

[ORAL ARGUMENT NOT SCHEDULED]

No. 15-1297

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

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

POSTAL REGULATORY COMMISSION,

Respondent,

ALLIANCE OF NONPROFIT MAILERS, ET AL.,

Intervenors.

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

BRIEF FOR RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

All parties, intervenors, and amici appearing before this Court are listed in the brief for the United States Postal Service.

B. Rulings Under Review.

The ruling under review is Order 2623 of the Postal Regulatory Commission, dated July 29, 2015 [JA 555].

C. Related Cases.

A previous order of the Commission in the same matter was before this Court in *Alliance of Nonprofit Mailers v. Postal Regulatory Commission*, 790 F.3d 186 (D.C. Cir. 2015). In *U.S. Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011), this Court resolved a challenge to an earlier Commission decision on the same topic. We are unaware of any other related cases pending in this Court or any other Court.

s/ Daniel Tenny
Daniel Tenny

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JURISDICTIONAL STATEMENT

The Postal Regulatory Commission issued the order at issue on July 29, 2015. *See* Order 2623 [JA 555]. The U.S. Postal Service filed a timely petition for review on August 27, 2015. *See* 39 U.S.C. § 3663 (30-day time limit). This Court has jurisdiction under 39 U.S.C. § 3663.

STATEMENT OF THE ISSUE

For classes of mail for which the Postal Service enjoys a dominant market position, the Postal Service must limit its price increases to the rate of inflation. This case concerns an exception to that rule for increases “due to either extraordinary or exceptional circumstances.” 39 U.S.C. § 3622(d)(1)(E). The Postal Regulatory Commission concluded that the Postal Service was entitled to charge a temporary surcharge to recoup monies lost due to the Great Recession’s effect on mail volumes. This Court previously upheld the Commission’s order in substantial part, but required the Commission to correct one aspect of its calculation. The issue is whether the Commission abused its discretion in declining to reopen another aspect of its reasoning that this Court did not disturb, and if so, whether the Commission’s reasoning on that issue was arbitrary and capricious.

PERTINENT STATUTES AND REGULATIONS

The pertinent statute is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

The 2006 Postal Accountability and Enhancement Act set out a process for the U.S. Postal Service to price “market-dominant products” like first-class mail and periodicals, as to which the Postal Service either enjoys a monopoly or exercises market power. *See* 39 U.S.C. §§ 3621–3629. Congress directed the five-member Postal Regulatory Commission to establish “a modern system for regulating rates and classes.” *Id.* § 3622(a). The new system, whose core features were prescribed by statute, allows the Postal Service to make profits and use them to fund capital improvements and network expansions.

To constrain price increases, Congress mandated that the new system include a price cap on market-dominant products in the form of “an annual limitation on the percentage changes in rates” equal to the rate of inflation. 39 U.S.C. § 3622(d)(1)(A). Proponents of the new price cap expected limits on price increases to promote predictability and stability for the Nation’s mail users and protect them from monopolistic price increases, while at the

same time providing the Postal Service with incentives to reduce costs. *See* S. Rep. No. 108-318, at 10 (2004). The new system was also expected to “give the Postal Service the flexibility to respond to all circumstances it is likely to face in the normal course of business.” *Id.* at 11.

In addition to the normal procedures for raising prices, Congress included in the new system “procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances” without regard to the inflation cap or the usual procedure for adjusting prices. 39 U.S.C. § 3622(d)(1)(E). Such an increase is permitted only if the Postal Regulatory 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.” *Id.*

B. Factual Background

1. The Postal Service first sought to invoke the “extraordinary or exceptional circumstances” exception to the inflation cap in 2010, in

response to the severe recession that led to a “dramatic, rapid and unprecedented decline in mail volume.” *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263, 1265 (D.C. Cir. 2011) (quoting Exigent Request of the U.S. Postal Service, Dkt. No. R2010-4, at 1 (July 6, 2010)). The Commission denied the request. Although the Commission agreed that “the recent recession, and the decline in mail volume experienced during the recession,” qualified as an ‘extraordinary or exceptional circumstance,’ the Commission concluded that the Postal Service had not adequately quantified the effect of the recession on revenues and addressed how the requested price increases related to the recession’s impact. *Id.* at 1265–66 (quoting Order 547, Dkt. No. R2010-4, at 3 (Sept. 30, 2010)).

The Postal Service petitioned for review in this Court. This Court agreed with the Commission that the statute unambiguously required a link between the effects of the extraordinary or exceptional circumstance and the price increase sought. *U.S. Postal Serv.*, 640 F.3d at 1267. The Court concluded, however, that the statute was ambiguous about “how closely the amount of the adjustments must match the amount of the revenue lost

as a result of the exigent circumstances,” and remanded the matter so that the Commission could “fill the statutory gap.” *Id.* at 1268.

On remand, the Commission concluded “that exigent rate adjustments are permitted only if, and to the extent that, they compensate for the net adverse financial impact of the exigent circumstances.” *Alliance of Nonprofit Mailers v. Postal Regulatory Comm’n*, 790 F.3d 186, 190 (D.C. Cir. 2015) (quoting Order 864, Dkt. No. R2010-4R, at 25 (Sept. 20, 2011)). The Postal Service has accepted this standard as applicable to the request at issue here.

2. In 2013, the Postal Service again sought an above-inflation price increase to compensate for the decline in mail volumes attributable to the recession. The Postal Service sought price increases, averaging 4.3 percent, to continue indefinitely. *Alliance of Nonprofit Mailers*, 790 F.3d at 191. The Postal Service supported its request with an econometric analysis that sought to calculate the losses attributable to the Great Recession. *Id.* The Commission granted the proposed increase, but did not permit the Postal Service to continue it indefinitely because the Commission disagreed with the Postal Service’s analysis in certain respects. *Id.*

“[T]he Commission’s decision rested on two distinct determinations.” *Alliance of Nonprofit Mailers*, 790 F.3d at 191. First, the Commission determined “that mail-volume loss could no longer be considered ‘due to’ the exigencies of the recession once a ‘new normal’ in operational levels was achieved.” *Id.* (citing Order 1926, at 83-94 [JA 87-98]). The Commission concluded that the “‘new normal’ was established once ‘all or most of’ four conditions were met: ‘(1) the disruption to a sufficient number of relevant macroeconomic indicators demonstrate[d] a return to near historic positive trends; (2) application of the macroeconomic variables accurately project[ed] change, and the rate of change on Postal Service mail volume is positive; (3) the Postal Service regain[ed] its ability to predict or project mail volumes following an extraordinary or exceptional event; and (4) the Postal Service demonstrate[d] an ability to adjust operations to lower volumes.’” *Id.* at 191-92 (quoting Order 1926, at 86 [JA 90]) (alterations in original). The “new normal . . . arrived at different times for different classes of mail, ranging between the start of fiscal year 2010 and the start of fiscal year 2012.” *Id.* at 192 (citation omitted).

Second, “the Commission announced that it would only count decreased mail volume one time, and that would be in the first year in which it was lost.” *Alliance of Nonprofit Mailers*, 790 F.3d at 192. The Commission thus rejected the Postal Service’s argument that if the recession lowered mail volumes for two years, all of the lost mail in both years could be counted as attributable to the recession. *See id.* at 195.

With these adjustments, and some other adjustments to the Postal Service’s econometric analysis that are not relevant here, “the Commission calculated that roughly \$2.8 billion in losses could be attributed to the recession.” *Alliance of Nonprofit Mailers*, 790 F.3d at 193 (citing Order 1926, at 106 [JA 110]). After concluding “that recouping that amount through a rate increase was ‘reasonable and equitable and necessary,’” the Commission allowed the Postal Service to impose a surcharge until it recovered approximately \$2.8 billion. *Id.* (citing Order 1926, at 107, 147 [JA 111, 151]).

3. This Court upheld “most of” the Commission’s order, but vacated it in one respect. *Alliance of Nonprofit Mailers*, 790 F.3d at 193. In particular, the Court concluded that “the ‘new normal’ rule was well reasoned and grounded in the evidence before the Commission,” and “comfortably

passee[d] deferential APA review.” *Id.* at 196. But “the ‘count once’ rule’s controversion of the new normal rule’s premises” did not withstand scrutiny and was therefore vacated. *Id.*

As to the “new normal” rule, the Court explained that “the Commission sensibly concluded that the statutory exception allowing higher rates when needed to respond to extraordinary financial circumstances should only continue as long as those circumstances, in fact, remained extra-ordinary.” *Alliance of Nonprofit Mailers*, 790 F.3d at 193. The Commission used the “new normal” test to “capture precisely the time when the exigent character of a circumstance dissipates — when its effects lose their exceptional character — even though the effects in some literal, but-for causal sense linger.” *Id.* at 194. In adopting that analysis, “the Commission permissibly reasoned that just because some of the effects of exigent circumstances may continue for the foreseeable future, that does not mean that those circumstances remain ‘extraordinary’ or ‘exceptional’ for just as long.” *Id.*

The Court rejected the Postal Service’s argument that the “new normal” analysis was relevant only to “the Act’s separate requirement that any rate imposed be ‘reasonable and equitable and necessary.’” *Alliance for*

Nonprofit Mailers, 790 F.3d at 194 (quoting 39 U.S.C. § 3622(d)(1)(E)). The Court held that “the Commission acted well within its discretion in concluding that the ‘due to’ test is concerned with determining the extent of the impact of an extraordinary or exceptional past event,” while “the ‘reasonable and equitable and necessary’ test . . . applies only *after* exigent causation for a loss has been established and turns on the Postal Service’s *current* need to get back on its feet in the wake of the now-defined exigency.” *Id.*

The Court concluded, however, that the Commission’s determination that lost mail pieces should be counted only in the first year in which they were lost could not be reconciled with “the Commission’s immediately preceding explanation that the ‘new normal’ – not the arbitrariness of turning a calendar – defines when the Postal Service ‘regain[ed] its ability to predict or project mail volumes’ or to ‘adjust to the lower volumes.’”

Alliance of Nonprofit Mailers, 790 F.3d at 196 (quoting Order 1926, at 86 [JA 90]). The Court held that the Commission, in adopting the “new normal” rule, had “identif[ied] a stopping point for the recession’s exigent impact on lost mail volume.” *Id.*

In particular, “the Commission credited [the Postal Service’s expert’s] testimony that ‘when we made a forecast in 2008 and 2009, there were terrible, terrible forecasts,’” but “[n]ow, 2011, ’12, 13, we’re back to a world similar to where we were before in terms of we have a better handle on our forecast.” *Alliance of Nonprofit Mailers*, 790 F.3d at 196 (quoting Order 1926, at 93 [JA 97]). And the Commission properly considered “macroeconomic variables,” which “suggested that the Service regained its ability to adjust in 2010.” *Id.*

In a footnote, the Court stated that “[a]t oral argument, counsel for the Postal Service argued that the ‘new normal’ analysis in the Order is also inconsistent with the Commission’s analysis of whether the rate increase was ‘necessary.’” *Alliance of Nonprofit Mailers*, 790 F.3d at 196 n.3. But because the “argument was not raised in the Postal Service’s briefs,” it was “not properly before this court.” *Id.* The Court stated that “[t]he Commission, of course, is free to consider that argument on remand.” *Id.*

4. On remand, the Commission allowed interested parties to submit comments, and to reply to comments submitted by other parties. *See* Order 2540, at 8 [JA 253]. The Commission then issued the order currently under review.

In that order, the Commission performed new calculations to eliminate the effects of its vacated “count once” rule. *See* Order 2623, at 41-46 [JA 597-602]. The Postal Service does not raise any issue with those calculations here.

At issue here is the Commission’s response to the Postal Service’s request that the Commission alter its determination about when the “new normal” occurred, and to define that moment “as the point when the Postal Service, as an institution, regained its ability to adjust to the post-Great Recession ‘new normal.’” Postal Service Comments 21 [JA 379], *quoted in* Order 2623, at 18 [JA 574]. The Commission “decline[d] to revisit the ‘new normal’ analysis . . . that was affirmed by [this] Court.” Order 2623, at 23 [JA 579].

The Commission acknowledged that this Court, in a footnote in its opinion, had stated that the Commission could reconsider the relationship between the “new normal” analysis and the “necessary” analysis. Order 2623, at 23 [JA 579]. But “[w]hile the Commission has discretion to reopen its decisions,” the Commission concluded that “an exercise of that discretion is not warranted here given the interest in finality and the lack of

any newly available evidence that would justify raising the issue at this late stage.” *Id.* at 24 [JA 580].

The Commission noted that it “ha[d] already explained the relationship between the ‘new normal’ and ‘necessary’ analysis” in the order upheld in relevant part by this Court. Order 2623, at 24 [JA 580]. “[W]hile the Commission did discuss some limitations on the Postal Service’s ability to adjust in context of its ‘necessary’ analysis,” that discussion “does not conflict with the fourth factor of the ‘new normal’ test” (namely, that “the Postal Service demonstrates an ability to adjust operations to the lower volumes”). *Id.*

The Commission explained that the “new normal” test forms “part of the ‘due to’ analysis to aid the Commission’s assessment of the point in time when volume losses could no longer be attributed to the exigent circumstance.” Order 2623, at 25 [JA 581]. The question whether recouping a volume loss is “necessary” arises only after the Commission has determined the extent of the volume loss. As the Commission previously explained, “[q]uantification of . . . volume losses is independent of how the Postal Service has reacted to the volume loss in terms of shedding mail capacity or how it should adjust its network to the new

normal, although those factors might be relevant to the ‘necessary’ analysis.” *Id.* at 26 [JA 582] (quoting Order 1926, at 98 [JA 102]) (alterations in original).

As to the specific inconsistency alleged by the Postal Service, the Commission explained that its observation that “the unique framework within which the Postal Service must operate is a relevant consideration in determining what constitutes best practices,” Order 1926, at 127 [JA 131], does not eliminate the expectation “that the Postal Service will, as it did, take steps to adjust to lower levels of mail volume once the ‘new normal’ is reached.” Order 2623, at 26 [JA 582].

The Commission thus rejected the Postal Service’s request to extend the “new normal” to fiscal year 2013 for all market dominant classes, or, alternatively, to extend the period to fiscal year 2011 for First-Class Mail and Standard Mail. Order 2623, at 26-27 [JA 582-83]. The Commission explained that the Postal Service’s argument constituted “a request for a new approach to an issue that was not disturbed by [this Court’s] decision,” and “decline[d] to embark on a new approach at this late stage of the proceedings.” *Id.* at 27 [JA 583].

In addition, the Commission explained “that acceptance of the Postal Service’s position would effectively rewrite the four-factor ‘new normal’ test as a one factor test,” and would also “effectively redefine[] the fourth factor from ‘when the Postal Service has begun to adjust’ to ‘when the Postal Service has fully adjusted.’” Order 2623, at 27 [JA 583]. The Commission had already “determined the ‘new normal’ cutoff was a point in time when *all or most* of the four factors of the test occurred.” *Id.* (citing Order 1926, at 86 [JA 90]) (emphasis in Order 2623). The “four factors were carefully selected by the Commission,” *id.*, and this Court held that “the ‘new normal’ rule was well reasoned and grounded in the evidence before the Commission.” *Alliance of Nonprofit Mailers*, 790 F.3d at 196. The Commission thus “decline[d] to revisit [the factors] in the context of this proceeding.” Order 2623, at 27 [JA 583].

The Commission concluded that the Postal Service was authorized to recover approximately \$1.2 billion, in addition to the amount already authorized by the previous order. Order 2623, at 62 [JA 618]. The surcharge will continue until that amount is collected. *Id.*

Commissioner Langley issued a separate opinion, stating that she was not a Commissioner at the time of the 2013 order, and that the new

order does not address the issues presented there. Order 2623, Separate Opinion of Commissioner Langley, at 1 [JA 620]. She agreed with the new order “because it complies solely with the remand from the Court that specifically vacated the manner in which [the 2013 order] calculated the total cumulative loss of mail due to the Great Recession.” *Id.*

Vice Chairman Hammond dissented, stating that although “the Order complies with the Court’s mandate,” he “cannot agree with the conclusion that the new amount the Postal Service is authorized to collect as a result of the new calculation of volume lost due to the Great Recession is ‘reasonable and equitable and necessary.’” Order 2623, Dissenting Opinion of Vice Chairman Hammond, at 1 [JA 621].

SUMMARY OF ARGUMENT

1. This case involves the Postal Regulatory Commission’s analysis of the extent to which financial losses suffered by the Postal Service were “due to either extraordinary or exceptional circumstances,” and thus might, subject to other statutory requirements, entitle the Postal Service to increase its prices above the inflation-based price cap. *See* 39 U.S.C. § 3622(d)(1)(E). When this case was previously before this Court, the Court upheld the Commission’s order in all respects except for one. The

Commission addressed that defect on remand, and the Postal Service does not contest the Commission's resolution of the issue that required a remand.

Instead, the Postal Service seeks to reopen an aspect of the Commission's reasoning that was upheld by this Court. During the remand proceedings, the Commission expressly declined to reopen that issue. Under precedents from this Court and the Supreme Court, the determination not to reopen an issue that had already been settled falls within the Commission's unreviewable discretion. And the Commission's decision not to prolong this long-running case was reasonable in any event. Because the only issue raised is not properly before the Court, the petition for review should be denied.

2. The Postal Service's challenge also fails on the merits. The Commission established a four-factor test for determining when, for each class of mail, circumstances had reached a "new normal" and thus should no longer be considered "extraordinary or exceptional." In the prior petition for review, this Court held that the four-factor test was "well reasoned and grounded in the evidence before the Commission" and

“comfortably passe[d] deferential APA review.” *Alliance of Nonprofit Mailers v. Postal Regulatory Comm’n*, 790 F.3d 186, 196 (D.C. Cir. 2015).

The Postal Service’s belated challenge to the “new normal” determination focuses exclusively on one of the four factors: the Postal Service’s ability to adjust to the changed circumstances. The Commission has consistently explained that this factor appears in the test because when the Postal Service begins to adjust to circumstances, it is one indication (to be considered along with the other factors) that circumstances have become more normal and predictable, rather than extraordinary.

The Commission properly rejected the Postal Service’s assertion that its inability to fully adjust to changed circumstances should alone suffice to demonstrate that the “new normal” has not been reached. As the Commission explained, this assertion ignores the other three factors in the four-factor test. It also misconstrues the fourth factor by requiring an ability to adjust fully to the circumstances, rather than an indication that the Postal Service has begun to adjust to changed circumstances. The Postal Service presents no basis for disturbing the Commission’s consistent application of the four-factor test, which has already been upheld by this Court.

STANDARD OF REVIEW

The Postal Regulatory Commission's decision may be disturbed only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* 39 U.S.C. § 3663 (adopting that standard). The Commission's decision about whether to reconsider a decision that was already made is committed to agency discretion by law and not subject to judicial review. *See Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987). The Commission's reasonable interpretation of the statute it is charged with administering is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 599 F.3d 705, 710 (D.C. Cir. 2010).

ARGUMENT

I. The Postal Service presents no basis for this Court to upset the Commission's decision not to reconsider its prior analysis.

The dispute in this case, as in the last petition for review in this matter, centers on the Postal Regulatory Commission's determination about the extent to which declines in mail volume during and immediately after the Great Recession should be treated as "due to either extraordinary

or exceptional circumstances.” 39 U.S.C. § 3622(d)(1)(E). For financial losses resulting from such declines in mail volume, the Postal Service can increase its prices above the inflation-based price cap so long as the 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.” *Id.*

In an order issued in 2013, the Postal Regulatory Commission determined “that mail-volume loss could no longer be considered ‘due to’ the exigencies of the recession once a ‘new normal’ in operational levels was achieved.” *Alliance of Nonprofit Mailers*, 790 F.3d at 191 (citing Order 1926, at 83-94 [JA 87-98]). The Commission established a four-factor test for ascertaining when the “new normal” occurred, and determined, for each class of mail, the date on which the “new normal” arrived. *Id.* at 191-92 (citing Order 1926, at 86, 94 [JA 90, 98]).

The Postal Service petitioned for review in this Court, challenging those determinations by the Commission. But this Court upheld the Commission’s order in this respect, concluding that “the ‘new normal’ rule was well reasoned and grounded in the evidence before the Commission,”

and “comfortably passe[d] deferential APA review.” *Alliance of Nonprofit Mailers*, 790 F.3d at 196. The Court remanded the case to the Commission only because another aspect of the Commission’s decision, known as the “count once” rule, was inconsistent with “the new normal rule’s premises.” *Id.* The Commission has now adjusted its calculations to eliminate the effects of the “count once” rule, and there is no dispute that it has done so properly and effectively. *See* Order 2623, at 28-46 [JA 584-602].

The Postal Service’s current petition for review seeks to revisit the assessment of the “new normal” that was made in the 2013 order and upheld by this Court. The Commission permissibly declined to reconsider a portion of its order that this Court left undisturbed. As the Commission explained, while it “has discretion to reopen its decisions, an exercise of that discretion is not warranted here given the interest in finality and the lack of any newly available evidence that would justify raising the issue at this late stage.” Order 2623, at 24 [JA 580].

This Court and the Supreme Court have long recognized that “an agency’s denial of . . . a request for reconsideration is, under 5 U.S.C. § 701(a)(2), ‘committed to agency discretion by law.’” *Sendra Corp. v. Magaw*, 111 F.3d 162, 166 (D.C. Cir. 1997) (citing *Interstate Commerce*

Comm'n v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 282 (1987)). If a petitioner alleges only “material error” in the agency’s original decision, there is no basis for judicial review. *Id.* And even if the petition for reconsideration alleges that there is “‘new evidence’ or ‘changed circumstances,’” the agency’s denial of reconsideration “will be set aside only for the ‘clearest abuse of discretion.’” *Id.* (quoting *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 278).

Under these standards, the Postal Service presents no basis for setting aside the Commission’s determination that it would decline to reopen a key aspect of its analysis in this long-running case. The only suggestion that the Postal Service makes of “new evidence” or “changed circumstances” is its allusion to the Commission’s fiscal year 2013 Financial Analysis Report, which was issued three months after the 2013 order in this matter. *See* Postal Service Br. 45. The Postal Service cannot identify any materially changed circumstances in those three months, and instead relies on the fact that the Commission, a few months after its 2013 order, described events that occurred before the order was issued. A new descriptive report does not constitute a change in circumstances.

Moreover, the Postal Service does not assert that the 2013 Financial Analysis Report provided materially different evidence from what was already available. Instead, it suggests that the 2013 Financial Analysis Report merely confirms what was already known at the time of the 2013 order. *See* Postal Service Br. 31 (contending that the Commission had already made a “finding” in the 2013 order itself that the Postal Service could not have adjusted to new circumstances by fiscal year 2010, and suggesting “that any finding that the Postal Service could have immediately adapted was further belied by the evidence relied on in the Commission’s [fiscal year] 2013 Financial Analysis Report”). The Postal Service argues that the Commission’s 2013 order “made contradictory findings,” *id.*, or reflected legal error, and not that something has changed between 2013 and the present that warrants reconsideration of that order.

The argument that the Postal Service now raises could have been raised in its challenge to the 2013 order. In fact, the Postal Service asserts that it *did* raise the argument in its petition for review of the 2013 order. *See* Postal Service Br. 45. But this Court expressly held that the argument, though it was discussed at oral argument, “was not raised in the Postal Service’s briefs” and thus was “not properly before this court.” *Alliance of*

Nonprofit Mailers, 790 F.3d at 196 n.3. Now that this Court's decision in that case has become final, the Postal Service cannot properly challenge it by filing a new petition for review. This Court's observation that the Commission was "free to consider that argument on remand," *id.*, did not compel the Commission to reconsider the reasoning that was upheld by this Court, but rather reflected the Commission's discretion to reopen the issue if it elected to do so.

Given that the Commission declined to revisit the issue, the Postal Service's current petition for review amounts to a collateral attack on the 2013 order. Any challenge to that order was required to be brought within 30 days. *See* 39 U.S.C. § 3663. The Postal Service did bring a challenge within 30 days, but it failed to adequately raise the issue that it raises now. *See Alliance of Nonprofit Mailers*, 790 F.3d at 196 n.3. The Postal Service may not challenge the 2013 order with a new petition for review filed in 2015. *See Georgia Indus. Grp. v. FERC*, 137 F.3d 1358, 1363-64 (D.C. Cir. 1998) (where this Court had previously upheld agency order, "subject to one remanded issue not relevant here," a subsequent challenge to the agency's order was "a collateral attack" over which "the court lack[ed] jurisdiction").

In short, the Commission's decision whether to reopen its earlier decision lies within the Commission's unreviewable discretion, and it is too late to obtain review of that earlier decision directly. The petition for review should be denied on that basis alone. But as discussed below, the Postal Service's legal argument is without merit in any event.

II. The Commission's "new normal" analysis was reasonable and consistent with the statute, as this Court recognized in the last appeal.

A. The Commission reasonably applied the "new normal" test.

As noted above, this Court upheld the Commission's test for when the "new normal" had arrived, and thus when mail volume losses should no longer be characterized as "due to either extraordinary or exceptional circumstances." *See Alliance of Nonprofit Mailers*, 790 F.3d at 190-92. That test has four parts: the "'new normal' was established once 'all or most of' four conditions were met: '(1) the disruption to a sufficient number of relevant macroeconomic indicators demonstrate[d] a return to near historic positive trends; (2) application of the macroeconomic variables accurately project[ed] change, and the rate of change on Postal Service mail volume is positive; (3) the Postal Service regain[ed] its ability to predict or project

mail volumes following an extraordinary or exceptional event; and (4) the Postal Service demonstrate[d] an ability to adjust operations to lower volumes.” *Id.* at 191-92 (alterations in original) (quoting Order 1926, at 86 [JA 90]). Applying that test, the Commission concluded that the “new normal” arrived at different times for different classes of mail, in each case between the beginning of fiscal year 2010 and the beginning of fiscal year 2012.

The Postal Service properly does not dispute that the Commission correctly analyzed the first three factors. The Commission extensively analyzed macroeconomic variables, which began to improve in fiscal year 2009 and 2010. *See* Order 1926, at 83-92 [JA 87-96]. The Commission also examined the Postal Service’s own econometric analysis to determine the effect of macroeconomic variables on mail volumes, and concluded that the effect was different for each class of mail, but occurred for each class of mail between 2009 and 2011. *Id.* at 92-93 [JA 96-97]. And the Commission relied on the Postal Service’s expert witness to assess when the Postal Service regained its ability to make accurate mail forecasts, and in particular noted that forecasts “in 2008 and 2009 . . . were terrible, terrible forecasts,” while in “2011, ’12, ’13, we’re back to a world similar to where

we were before in terms of we have a better handle on our forecast.” *Id.* at 93 [JA 97] (quoting Postal Service witness), *quoted in Alliance of Nonprofit Mailers*, 790 F.3d at 196. These three factors all support the Commission’s ultimate conclusions about the timing of the “new normal” for each class of mail.

The Postal Service now ignores these factors and focuses exclusively on the fourth factor: the Postal Service’s ability to adjust to lower volumes. As the Commission explained in its 2013 order, that factor is part of the “new normal” analysis because “if the Postal Service is adjusting to the circumstances, then the circumstances are in the realm of predictability and thus, more normal than extraordinary or exceptional.” Order 1926, at 94 [JA 98]. And “[o]nce impact of a circumstance is normal, and the Postal Service has begun to adjust to it, additional impact cannot be said to be due to a past extraordinary or exceptional circumstance.” *Id.*

The Postal Service does not dispute that it had “begun to adjust” to the Great Recession in fiscal year 2010. To the contrary, the Postal Service acknowledges that, although it did not start realizing noticeable savings until 2013, it “had long been reducing operating expenses and increasing

efficiency in order to better align operating expenses with the current volumes.” Postal Service Br. 39-40 (quotation marks omitted).

The Postal Service instead argues that its continuing financial difficulties establish that it was unable to adjust, and that the “new normal” therefore could not have been reached. The Commission properly rejected this argument for two reasons. First, the Postal Service ignores the first three factors in the “new normal” test. The Commission determined in its 2013 order that “the ‘new normal’ cutoff was a point in time when *all or most* of the four factors of the test occurred.” Order 2623, at 27 [JA 583] (citing Order 1926, at 86 [JA 90]) (emphasis in Order 2623). As the Commission explained, “acceptance of the Postal Service’s position would effectively rewrite the four-factor ‘new normal’ test as a one factor test.” *Id.*

The Postal Service similarly ignores three-fourths of the applicable test when it argues that “it is hard to imagine how an event could lose its extraordinary character (thus rendering the exigency clause inoperable) merely because the Postal Service began to take steps to respond to it.” Postal Service Br. 42-43. If the Postal Service has begun to take steps to respond, *and* macroeconomic variables have improved, *and* macroeconomic variables accurately project a positive change in mail volumes, *and* the

Postal Service has regained its ability to project mail volumes accurately, it is not difficult to imagine that the extraordinary circumstances have ended.

Second, as noted above, the fourth factor of the “new normal” test is satisfied when “the Postal Service has begun to adjust” to the new circumstance. Order 1926, at 94 [JA 98]. “[T]he Postal Service’s proposal effectively redefines the fourth factor from ‘when the Postal Service has begun to adjust’ to ‘when the Postal Service has fully adjusted to the impacts of the exigent event.’” Order 2623, at 27 [JA 583] (quoting Order 1926, at 94 [JA 98]). The ability to begin to adjust, even if it is difficult or impossible to address every effect of the new circumstances, is evidence of a return to predictability and away from extraordinary circumstances. *See* Order 1926, at 94 [JA 98].

The Postal Service makes the same error when it asserts that the “new normal” analysis somehow conflicts with the analysis of whether the requested increase is “necessary.” This Court has already upheld the Commission’s statutory analysis underlying the “new normal” test, which forms a part of the analysis of whether a loss is “due to either extraordinary or exceptional circumstances,” and the Commission’s treatment of the separate statutory requirement that any price increase be “reasonable and

equitable and necessary.” 39 U.S.C. § 3622(d)(1)(E); see *Alliance of Nonprofit Mailers*, 790 F.3d at 194. As this Court explained, the “‘new normal’ test is designed to capture precisely the time when the exigent character of a circumstance dissipates — when its effects lose their exceptional character — even though the effects in some literal, but-for causal sense linger,” while “the ‘reasonable and equitable and necessary’ test looks to present conditions to determine what the Postal Service requires ‘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. § 3662(d)(1)(E), given the realities of the post-exigency marketplace.” *Alliance of Nonprofit Mailers*, 790 F.3d at 194. The Postal Service’s assertion that the two tests are somehow in conflict ignores these two different functions.

B. The Commission’s position has been consistent.

The Postal Service is mistaken to suggest that the Commission has been inconsistent in the degree to which the inquiry about whether a volume loss is “due to either extraordinary or exceptional circumstances,” 39 U.S.C. § 3622(d)(1)(E), focuses on causation or instead focuses on the Postal Service’s ability to adjust to the loss. See Postal Service Br. 33-34. As discussed above, the Commission has been entirely consistent on that

point: the Postal Service's ability to adjust is one of four factors relevant to measuring whether a circumstance continues to be extraordinary. The Postal Service's apparent view that the "ability to adjust" factor should supersede all the others cannot be reconciled with the Commission's consistent position.

Moreover, the Postal Service's effort to give undue prominence to the Postal Service's ability to respond, as opposed to the causal connection between the recession and financial losses, cannot be reconciled with this Court's analysis. The first time this matter came to this Court, the Court stated that "the plain meaning of 'due to' mandates a causal relationship between the amount of a requested adjustment and the exigent circumstances' impact on the Postal Service." *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 640 F.3d 1263, 1267 (D.C. Cir. 2011). The case was remanded to allow the Commission to "determin[e] how closely the amount of the adjustments must match the amount of the revenue lost as a result of the exigent circumstances." *Id.* at 1268.

The second time this matter came to this Court, the Court reiterated that "'due to' looks at causation." *Alliance of Nonprofit Mailers*, 790 F.3d at 194; *see also id.* (distinguishing between "due to" test and "reasonable and

equitable and necessary” inquiry, which “focuses not on causation, but on recovery”). The Court upheld the Commission’s four-factor test – of which ability to adjust was just one factor – for assessing when volume losses should be considered to be due to extraordinary circumstances. *Id.* at 193-94.

It is therefore plain from the face of this Court’s opinions that the Court did not understand the “new normal” test to focus only, or even primarily, on the extent of the Postal Service’s ability to adjust to volume losses. The Postal Service’s reliance on passages from the Commission’s submissions to this Court is misplaced. Many of the cited passages, in context, make the simple point that once circumstances are no longer “extraordinary or exceptional,” Congress expected the Postal Service to adjust to the circumstances within the bounds of the inflation-based price cap. *See, e.g.,* Commission Br. 38, *Alliance of Nonprofit Mailers*, Nos. 14-1009, 14-1010 (D.C. Cir. July 18, 2014) (“Congress’s determination that prices should be increased faster than inflation ‘on an expedited basis due to either extraordinary or exceptional circumstances,’ 39 U.S.C.

§ 3622(d)(1)(E), does not compel the Commission to excuse the Postal Service from responding, over time, to the effects of circumstances that

were exceptional when they first occurred.”); Oral Arg. Tr. 53-54, *Alliance of Nonprofit Mailers*, Nos. 14-1009, 14-1010 (D.C. Cir. Sept. 9, 2014) (describing “new normal” as “the point when we expect you to entirely adapt going forward, and so if there’s another sort of ordinary recession then we’re not going to start counting mail volume again,” and stating that “going forward we expect you to be back to a scheme in which you can adapt to circumstances as they’re changing, and that’s just the end point for the whole thing”). This Court agreed. *See Alliance of Nonprofit Mailers*, 790 F.3d at 194 (“[T]he Commission permissibly reasoned that just because some of the effects of the exigent circumstances may continue for the foreseeable future, that does not mean that those circumstances remain ‘extraordinary’ or ‘exceptional’ for just as long.”).

Other statements on which the Postal Service relies are even further afield. The statement that the “due to” clause can “take into account [the Postal Service’s] ability to adjust,” Oral Arg. Tr. 44, *Alliance of Nonprofit Mailers*, merely reflects the presence of the fourth factor in the “new normal” test. The statement that the “due to” clause considers “what could the Postal Service have been expected to do” similarly reflects the presence of the fourth factor, and was in any event made only to distinguish the

“due to” clause from the “necessary” clause, which considers “what the Postal Service is actually doing and proposing to do.” *Id.* at 41; *see also id.* at 45 (stating, primarily in defending portion of decision that is no longer at issue, that “to the extent that the Postal Service is able to respond by reducing costs . . . then that would affect the net financial impact, and that sort of, that informs some of the inquiries about temporal limitations”).

But in any event, isolated statements from oral argument in a prior case cannot provide a basis for setting aside the Commission’s reasoned determination in this one. The Commission reasonably declined to reconsider its prior order, which was entirely proper in any event.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set out in Federal Rule of Appellate Procedure 32(a). This brief contains 6,628 words.

s/ Daniel Tenny
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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

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39 U.S.C. § 3622(d)**(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.