Quoting a prior order, the Commission argues in its brief that its "regulations reflect its conclusion that application of the qualitative standards must largely be deferred to post-implementation compliance review." PRC Br. 24 (quoting Order No. 536 at 34). The Commission also argues that "this represents a reasonable construction of the Act, and is not foreclosed by the text of the PAEA." *Id.*

Furthermore, the Commission "is entitled to substantial deference because Congress expressly delegated to the Commission responsibility for devising the system for postal rate regulation." *Id.*

The Administrative Procedure Act provides that this court shall "hold unlawful and set aside agency action, findings, and conclusions found to be * * * in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Moreover, under a *Chevron* step one analysis, the first question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, * * * as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 2781 (1984).

Here, Congress has spoken: The Commission's modern system for regulating rates must consider the objectives in section 3622(b) and the factors in section 3622(c). However, the Commission's system does not consider these objectives and factors. Instead, in almost all cases, the Commission declines to consider these issues and defers consideration to the annual determination of compliance and the complaint process, both of which Congress, not the Commission, separately established. The statute is clear. And the Commission's failure to implement Congress' intent, expressed in the letter of the statute, also is clear. The

Commission did *not* reasonably construe the statute, and the text of the PAEA *does* foreclose the Commission's interpretation. Therefore, the Commission's regulations are not entitled to substantial deference. This flaw in the Commission's system led the Commission to allow the Postal Service to raise the basic stamp price from 50 cents to 55 cents despite numerous obvious section 3622(b) and (c) concerns identified in the record. This court should rule that the regulations that the Commission followed in approving the five-cent increase in the price for stamped letters fail a *Chevron* step one analysis.

B. Congress was aware of the challenges of the 45-day review period.

The Commission observed challenges in reviewing qualitative issues within the 45-day pre-implementation review period. The Commission concluded, in self-serving comments in a previous order, that Congress actually did not intend a review of qualitative issues during the 45-day period. *See* PRC Br. 25 (quoting Order No. 536 at 12). The legislative history indicates otherwise. The Senate report spoke to this issue:

> The Committee clearly recognizes that the 45-day review period is short and has determined that a short review period is consistent with the goals of increasing Postal Service pricing flexibility. To facilitate review of rate adjustments, the Committee presumes that extremely clear and well-defined standards will be established by regulation allowing the Postal Service and the Postal Regulatory Commission to make a rapid determination of whether a rate adjustment meets the applicable criteria.

S. Rep. 108-318 at 11. Nowhere does the Senate report suggest that Congress intended to excuse the Commission from any duty that its legislation simultaneously was imposing. To the contrary, the Senate report anticipated that the Commission would establish, by regulation, "clear and well-defined standards" to facilitate a "rapid determination" of whether a rate adjustment "meets the applicable criteria." *Id.* The legislative history does not suggest that the objectives in section 3622(b) and the factors in section 3622(c) that Congress required the Commission's regulatory system to consider are not "applicable criteria." The Senate report also does not restrict the contemplated "review" to quantitative issues.

In its brief, the Commission cites a letter from Senators Collins and Carper in which the senators stated that the 45-day period is "largely intended to be used to determine whether or not a rate filing is within the rate cap." PRC Br. 9, 24. This letter does not constitute legislative history. Legislation is the product of compromise, and the views of two senators do not necessarily reflect the intent of Congress. Nonetheless, the letter does not foreclose the view that the Commission could properly consider qualitative issues during the 45-day period, as the word "largely" does not mean "exclusively."

The Commission argues, "As Congress understood, a necessary consequence of this transition to streamlined procedures for pricing changes is that

detailed consideration of how best to balance qualitative factors is generally no longer possible during pre-implementation review." PRC Br. 19. However, neither the statute nor the legislative history supports the understanding that the Commission conveniently attributed to Congress, and the Commission did not cite evidence reflecting this supposed congressional understanding.

C. Qualitative review during the 45-day period may not be possible.

Notwithstanding the absence of any support in the legislative history for the Commission's conclusion that ignoring qualitative section 3622(b) and (c) issues during the 45-day period satisfactorily implements the intent of Congress, the Commission still might plead that reviewing qualitative issues during the 45-day period simply would not be possible. Rather than punting these issues to the annual determination of compliance a year later or waiting for someone to file a complaint, the Commission could have devised a regulatory scheme that balanced these problems and still implemented the clear mandate of Congress. For example, as it does now, the Commission could require the Postal Service to provide 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). 39 C.F.R. § 3010.12(b)(7). The Commission could require this discussion only for rate adjustments that deviated from the average increase for the mail class by some factor, such as double, triple, or

quadruple.[2] By focusing on the adjustments that might trigger section 3622(b) or (c) issues and seeking justification for them, this requirement would advance objective 6 by reducing the "administrative burden" and increasing the "transparency" of the "ratemaking process." 39 U.S.C. § 3622(b)(6). Under this system, the Commission could retain its current option during the 45-day review period to prevent the Postal Service from implementing a rate adjustment that did not comply with the criteria in section 3622(b) and (c). However, if section 3622(b) and (c) issues arose that the Commission could not adequately consider or resolve during the 45-day period, the Commission could allow the rate adjustments to take effect but *immediately commence a proceeding to review the issues.* This way, rather than possibly allowing unlawful rates to take effect for a year, the Commission would promptly review the issues and require any necessary adjustments at the conclusion of its proceeding. Such a regulatory system would properly take into account the objectives in section 3622(b) and the factors in section 3622(c) while acknowledging the possibility that not all qualitative issues could be addressed during the 45-day period. This example demonstrates that the Commission could have and should have complied with the statute and created a

[2] The Commission's regulations for workshare discounts already incorporate a similar concept. The regulations require the Postal Service to provide a "[s]eparate justification for all proposed workshare discounts that exceed avoided costs" and to "identify and explain discounts that are set substantially below avoided costs[.]" 39 C.F.R. § 3010.12(b)(6). Thus, the requirement for an explanation turns on the magnitude of the discount.

regulatory system that considered section 3622(b) and (c) issues, rather than pleading impossibility, imputing its own regulatory priorities to Congress, and denying users of the postal system the protections of section 3622(b) and (c) until the statutory annual determination of compliance process arrives a year later.

D. The Commission unfairly shifts the burden of proof.

By declining to consider section 3622(b) and (c) issues in a timely manner, the Commission compounds the injustice to users of the mail by shifting the burden of proof. Although the Commission is correct that an interested person can file a complaint pursuant to section 3662 to avoid waiting until the Commission's annual determination of compliance arrives, the complaint process shifts the burden of proof from the Postal Service to the interested person. In contrast, the Commission's current system correctly requires the Postal Service to provide 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)." 39 C.F.R. § 3010.12(b)(7). If the Commission actually reviewed this discussion and acted on deficiencies, the Postal Service properly would have the burden of justifying its proposed rates. However, by ignoring these issues and noting that interested citizens can file a complaint, the Commission shifts the burden of proof onto the public to prove that rates do not comply with statutory criteria. Members of the public may not have the resources

to develop necessary evidence or to manage a complaint proceeding. This outcome is not consistent with the intent of Congress, which required the *Commission's system* to consider section 3622(b) and (c) issues, without placing a burden of proof, or a burden of litigation, on users of the postal system.

In sum, this court shall "hold unlawful and set aside agency action, findings, and conclusions found to be * * * in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The question of whether the Commission had the right to design a system for regulating market-dominant rates that did not consider section 3622(b) and (c) issues is not even close. The language of section 3622 is explicit, but the Commission inferred, without evidence, a completely different congressional intent. Moreover, to the extent that the 45-day review period might have created practical obstacles, the Commission could have overcome these challenges by promptly reviewing qualitative issues beyond the 45-day period, thus providing users of the postal system the protections that Congress mandated in section 3622(b) and (c). The statute is unambiguous, and this court's *Chevron* analysis can conclude at step one with a determination that the Commission's approval of the five-cent increase in the stamp price does not comply with section 3622 due to deficiencies in the Commission's regulatory system.

II. ORDER NO. 4875 WAS ARBITRARY AND CAPRICIOUS.

A. The Commission's order failed to consider an important aspect of the problem.

If this court determines that the Commission's *system* does not fail *Chevron* step one, the court should find that *Order No. 4875* fails *Chevron* step two. "Normally, an agency rule would be arbitrary and capricious if the agency has * * * entirely failed to consider an important aspect of the problem[.]" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Insurance*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983). The Commission's system and order fail to consider an important aspect of the problem — the objectives and factors in section 3622(b) and (c).

B. The Commission abused its discretion by failing to consider the criteria in section 3622(b) and (c) when the record clearly called for this review, particularly if "blatant disregard" is the Commission's standard for considering these criteria.

Even if the Commission's construction of the PAEA is permissible, the "Commission's exercise of its authority must be 'reasonable and reasonably explained' in order to survive arbitrary and capricious review under the Administrative Procedure Act." *U.S. Postal Service v. Postal Regulatory Commission*, 785 F.3d 740, 750 (D.C. Cir. 2015) (citing *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012)); *see also Northwestern Corporation v. Federal Energy Regulatory Commission*, 884 F.3d 1176, 1181 (D.C. Cir. 2018)

and 5 U.S.C. § 706(2)(A). The Commission's order approving the five-cent increase in the stamp price fails *Chevron* step two.

As I explained in section I, the Commission exceeded statutory authority by designing a system for regulating market-dominant rates that does not properly consider section 3622(b) and (c). The system is defective because the Commission "generally" declines to analyze qualitative factors in the 45-day pre-implementation review period. PRC Br. 25.

Complicating matters further, the Commission does reserve the right to consider qualitative factors during the 45-day review period. *See* 39 C.F.R. § 3010.11(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" [emphasis added]. Thus, if the Commission operated its system correctly, the system potentially could properly implement section 3622(b) and (c). The Commission acknowledged at least one instance in which it did reject a rate adjustment during the 45-day period. PRC Br. 26–27. Although not codified in regulations, the standard for triggering a review apparently is when a "blatant disregard" exists for "non-quantitative standards," PRC Br. 26, or for "a given standard." PRC Br. 14 (quoting Order No. 536 at 34).

The Commission did not further define this standard, except for adding the unhelpful comment that "blatant disregard" cases are "rare." PRC Br. 27.

Since the Commission apparently does have a standard for considering qualitative issues during the 45-day period, the Commission should have applied this standard to the contested five-cent price increase at issue here. A reasonable person could conclude that the Postal Service's five-cent increase, and the laughable justifications that the Postal Service offered for it, *see* Carlson Br. 11–14, represented a blatant disregard for the objectives in section 3622(b) and the factors in section 3622(c). The Commission failed to exercise its discretion reasonably when it remained silent and did not analyze this increase under the "blatant disregard" standard. The Commission's decision also was arbitrary because the Commission failed to explain its decision reasonably.

To support its decision not to consider qualitative factors, which the Commission did not explain or articulate in its order, the Commission attempts on brief to diminish the significance of the five-cent, or 10-percent, price increase at issue here. First, the Commission observes that the 10-percent increase is not the largest increase in history for the rate for stamped letters. The rate did increase by 10.3 percent in 1991, Carlson Br. 4 and JA 103, but revenue, cost, and other conditions nearly three decades ago justified that increase. The increase in 1991 was not approved under a price-cap system where, as here, the price cap authority allowed

an increase of only 2.497 percent for the First-Class Mail class. Besides, a price increase does not need to be the largest in history to be extreme.

Second, the Commission observes that the statute does not automatically disallow changes in rates of an unequal magnitude within a class. *See* PRC Br. 31, § 3622(b)(8), and § 3622(d)(2)(A). The Commission contrasts the 10-percent increase here with the 963-percent increase for a particular subscription price in a 2009 case that caused the Commission suddenly to spring into action and review qualitative issues during the 45-day period. The 963-percent increase for a subscription service that the Postal Service expected up to 45 sophisticated customers to use is an outlier. *See* Docket No. R2009-2, Response to Chairman's Information Request No. 3 at 9.[3] The Commission's intervention in that 2009 case certainly was justified, but the Commission now uses it as a benchmark in its brief. This tactic is misleading. In my brief, I characterized the five-cent increase in the First-Class stamp price as "extreme." *See, e.g.,* Carlson Br. 18. The Commission attempts to diminish the magnitude of this increase by comparing it to the 963-percent increase in 2009. Ten percent looks small compared to 963 percent. However, that outlier case aside, the Commission does not actually disprove my premise that a 10-percent increase is extreme or abnormal post-PAEA. The Commission could have shown that increases in some rates that are four times the

[3] *https://www.prc.gov/docs/62/62467/1st%20Set.Resp.CIR.No.3.pdf*

average increase occur routinely. However, the Commission did not state this claim. As far as we know, this case is, indeed, unique for singling out a large group of customers — almost all individuals and small businesses — for a price increase that is more than quadruple the average increase of 2.464 percent for First-Class Mail and more than 10 times the increase that large presort mailers are paying. JA 202. Also, a 10-percent increase that affects nearly every individual and small-business user of the postal system may be at least as significant as a 963-percent increase that affects 45 users. In short, this unusual increase should have prompted the Commission to exercise its discretion to review qualitative section 3622(b) and (c) issues, even if the increase did not match the rare 963-percent example. Also, particularly given the Postal Service's weak explanation for how the five-cent increase is consistent with the objectives in section 3622(b) and factors in section 3622(c), the Commission failed to explain why this increase did not meet the standard announced in 2009 of a "blatant disregard" for non-quantitative issues.

To justify its inaction, the Commission attempts to belittle even further the amount of the increase, arguing that the five-cent increase here is "only a few pennies" above the two-cent increase that I described in my brief as "run-of-the-mill." PRC Br. 32. This statement is problematic for two reasons. First, disputes about postage rate increases often involve pennies because individual rates are

relatively low, and the product of a small number multiplied by a small percentage usually is measured in cents. In the case of First-Class letters, billions of pennies are at issue. With a FY 2017 volume of 10.27 billion letters, JA 379, each cent in the price for stamped letters represents over $100 million in revenue, possibly wrongly collected from the general public and small businesses. Cents are legally significant, and the Commission should not be dismissing objections just because they involve only a few cents.

This observation leads to the second point: Pennies matter to individual people. Commenter Ray Ardis captured this concern. He typed into a comment form on the Commission's Web site that the 55-cent stamp price "may be ok for those individuals making incomes of $100,000.00 or more but for the average American Tax paying citizen this is outrageous that our home mailing stamp should be priced out of sight for the average minimum wage earner. We need your thinking to be reasonable and acceptable for all income levels. The social security increase for 2019 is expected at 2.8% and at that rate our postage stamp should rise no more than that figure or no more than .52 per first class stamp." JA 81. He added, "I would appreciate your attention to this matter and reconsider the hike of .55 as unfair at this time for the majority of our American citizens." *Id.* He concluded by thanking the Commission for its "help in keeping our postal system functional for all citizen [sic] at reasonable cost." *Id.*

In sum, the Commission should have recognized the magnitude of this five-cent increase in the basic stamp price and the widespread effect of this increase on the American public. The Commission abused its discretion by not considering qualitative issues during the 45-day pre-implementation period.

The Commission attempts to dodge this failure by asserting that, "[b]ecause the Commission was not required to address qualitative factors, it cannot have abused its discretion in failing to consider those factors, in misweighing the record evidence related to those factors, or in inadequately explaining its reasoning on that point." PRC Br. 29. However, by providing itself discretion to consider qualitative factors in its own regulations, and by having done so at least once before, the Commission does have a responsibility to exercise discretion reasonably. With the assertion above, the Commission has boxed itself into a corner because if the Commission believes that it is not required to consider qualitative factors, then where in its system of regulating market-dominant rates does it implement the mandate from Congress to create a regulatory system that considers section 3622(b) objectives and second 3622(c) factors? If, however, the Commission's system considers these objectives and factors through discretion, albeit rarely exercised, the Commission, when faced with an unusually high increase in the basic stamp price, abused its discretion by not considering qualitative factors here. Furthermore, the Commission's decision was arbitrary because Order No. 4875

failed to explain the Commission's reasons for inaction. The Commission's dismissive and conclusory explanation, that the "Postal Service has complied with the applicable statutory and regulatory requirements," JA 209, most certainly does not qualify as an explanation for its decision.

C. The record before the Commission does not support the 55-cent stamp price.

I explained in my initial brief that the record does not support the 55-cent stamp price because the Postal Service provided no justification that survives even superficial scrutiny, and the increase obviously conflicts with several pricing criteria, as discussed in argument section I.A. of my initial brief.

In its brief, the Commission criticizes me for not mentioning that the Postal Service discussed a particular statutory factor when it wrote that it was "purposely increasing the differential between the Stamped and Metered Letters prices from three cents to five cents, both to better retain those non-Presort customers who most use the mail, and to enhance operational efficiency." PRC Br. 34–35, JA 9. The Postal Service did not cite any statutory objectives and factors when it provided this explanation. The Commission notes that this discussion relates to the "statutory factor of encouraging 'increased mail volume and operational efficiency,' 39 U.S.C. § 3622(c)(7)." However, the Commission omitted the full quote for this factor, which is "the importance of pricing flexibility to encourage increased mail volume and operational efficiency[.]" *Id.* Thus, the reasons that the

Postal Service cites are the justification for pricing flexibility; they do not constitute a factor in and of themselves. The Postal Service already has received plenty of deference in favor of pricing flexibility. The Commission and Postal Service appear to want to double-count factor 7.

Also, the Commission criticizes me for not citing the Postal Service's general discussion of objectives and factors at JA 31 as evidence in the record supporting the five-cent increase in the stamp price. PRC Br. 34. However, this perfunctory discussion is general and conclusory. The Commission's regulation requires from the Postal Service 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)." 39 C.F.R. § 3010.12(b)(7). The Postal Service's discussion does not cite a single rate adjustment and explain how that adjustment is designed to help achieve the objectives listed in 39 U.S.C. 3622(b) and properly takes into account the factors listed in 39 U.S.C. 3622(c). This discussion lacks the specificity that would allow the Commission or anyone else to evaluate it. Therefore, this general discussion does not "demonstrate" anything, and it does not constitute record evidence supporting the 55-cent stamp price.

Also, the Commission needs to decide once and for all whether the Postal Service needs to provide a discussion that demonstrates the required information.

The regulation is clear, but on brief the Commission asserts that the Postal Service's general discussion at JA 31 "adequately discharged [the Postal Service's] obligations." PRC Br. 34. However, the Commission also explained on brief that, although it probably will not consider qualitative issues during the 45-day period, it requires this information from the Postal Service to "give the Commission leeway to consider those issues in an appropriate case." PRC Br. 33. The scant level of detail that the Postal Service provided in this case would never deliver to the Commission sufficient information to conduct a meaningful review of section 3622(b) and (c) issues — and yet the Commission claims on brief that the Postal Service's explanation was adequate. The Commission abused its discretion by accepting the Postal Service's inadequate explanation of the statutory justifications for a rate increase that affects nearly every user of the postal system.

CONCLUSION

This court's path to decision in this case is clear. The Commission's system fails to help achieve the objectives listed in section 3622(b) and properly take into account the factors listed in section 3622(c) because it does not require the Commission to consider these objectives and factors when reviewing Postal Service price adjustments. The congressionally established annual determination of compliance and the congressionally established complaint process are not substitutes for the congressional requirement in section 3622(a) for the

Commission to establish a regulatory system that considers these statutory objectives and factors. The Commission's defective regulatory system led directly to the Commission's flawed decision in Order No. 4875 to allow the 55-cent stamp price to take effect.

If this court determines that the Commission's regulatory system is not defective because it provides the Commission discretion to consider section 3622(b) and (c) issues when reviewing Postal Service rate adjustments, this court nonetheless should determine that the Commission abused its discretion in this case by not considering section 3622(b) and (c) issues when concerns about these issues existed. These concerns were clear in the public comments, in the inadequacy of the Postal Service's explanation of how this price increase helped to achieve Congress' objectives in section 3622(b) and factors in section 3622(c), and in the disproportionate magnitude of this increase, compared to both the average increase under the price cap and the tiny increase that the Postal Service gifted to presort mailers. Despite these alarm bells, the Commission sat silent. The Commission failed to exercise its authority reasonably, and it neglected to explain its decision reasonably. This court also should find that the record did not support the 55-cent price increase. Finally, this court should find that the Postal Service's justification for the price increase did not satisfy the requirement in 39 C.F.R. § 3010.12(b)(7) for "[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)" and that the Commission abused its discretion in accepting the Postal Service's explanation anyway.

This court should remand this case to the Commission for the Commission to set prices for First-Class Mail that comply with section 3622(b) and (c) on the basis of the record before the Commission in Docket No. R2019-1.

Finally, the Commission's position was not "substantially justified" within the meaning of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). I request an award of court costs pursuant to this act.

Respectfully submitted,

/s/ Douglas F. Carlson

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Dated: April 8, 2019 DOUGLAS F. CARLSON

CERTIFICATE OF COMPLIANCE

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/s/ Douglas F. Carlson

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