

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 19-1026

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

UNITED PARCEL SERVICE, INC.,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

AMAZON.COM SERVICES, INC.;
PARCEL SHIPPERS ASSOCIATION;
PITNEY BOWES INC.;
AND
UNITED STATES POSTAL SERVICE
Intervenors Supporting Respondent.

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

**BRIEF FOR INTERVENORS
AMAZON.COM SERVICES, INC.; PARCEL SHIPPERS ASSOCIATION;
PITNEY BOWES INC.; AND UNITED STATES POSTAL SERVICE
IN SUPPORT OF THE POSTAL REGULATORY COMMISSION**

(Names of sponsoring parties and counsel appear inside front cover)

September 12, 2019

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Intervenors adopt the Certificate as to Parties, Rulings, and Related Cases in the Commission's brief.

RULE 26.1 DISCLOSURE STATEMENTS

Amazon.com Services, Inc.

Amazon.com Services, Inc. ("ASI") states that it is a wholly owned subsidiary of Amazon.com, Inc., a corporation whose common stock is publicly traded on the NASDAQ Global Select Market under the symbol "AMZN." No publicly held company has a 10 percent or greater ownership interest in Amazon.com, Inc.

Amazon.com, Inc. has organized its operations into three segments: North America, International, and Amazon Web Services, serving consumers through online and physical stores with a focus on selection, price, and convenience. ASI's activities include operation of fulfillment centers, including package delivery services utilizing the United States Postal Service. The rates for such services could be affected by this proceeding.

Parcel Shippers Association

Parcel Shippers Association ("PSA") is organized as a nonprofit corporation under the laws of Virginia, and has its principal place of business in Alexandria, Virginia. PSA is not publicly traded and has no corporate parent. No publicly traded entity has an ownership interest in PSA.

PSA is a voluntary membership organization whose primary mission is to foster fair competition in the postal package delivery services market. PSA seeks to promote the interests of its members, *inter alia*, by participating in administrative and civil litigation concerning the prices charged for shipping packages through the U.S. Postal Service and competing private carriers. The rates for such services are at issue in this proceeding.

PSA is a trade association within the meaning of Circuit Rule 26.1(b).

Pitney Bowes Inc.

Pitney Bowes Inc. (“Pitney Bowes”) is a corporation headquartered in Stamford, Connecticut, whose common stock is publicly traded on the New York Stock Exchange under the symbol “PBI.” No publicly held company has a 10 percent or greater ownership interest in Pitney Bowes, except for BlackRock, Inc.

Pitney Bowes’s ecommerce fulfillment, shipping and returns, cross-border ecommerce, presort mailing services, and office mailing and shipping solutions businesses depend on a strong and viable postal service.

Respectfully submitted,

___/s/___John Longstreth_____

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ASI NPRM Comments	Comments of Amazon.com Services, Inc. on Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products, Dkt. No. RM2017-1 (Apr. 16, 2018)
FTC Report	Federal Trade Commission, <i>Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors</i> (Dec. 2007)
JA	Joint record appendix
Order	Order Adopting Final Rules Relating to the Institutional Cost Contribution Requirement for Competitive Products, Dkt. No. RM2017-1 (Jan. 3, 2019) (Order No. 4963)
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Order No. 4742 or "Revised NPRM"	Revised Notice of Proposed Rulemaking, Dkt. No. RM2017-1 (Aug. 7, 2018)

PAEA	Postal Accountability and Enhancement Act, Pub. L. No. 109- 435, 120 Stat. 3198 (2006)
PRC or Commission	Postal Regulatory Commission
PSA	Parcel Shippers Association
UPS	United Parcel Service, Inc.
USPS or Postal Service	United States Postal Service

INTRODUCTION

This case arises out of the continuing, unsuccessful attempts of Petitioner United Parcel Service, Inc. (“UPS”)—in this context a competitor of the U.S. Postal Service (“Postal Service” or “USPS”)—to use the regulatory process to require the Postal Service to set prices for its competitive products at levels that would render its products uncompetitive. In this case, UPS seeks to compel the Respondent Postal Regulatory Commission (“PRC” or “Commission”) to significantly increase the minimum percentage of institutional costs that it requires the Postal Service to cover when offering competitive products, known as their “appropriate share” under 39 U.S.C. § 3633(a)(3). This would force the Postal Service to set a higher price floor for those products. If UPS were to succeed in this effort, it would gain an improper regulatory and competitive advantage, competition would be harmed, and the Postal Service and the more than 100 million consumers and businesses that rely on competitive package delivery services would be disadvantaged.

Intervenors are the Postal Service and parties who rely significantly on its services. Intervenors Amazon.com Services, Inc. (“ASI”), Pitney Bowes Inc., and the Parcel Shippers Association all have a direct interest in fostering fair competition for postal package delivery services so that package service providers, including the UPS and the Postal Service, can provide customers the price, convenience, selection, and innovation needed in a highly competitive marketplace. UPS’s efforts to force

the Commission to adopt standards to increase the price of package delivery services would, if successful, enable UPS to accelerate its own price increases, take business from the Postal Service, or both, thus damaging fair competition, harming consumers and businesses by increasing delivery costs, and impairing the Postal Service's operations and potential viability.

UPS's challenge lacks merit. The Commission properly rejected UPS's arguments urging dramatic increases in the minimum contribution requirement, finding that they were based on a misreading of the statute, economic theory, and the record evidence, and on costing theories that have been repeatedly and thoroughly reviewed and then rejected and discredited by the Commission, the courts, and mainstream economists. The Commission increased the minimum contribution requirement but did not impose the drastic increase UPS sought. This decision was well within the Commission's substantial discretion, particularly given that the statute expressly grants the Commission the discretion to eliminate the minimum contribution entirely.

UPS's main statutory argument misstates what the Commission actually did. Contrary to the incorrect assertion in UPS's brief that the Commission merely "assume[d]" that there are no institutional costs "uniquely or disproportionately associated" with competitive products, *see* UPS Br. at 3, the Commission properly determined that all such costs are *already* captured by its costing methodology and

included in the costs attributed to competitive products. The Commission's reasoned and thorough discussion of this issue covers more than 18 pages and incorporates prior related orders that exhaustively reviewed the cost attribution methodologies for competitive products and the widely accepted economic principles underlying them. *See* Order No. 4963, *Order Adopting Final Rules Relating to the Institutional Cost Contribution Requirement for Competitive Products* (Jan. 3, 2019) at 138-56 ("Order") (citing Order No. 4402 at 43-45 and Order No. 4742 at 52-53) (JA ____).

The Commission properly interpreted and applied the statute by carefully considering all of the required statutory elements, including unique or disproportionate costs and prevailing competitive conditions. *See* Order at 114-38 (JA ____). The Commission did not merely assume away the possibility of unfair competition; rather, it affirmatively determined that there is no evidence that the Postal Service has engaged in unfair competition. *See id.* at 114-17, 119-23, 126-32 (JA ____). Specifically, the Commission found that the Postal Service has a relatively modest share of the package delivery business and does not have an unfair competitive advantage, and that its actual pricing behavior and evidence of robust price and contribution increases over time are consistent with ordinary profit-maximizing behavior and inconsistent with any suggestion of predation. *See id.* at 126-32, 134 n.254 (JA ____). It further found that the Postal Service was not engaged in, and could not engage in, predatory pricing because the statute requires the Postal

Service to set prices above the costs attributable to each competitive product under 39 U.S.C. § 3633(a)(2) and to competitive products as a whole under 39 U.S.C. § 3633(a)(1). *See id.* at 131 (JA ____).

In view of the express provision of the Postal Enhancement and Accountability Act of 2006 (“PAEA”) that the appropriate share can be set at zero, and the Commission’s detailed findings that there was no competitive harm to the Postal Service’s competitors to be addressed by the appropriate share review, the Commission could have justified reducing the share or eliminating it altogether, as the Postal Service and several other commenters advocated. Despite the arguments of the Postal Service and others for a different result, the Commission was well within its discretion to nonetheless retain a minimum price floor on competitive products sufficient to cover a designated share of institutional costs and to allow for adjustment of that floor as developments warranted. The Commission did so through a formula-based approach designed to reflect the Postal Service’s relative pricing power and prevailing competitive conditions. Applying this formula increased the minimum contribution requirement from 5.5 percent to approximately 8.8 percent in the most recent fiscal year, an exercise of the Commission’s discretion in UPS’s favor. *See Order* at 28 (JA ____). UPS’s arguments that the functional elements of the formula are “unexplained” and “irrational” are likewise without merit.

STATEMENT OF ISSUES

1. Whether the appropriate share established in the Order is consistent with the text, structure, and purpose of the Postal Enhancement and Accountability Act of 2006 (“PAEA”), Pub. L. No. 109-435, 120 Stat. 3198 and, in particular, the appropriate share provisions of 39 U.S.C. § 3633.
2. Whether the Commission adequately explained and justified the formula adopted in the Order.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 39 U.S.C. § 3663.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations appear in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The PAEA divided Postal Service products into two categories: market dominant products and competitive products. Market dominant products are products for which the Postal Service “exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business.” 39 U.S.C. § 3642. Market dominant products include all products

covered by the statutory monopoly on letter mail delivery and are subject to a price cap.

The PAEA defines “all other products” that are not classified as market dominant products as competitive products. Competitive products include package delivery services that the Postal Service offers in competition with UPS and other private express carriers. Three separate pricing provisions of the PAEA ensure fair competition with respect to competitive products.

First, under 39 U.S.C. § 3633(a)(2), the Postal Service must charge a rate for *each* competitive product that covers the “costs attributable” to that product. The PAEA defines these costs as “the direct and indirect postal costs attributable to such product through reliably identified causal relationships.” *Id.* § 3631(b). The Commission considers these to be the product’s incremental costs, calculated by summing its volume-variable costs, product-specific fixed costs, and certain inframarginal costs whose causal relationship to the product has been empirically verified. *See* PRC Docket No. RM2016-2, Order Concerning United Parcel Service, Inc.’s Proposed Changes to Postal Service Costing Methodologies (UPS Proposals One, Two, and Three) (Sept. 9, 2016) (updated Oct. 19, 2016) at 42, 62 (“Order No. 3506”); PRC Docket No. RM2016-13, Order Adopting Final Rules on Changes Concerning Attributable Costing (Dec. 1, 2016) at 2, 11 (adopting this definition in 39 C.F.R. § 3015.7(b)); *see also United Parcel Serv., Inc. v. Postal Regulatory*

Comm'n (“*UPS v. PRC*”), 890 F.3d 1053, 1068-70 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 2614 (2019) (explaining inframarginal costs and upholding the causation-based cost attribution methodology adopted in Commission Order No. 3506).

Second, 39 U.S.C. § 3633(a)(1) prohibits the cross-subsidization of competitive products by market dominant products. The Commission interprets this statutory prohibition to require that competitive products as a whole are fully recovering their aggregate incremental costs. *See* Order No. 3506 at 10, 18, 57-59, Appendix A at 17. This ensures that competitive products are not subsidized by market dominant products, and that the Postal Service unambiguously improves its financial position by offering the competitive products.

Third, 39 U.S.C. § 3633(a)(3) requires that “all competitive products collectively cover what the Commission determines to be an appropriate share of the institutional costs of the Postal Service.” 39 U.S.C. § 3633(a)(3). The Commission refers to this provision as the “appropriate share” or minimum contribution requirement.

Postal costs have long been segmented into a two-tier system where all costs causally linked to products are considered “attributable costs” and “[a]ll other costs are classified as institutional.” *UPS v. PRC*, 890 F.3d at 1062. Congress codified the Commission’s longstanding two-tier approach in the PAEA. Borrowing

language used by the Supreme Court and the Commission, the PAEA provided that rates for competitive postal products must cover their “attributable” costs as defined in 39 U.S.C. § 3631(b). *See* § 3633(a)(2); *Nat’l Ass’n of Greeting Card Publishers v. U.S. Postal Serv.* (“NAGCP”), 462 U.S. 810, 821, 825-26 (1983). Institutional costs are the residual costs that cannot be specifically attributed to products through reliably identified causal relationships.

The statute requires the Commission to conduct a review every five years “to determine whether this institutional cost contribution requirement under [39 U.S.C. § 3633(a)(3)] should be retained in its current form, modified, or eliminated.” *Id.* § 3633(b). “In making its determination the Commission shall consider all relevant circumstances, including the prevailing competitive conditions in the market, and the degree to which any costs are uniquely or disproportionately associated with any competitive products.” *Id.*

The three statutory pricing provisions operate in concert to protect fair competition. The incremental cost tests imposed by 39 U.S.C. §§ 3633(a)(1) and 3633(a)(2) are mandatory and address cross-subsidization and predatory pricing. The Commission’s periodic review under 39 U.S.C. § 3633(b) is a further safeguard against unfair competition. The imposition of a minimum contribution requirement or appropriate share—the issue in this case—is committed to the Commission’s

discretion, as the statute expressly and unambiguously authorizes the Commission to eliminate the minimum contribution entirely.

B. UPS's Cost Attribution Challenge

In 2015, UPS filed a petition asking the Commission to dramatically alter its longstanding and judicially approved approach to cost attribution under 39 U.S.C. § 3633(a)(2). UPS proposed a “fully distributed cost” model that would require, for example, that the Commission abandon the statutory causality requirement and redefine “attributable costs” to include *all* variable costs, including those without a causal link to products. *UPS v. PRC*, 890 F.3d at 1058. Numerous entities, including many of the intervenors here, opposed UPS’s proposal, showing among other things that it was based on a flawed economic theory, faulty assumptions, and incorrect analysis.

The Commission rejected UPS’s fully distributed costing proposal as an arbitrary and discredited economic approach. *See* Order No. 3506, *supra*. UPS petitioned for review, and a panel of this Court unanimously upheld the Commission’s order, holding that the Commission’s causation-based cost attribution methodology was consistent with the structure of the statute and its long-established meaning in the postal ratemaking context and was “perfectly reasonable.” *UPS v. PRC*, 890 F.3d at 1062, 1068.

UPS petitioned for rehearing en banc. No judge called for a vote, and the petition was denied. UPS petitioned for a writ of certiorari, which the Supreme Court denied. 139 S. Ct. 2614 (2019).

C. The Appropriate Share Proceedings

While the attributable cost proceeding was ongoing, UPS was pursuing a parallel effort to force the Postal Service to increase its prices via participation in the Commission's required five year review of the "appropriate share." These proceedings extended over two years, included multiple rounds of comments, and resulted in three separate and detailed Commission orders. UPS also participated in at least a half dozen prior Commission proceedings regarding specific proposals to refine Commission-approved postal costing methodologies. *See, e.g.*, Docket No. RM2018-2, *Periodic Reporting Rules* (Mar. 7, 2018); Docket No. RM2017-10, *Periodic Reporting (Proposal Six)* (Nov. 20, 2017); Docket No. RM2017-9, *Periodic Reporting (Proposal Five)* (Feb. 6, 2018); Docket No. RM2017-8, *Periodic Reporting (Proposal Four)* (Dec. 1, 2017); Docket No. RM2016-12, *Periodic Reporting (Proposal Four)* (June 22, 2017); Docket No. RM2016-3, *Periodic Reporting (Proposal Twelve)* (Dec. 22, 2015); Docket No. RM2015-7, *Periodic Reporting (Proposal Thirteen)* (Oct. 29, 2015).

The Commission undertook an initial review of the "appropriate share" in 2007 and another review five years later in 2012. Both times, the Commission set

the minimum contribution requirement at 5.5 percent of the institutional costs of the Postal Service. The Commission explicitly stated that it viewed the 5.5 percent appropriate share as a “floor,” or minimum amount of contribution, with “the hope (and expectation) . . . that competitive products will generate contributions in excess of the floor.” Docket No. RM2007-1, Order Proposing Regulations to Establish a System of Ratemaking (Aug. 15, 2007) at 72. In fiscal year 2017, the actual contribution of competitive products to the Postal Service’s institutional costs had risen to more than \$7 billion, or more than 23 percent, well in excess of the 5.5 percent required minimum contribution. *See* Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products (Feb. 8, 2018) (“NPRM” or “Order No. 4402”) at 17, 52 (JA ____).

The Commission initiated its third required review with an Advance Notice of Proposed Rulemaking in November 2016. *See* Docket No. RM2017-1, Advance Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products (Nov. 22, 2016). After rounds of initial and reply comments in response to the advance notice, the Commission issued an extensive Notice of Proposed Rulemaking in February 2018. *See* Order No. 4402 (JA ____). The NPRM proposed to modify the appropriate share, based on the Commission’s analysis of all relevant circumstances in accordance with 39 U.S.C. § 3633(b), under a formula-based approach. *See id.* at 3 (JA ____).

UPS, its economists (Sidak and Carlton), and affiliated groups proposed a substantial increase in the appropriate share. *See id.* at 68 (JA ____). The Postal Service, the intervenors and their economists, and many other users of postal services opposed any increase, with the Postal Service and other commenters calling on the Commission to eliminate the minimum contribution requirement altogether on the basis that imposing an artificial price floor above incremental costs would harm consumers and shippers to benefit already-profitable private competitors. *See id.* at 68, 71, 89-93 (JA ____). Commenters noted that the Postal Service’s success in the competitive package delivery business has helped maintain competition while providing significant value to retail customers, to hundreds of thousands of U.S. businesses (including small businesses, big-box retailers, and other e-commerce companies), and even to the Postal Service’s direct competitors, including UPS, who use the Postal Service for a substantial portion of their last-mile package delivery services. *See id.* Commenters expressed concern regarding competitive harm if the Commission imposed a minimum price floor at a level that forced the Postal Service to set its prices above competitive levels. *See id.*

Fully satisfying all of the PAEA’s requirements, the Commission found that “UPS fail[ed] to provide any evidence of reliably identified causal relationships between the institutional costs it identifies and specific competitive products,” and it further found that “there are no costs uniquely or disproportionately associated

with competitive products that are not already attributed to competitive products.” Order No. 4402 at 43-46 (JA ____). It found no evidence that the Postal Service has engaged in predatory pricing, *id.* at 36-37 n.64, 97 (JA ____), and concluded that the past finding of the Federal Trade Commission (“FTC”) that the Postal Service operates with a net economic disadvantage in offering competitive products “continues to be valid.” *Id.* at 61, 65, 97 (JA ____). The Commission also found there were no other “relevant circumstances” that warranted raising the appropriate share. *Id.* at 45-49 (JA ____).

The Commission also considered whether the “prevailing competitive conditions in the market,” might justify an increased minimum contribution requirement, and it found they did not. While “the Postal Service has gained some market share” since 2007, “its competitors have also become more profitable, and the market itself has grown through increased demand, advancing technology, and new entrants.” *Id.* at 98. Indeed, there was abundant evidence in the record that UPS and other participants in the package delivery business were thriving. *See id.* (JA ____); Comments of ASI on Order No. 4402 (Apr. 16, 2018) at 16-18 (JA ____.)

The Commission nonetheless declined to eliminate the appropriate share altogether, noting that the “state of flux, innovation and growth” in the package delivery industry warranted continued regulatory enforcement of a minimum contribution requirement. Order No. 4402 at 96, 98 (JA ____). It proposed to

calculate that appropriate share through a formula based on changes to the Postal Service's position in the package delivery business and its ability to set prices above costs, which the Commission considers an indication of market segment power. *Id.* at 22, 29-32 (JA ____).

After considering further comments on the NPRM, the Commission issued a revised NPRM in August 2018. *See* Revised Notice of Proposed Rulemaking, RM2017-1 (Postal Regulatory Comm'n Aug. 7, 2018) ("Revised NPRM" or "Order No. 4742"). The Revised NPRM confirmed the Commission's principal conclusions but proposed modifications to the formula-based approach to better measure the Postal Service's pricing power and more explicitly incorporate the Postal Service's competitive share of the package delivery industry. *See* Order No. 4742 at 8 (JA ____). After thoroughly considering and responding to comments, the Commission reaffirmed that "the last 5 years have been a time of significant innovation and development in the delivery industry," *Id.* at 54 (JA ____), and that there is "minimal risk" at best if the appropriate share is set too low, because of the protections afforded by sections 3633(a)(1) and 3633(a)(2) and because "the Postal Service has little incentive to discount prices in order to gain market share because discounting prices to gain market share would decrease the Postal Service's profitability at a time when it continues to face financial challenges." *Id.* at 56-57. (JA ____).

Following yet another round of comments on the Revised NPRM, the Commission issued a Final Rule in January 2019 implementing its new formula-based approach. *See* Order Adopting Final Rules Relating to the Institutional Cost Contribution Requirement for Competitive Products (Jan. 3, 2019) (“Order” or “Order No. 4963”) (JA ____). Again, after thoroughly considering and responding in detail to comments received from UPS and others on the Revised NPRM, the Order confirmed and elaborated on the Commission’s evaluation of the prevailing competitive conditions and its conclusions that any costs uniquely or disproportionately associated with competitive products were already captured by its costing methodology. UPS was the only party to the proceedings to petition for review.

STANDARD OF REVIEW

The Order under review is entitled to substantial deference. An agency regulation will be upheld where a petitioner “cannot show the regulation is irrational or inconsistent” with the governing statute, and the agency need only clear a “rather low bar” to survive deferential Administrative Procedure Act review. *Swatters v. DOT*, 826 F.3d 507, 512 (D.C. Cir. 2016). The court asks only whether “the Commission’s exercise of its authority [was] ‘reasonable and reasonably explained.’” *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 785 F.3d 740, 750 (D.C. Cir. 2015).

The arbitrary and capricious standard is “[h]ighly deferential,” and “presumes the validity of agency action.” *AT&T Corp. v. FCC*, 349 F.3d 692, 698 (D.C. Cir. 2003) (internal quotation marks omitted). The agency will be upheld if it “has considered the relevant factors and articulated a ‘rational connection between the facts found and the choice made,’” *Allied Local & Reg’l Mfrs. Caucus v. U.S. EPA*, 215 F.3d 61, 68 (D.C. Cir. 2000) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Courts are “particularly reluctant to interfere with [the] agency’s reasoned judgments about technical questions within its area of expertise.” *All. of Nonprofit Mailers v. Postal Regulatory Comm’n*, 790 F.3d 186, 197 (D.C. Cir. 2015).

The Commission’s interpretations of the PAEA receive the familiar *Chevron* deference, *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 785 F.3d at 750, and its statutory interpretations received substantial deference even before *Chevron*. *See, e.g., NAGCP*, 462 U.S. at 821, 827 (Commission was “due deference” when interpreting the then-existing postal ratesetting statute in light of the “structure of the Act,” the statutory “history,” and the discretion generally afforded to “ratesetting agenc[ies].”). *See also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (discussing the special deference due in the context of agency ratesetting and the “presumption of validity [that] attaches to each exercise of the [agency’s] expertise;” and noting that “those who would overturn the [agency’s] judgment

undertake ‘the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.’”) (citations omitted).

SUMMARY OF ARGUMENT

The PAEA gives the Commission the discretion to set the appropriate share at any level, including zero, provided that it “consider[s] all relevant circumstances, including the prevailing competitive conditions in the market, and the degree to which any costs are uniquely or disproportionately associated with any competitive products.” 39 U.S.C. § 3633(b). The Commission carefully considered each of the relevant circumstances at length based on a substantial record, fully explained its findings and reasoning, and came to a conclusion well within its considerable discretion. UPS has provided no basis to overturn its Order.

Contrary to UPS’s incorrect claim that the Commission merely “assume[d]” or “asserted” that there are no institutional costs uniquely or disproportionately associated with competitive products, UPS Br. at 3, 17, the Commission properly found that its existing costing methodology already captures any such costs along with the others attributed to competitive products. The Commission correctly rejected UPS’s attempt to reargue costing theories that have been repeatedly rejected by the Commission and the courts. This Court has already approved the costing methodology, and the statute does not require the Commission to arbitrarily attribute additional costs to competitive products. *See* pp. 19-20, *infra*.

UPS also incorrectly asserts that the Commission merely assumed away the possibility of unfair competition. The Commission carefully considered the evidence of record on this point as well, and it found that the Postal Service has not engaged in unfair competition. It further noted that statutory pricing rules prohibiting the Postal Service from pricing below the costs attributable to each competitive product and to competitive products as a whole already provide substantial protection against unfair competition. *See* p. 30, *infra* (citing 39 U.S.C. § 3633(a)(1), (2)).

The Commission could have eliminated the appropriate share altogether, and its decision to retain a formula-based minimum price floor to allow for future adjustments falls well within its substantial discretion. UPS's assertion that the Commission did not adequately explain or justify its formula is incorrect. The Commission fully explained how and why it adopted the formula and provided a detailed analysis in response to UPS's comments. *See* pp. 36-40, *infra*.

ARGUMENT

I. THE COMMISSION'S FINDINGS ARE CONSISTENT WITH THE TEXT, STRUCTURE, AND PURPOSE OF THE PAEA

The Commission's discretion with respect to the appropriate share determination is broad, and the statutory limitations on that discretion are modest. The statute requires the Commission undertake a review every five years but delegates to the Commission the discretion to determine whether the minimum

contribution, if any, should be “retained in its current form, modified, or eliminated.” 39 U.S.C. § 3633(b). The Commission is required to “consider all relevant circumstances, including the prevailing competitive conditions in the market, and the degree to which any costs are uniquely or disproportionately associated with any competitive products.” *Id.* The appropriate share is not defined, it is simply “what the Commission determines [it] to be” after this consideration. 39 U.S.C. § 3633(a)(3). All parties agree the statute unambiguously authorizes the Commission to eliminate the minimum contribution entirely.

The Commission carefully considered all of the factors specified in 39 U.S.C. § 3633(b) and “addressed the ways the proposed formula captured the prevailing competitive conditions and other relevant circumstances described in previous Commission decisions concerning the appropriate share.” Order No. 4742 at 7 (citing Order No. 4402 at 34-40, 45-51) (JA ____). The Commission found, for example, that “all costs uniquely or disproportionately associated with competitive products were already attributed to those products under the Commission’s costing methodology.” *Id.* at 8 (JA ____). As noted above, UPS has repeatedly challenged aspects of this costing methodology without success. *See UPS v. PRC*, 890 F.3d at 1068. The Commission further found that (1) the Postal Service is pricing appropriately, (2) its competitors are profitable and competition is robust, (3) the package delivery industry is growing and innovating, (4) the Postal Service is not

operating with any net economic advantage in offering competitive products that an appropriate share allocation would be necessary to offset, and (5) no other “relevant circumstances” warrant an increase in the minimum contribution requirement. *See* pp. 13-14, *supra* (citing Order No. 4402 at 36-37, 43-49, 61, 65, 96-98; Order No. 4742 at 8, 54-57).

The Commission then exercised its discretion to adopt a formula to calculate an appropriate share given the current “state of flux, innovation and growth” in the package delivery industry. Order No. 4402 at 96, 98 (JA ____). The formula bases the minimum contribution requirement on changes to the Postal Service’s position in the package delivery business and its ability to set prices above attributable costs.

The Commission’s discretionary determination to impose a minimum contribution requirement as a buffer to protect against problems that UPS fears, but that the Commission found do not currently exist, did not satisfy UPS. UPS attempts to manufacture a challenge by stating wrongly that the Commission simply “assume[d]” or “asserted” that there are no institutional costs uniquely or disproportionately associated with competitive products. UPS Br. at 3, 17. UPS uses this mischaracterization to argue that the Commission “did *not* consider any costs uniquely associated or disproportionately associated with any competitive products.” *Id.* at 21-23 (emphasis in original).

UPS does not accurately state the statutory language, which requires only that the Commission “consider . . . *the degree to which* any” such costs exist, and does not direct it to find that there are, in fact, such costs. 39 U.S.C. § 3633(b) (emphasis added). Moreover, the Commission did not simply “assume” or “assert” that there were no such costs; rather, it expressly and repeatedly found there were no such costs that were not *already captured* under the Commission’s cost attribution methodology recently affirmed by this Court. *See* Order at 138-40 (citing Order No. 4402 at 43-45) (JA ____). This factual determination was abundantly supported in the record and is entitled to deference.

UPS conceded in its unsuccessful challenge to the Commission’s most recent cost attribution order that there are only two categories of costs under the PAEA—attributable and institutional—and that all costs must fall into one category or the other. *See* UPS Reply Br. at 6, 8 (D.C. Cir. No. 16-1354; June 2, 2018). UPS now reverses position to argue that there are three categories of costs—attributable, institutional, and an intermediate category of “associated” costs. UPS argues that the plain text of the statute requires this result because costs “reliably caused” by a product under section 3633(a)(2) must linguistically and definitionally be narrower than those “disproportionately associated” with the product under 3633(a)(3) and that the appropriate share determination is otherwise meaningless. UPS Br. at 22-34. UPS is explicit that its position would require the Commission to determine in

some manner that “a cost is more associated with competitive products than with market-dominant products,” even if there is “uncertainty regarding the existence of a reliably identified causal relationship,” and that this is a “much looser connection than causation.” *Id.* at 25-26, 33.

UPS is incorrect. UPS has repeatedly lost the argument that the Commission’s current costing methodology does not capture all “reliably caused” costs. UPS now argues that the Commission is required to designate the very same costs to the very same competitive products, but under a looser standard where no reliably identified causal relationship exists. UPS does not explain how the Commission could rationally apply such a loose standard, and the statute does not require that the Commission do so. The costing methodology adopted by the Commission, as required by the statute and upheld by this Court, requires that cost attribution be based upon causal relationships. The Commission properly rejected as unnecessary and inappropriate UPS’s attempts to further allocate costs without any causal relationship to the very same competitive products via the appropriate share mechanism.

Indeed, the Supreme Court has already rejected an argument almost identical to the one UPS advances now. In the 1970s and 1980s, some parties claimed that the then-existing statutory framework mandated an intermediate category known as “reasonably assignable” costs to be allocated on a more attenuated basis than reliable

causation. *NAGCP*, 462 U.S. at 816-17, 824-25. The Supreme Court squarely rejected the notion that attributable and assignable costs are distinguishable and that “the latter concept permits a greater degree of estimation and connotes somewhat more judgment and discretion than the former.” *Id.* at 817 n.8. It held that the Commission’s two-tier approach, which attributed costs on the basis of reliable causation and termed any non-attributed costs to be institutional costs, was consistent with the statutory language and intent, and found no basis for imposing a third tier of “reasonably assignable” costs. *Id.* at 823-25.

The two-tier costing approach has been firmly established since the *NAGCP* decision, was adopted in the PAEA, and was acknowledged by UPS itself as recently as last year. *See pp. 7-8, supra.* UPS’s claim that section 3633(b) of the PAEA somehow re-inserted an intermediate third cost tier ignores this history and finds no support in the text, structure, or purpose of the statute.

UPS’s brief highlights the infirmity of the notion of a third category of “associated costs” with a “much looser connection than causation.” UPS asserts, for example, that certain headquarters and data processing costs must be “uniquely” or “disproportionately associated” with competitive products because they are common costs that might be reduced if there were no competitive products, UPS Br. at 32, but that does not follow at all. The words “unique” and “disproportionate” are not synonymous with “common” or “shared.” Such an expansive definition of “unique”

and “disproportionate” costs would encompass virtually all institutional costs and result in the fully distributed costing approach that this Court and the Commission have repeatedly rejected. UPS’s suggestion that the Commission must go farther than it has, and arbitrarily allocate common or shared costs to competitive products beyond what it has already found attributable as reliably caused by them, is both unworkable and contrary to the language and purpose of the statute.

UPS’s efforts to assign additional costs further illustrate the problem. *See* UPS Br. at 29-34. None of these efforts are directed to identifying “unique” or “disproportionate” institutional costs, and UPS does not explain how or why any such costs would not be attributed to competitive products under the Commission’s costing methodology. UPS instead simply makes general critiques of the approved costing methodology, *see* UPS Br. at 31, and unsupported assertions that there must be some unacknowledged unique or disproportionate costs buried somewhere in the common costs. *See, e.g.*, Order No. 4402 at 44 (citing UPS evidence that the Postal Service is interested in competitive product growth but noting that there is “no evidence that management costs are disproportionately associated with competitive products”) (JA ____).

As the Commission correctly observes, UPS’s selective reading of section 3633(b) distorts its meaning. The relevant language requires only that the Commission consider “the degree to which any costs are uniquely or

disproportionately associated with competitive products,” 39 U.S.C. § 3633(b), and thus “plainly contemplate[s] that there may be no uniquely or disproportionately associated competitive product costs. Congress has not required that such costs be found; only for the Commission to ‘consider’ whether ‘any’ exist.” Order at 144 (JA ____). Thus, the Commission may properly determine, as it did here, that there are no such costs beyond the costs it has already identified in its attributable costing methodology.

As the Commission also repeatedly pointed out below, UPS also fundamentally misapprehends the nature of the Commission’s determination in setting the minimum contribution requirement. UPS reads section 3633(a)(3) as a mechanism to allocate some proportionate share of institutional costs to competitive products above and beyond costs attributed under the Commission’s causation-based costing methodology. UPS’s use of the term “allocation” in a technical sense to suggest a causal relationship between competitive products and some share of institutional costs necessarily fails because, by definition, there is no reliably identifiable causal relationship between institutional costs and competitive products. The Commission appropriately rejected UPS’s attempts to assign some proportion of institutional costs based on competitive products’ total costs or revenues as inherently arbitrary and inconsistent with the statute. Order at 36 (JA ____).

UPS's reference to "allocating" institutional costs thus conflates and confuses two separate issues: the Commission's causality-based cost attribution under sections 3633(a)(1) and 3633(a)(2), and the Commission's discretionary determination under section 3633(a)(3) concerning whether to impose a markup or price floor on competitive products sufficient to cover a (non-causally related) designated share of institutional costs. The Commission's finding under section 3633(b) that there are no other costs uniquely or disproportionately associated with competitive products necessarily means there can properly be no further cost allocation. For this same reason, the Commission is explicit that its appropriate share determination is based on its discretionary consideration of non-cost factors. *See Order at 15 (JA ___)*.

UPS's argument also ignores the language of the appropriate share provision as a whole. That provision requires consideration of factors other than unique and disproportionate costs, which the Commission also fully considered. There is no danger that the Commission's finding that there are no costs uniquely or disproportionately associated with competitive products beyond those already attributed under its costing methodology somehow renders the appropriate share provision a nullity. Moreover, by requiring consideration of the "degree to which any" such costs exist, the statutory language easily encompasses the conclusion that such degree might be zero, particularly where all reliably caused costs have already

been attributed. *See id.* at 144 (“Nothing in section 3633(b) prevents the Commission from concluding as it has—that all costs uniquely or disproportionately associated with competitive products are, in fact, captured by the costing methodology it currently employs pursuant to section 3633(a)(2).”).

UPS is also wrong to assert that the Commission has failed to acknowledge “a clear textual difference between the costs reliably caused by a single competitive product that are attributable under section 3633(a)(2), and the costs associated with competitive products collectively that are attributable under section 3633(a)(3).” UPS Br. at 18. In fact, the Commission has explained that, in determining the appropriate share under section 3633(a)(3), it does assess the incremental costs of competitive products collectively, as well as the incremental costs of market dominant products at the class level, to identify total attributable costs. *See* Postal Regulatory Commission, Annual Compliance Determination for Fiscal Year 2017 (March 29, 2018) at 10. The institutional costs continue to be the residual costs left after the total attributable costs for all competitive and market-dominant products and services, whether caused by a single product or multiple products collectively, are subtracted from total accrued costs. *See* Order No. 3506 at 10, n. 15 and Appendix A at 16. UPS in fact expressly acknowledged the Commission’s

collective assessment of such costs in comments in the agency docket of this proceeding.¹

UPS's brief thus does not square with its own stated understanding of the Commission's current methodology, which ensures that both single-product attributable costs and collective ("class-level") attributable costs are assigned to competitive products prior to determination of the appropriate share. The current cost methodology does the very thing that UPS insists it must do to make sure that no institutional costs are uniquely or disproportionately associated with competitive products. The Commission has thus correctly (and necessarily) concluded that no additional "associated" costs remain to be considered when evaluating the "appropriate" percentage to be applied.

Finally, because the appropriate share can itself be entirely eliminated under the plain language of 39 U.S.C. §3633(b), it is inherent in the text of the statute itself that there might be no unique and disproportionate costs required to be allocated in an appropriate share, over and above costs that have already been attributed. *See* Order No. 4402 at 98 (eliminating the minimum contribution requirement is "one of

¹ *See, e.g.*, Comments of United Parcel Service, Inc. on Revised Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products at 3, n.8 (RM2017-1; Sept. 12, 2018) ("The Commission has recently redefined institutional costs to exclude both product- and class-level inframarginal costs.") (JA ____).

the options set forth in the plain language of 39 U.S.C. §3633(b).”) (JA ____). UPS’s statutory arguments are meritless.

II. THE COMMISSION REASONABLY HELD THAT THE POSTAL SERVICE IS NOT ENGAGED IN UNFAIR COMPETITION AND THAT SECTION 3633 TAKEN AS A WHOLE PROVIDES SUBSTANTIAL PROTECTION AGAINST UNFAIR COMPETITION

UPS asserts that “the Order fails even to attempt to address fair competition.” UPS Br. at 38. This assertion is incorrect. The Commission did so at length. For example, the Commission rejected the contention that the current costing methodology distorts competition and creates an advantage for the Postal Service, *see* Order, Sections VIII.B.1, VIII.C.4 (JA ____); noted the lack of evidence that the Postal Service is competing unfairly, and that any advantages it receives due to its government status are outweighed by the burdens imposed upon it, *see id.* Section VIII.B (JA ____); rejected assertions that the Postal Service is underpricing competitive products and is focused on growth rather than profit, *see id.* Sections VII.A.3.a, VIII.B (JA ____); and found that the current structure of the Postal Service and its financial condition create the incentive to maximize profits from its competitive products and that UPS failed to provide any empirical evidence to the contrary. *See id.* Section VII.A.3 (JA ____).

UPS’s varied and somewhat disjointed arguments boil down essentially to two incorrect points: first, that it is somehow improper or inconsistent to cite to the cross-

subsidy and cost attribution portions of 39 U.S.C. §§ 3633(a)(1) and 3633(a)(2) in assessing fair competition; and second that the Commission has failed to address purported problems identified by UPS that the Commission has found do not exist.

The Commission observed that while section 3633(a)(3) is “the primary safeguard against the Postal Service competing unfairly,” Order at 111, “the goal of ensuring fair competition is achieved by section 3633 in its entirety.” *Id.* at 113. (JA ____). UPS asserts that these statements are contradictory, but the statute’s express recognition that the appropriate share can be “eliminated” means that the Commission can, on a proper finding, conclude that sections 3633(a)(1) and 3633(a)(2) are fully sufficient to protect competition and that no minimum contribution requirement is necessary under section 3633(a)(3). The Commission found that “Section 3633(a)(1)’s prohibition against cross subsidization and section 3633(a)(2)’s requirement that competitive products cover their attributable costs prevent competitive products from using the Postal Service’s economies of scale and scope to compete unfairly.” *Id.* at 120 (JA ____). There is no logical or statutory reason the Commission cannot take these findings under sections 3633(a)(1) and 3633(a)(2) into account in assessing fair competition under sections 3633(a)(3) and 3633(b).

Unable to find anything in the statute requiring that costs be allocated under section 3633(a)(3) in addition to those attributed under the Postal Service’s costing

methodology, UPS refers (no less than three times) to a statement of counsel at oral argument in its cost attribution appeal that the appropriate share proceeding would “account for market factors to ensure that the statutorily mandated price floor is not too low as to promote undue competitive behavior.” *See* UPS Br. at 2, 34, 40. That is exactly what the Commission did. The Commission extensively considered the relevant circumstances, including the prevailing competitive conditions, to determine the appropriate share of institutional costs to be covered by competitive products.

UPS argues that the Commission’s formula does not protect against Postal Service prices that are artificially low, only prices that are too high. UPS Br. at 40-42. This argument misconstrues the minimum contribution requirement, which is properly viewed as a minimum price floor, not a price ceiling. Order at 18 (JA ____). By definition, the constraint on maximum prices for competitive products is competitive conditions, not a regulatory price cap. As to the concern that prices might be too low, UPS ignores the extended discussion in Order No. 4402 that any concerns regarding predatory or anticompetitive pricing by the Postal Service are effectively mitigated by the aggregate incremental cost test applied via section 3633(a)(1) and the requirement imposed by section 3633(a)(2) that each competitive product cover its attributable costs. *See* Order at 113 (citing Order No. 4402 at 8 n.18; Order No. 1449 at 15) (JA ____).

Additionally, the Commission found no evidence of predatory pricing. *See id.* at 115-16 (citing Order No. 4402 at 37; Order No. 4742 at 50) (JA ____). This is not surprising given that predatory pricing requires pricing below cost, and the Postal Service complies with section 3633(a)(2), which requires that each competitive product be priced at a level that covers its attributable costs. *See id.* at 116 n.209 (JA ____). The Commission also specifically found that concerns about predation were entirely inconsistent with the Postal Service's actual pricing behavior, as its prices have generally increased faster than inflation and been similar to those of its competitors. *Id.* at 126-29 (JA ____). The Commission further found that the Postal Service has no incentive to sacrifice contribution from competitive products to gain volume, *see* Order No. 4402 at 50-51, 74-75 (JA ____), and its pricing over the past decade has led to increased contribution by increasing prices on growing volumes of competitive products. *See id.* at 17, 52 (JA ____). The Commission also noted that any predation would be picked up by the proposed formula, which would trigger further Commission action. *See id.* at 116 & n.210 (JA ____). Finally, the Commission observed that under the PAEA, the Postal Service is fully subject to generally applicable antitrust laws and no relevant antitrust actions have been brought against the Postal Service alleging unfair competition. *See* Order at 116 (citing Order No. 4402 at 35 n.61) (JA ____). In summary, UPS is incorrect that the Commission has failed to address this aspect of unfair competition.

The Commission thus did not merely assume away the possibility of unfair competition; rather, it made a series of affirmative findings that there was no evidence to support UPS's contentions to the contrary. UPS cites to legislative history regarding fair competition concerns to argue that the Postal Service should not be in the package business because its status as a government entity necessarily means that the Postal Service is competing unfairly with private companies for the delivery of packages. UPS Br. at 42-48. But the very legislative history UPS cites accompanies a statute that expressly *reaffirmed* the Postal Service's authority to offer package delivery services, subject to appropriate guardrails to ensure fair competition. *See* 39 U.S.C. § 3631. *See also* *100 Years of Parcel Post*, USPS OIG Rpt. No. RARC-WP-14-004 (Dec. 20, 2013) (a history of postal package delivery services, including the debate and enactment of Parcel Post legislation in 1912 in response to abuses of private express package delivery companies).

As the Commission notes, the advantages the Postal Service receives from its governmental status “must be considered in the context of the unique burdens mandated by Congress—obligations that private competitors do not have.” Order at 122 (JA ____). These include the unique obligation to prefund 100 percent of its employees' post-retirement benefits and constraints on how it can invest those funds that no private company faces, which UPS wrongly cites as evidence that the Postal Service “faces a softer budget constraint than does any private company,” and thus

may be pricing improperly. UPS Br. at 46 (JA ____). UPS asserts that governmental entities like the Postal Service have “different incentives” from private companies, but the Postal Service, unlike most governmental entities, is funded from its operations, not from appropriated tax revenues, and the Commission specifically found that the Postal Service’s actual pricing behavior demonstrates its commitment to maximizing profits from its package delivery business. *Id.* As the Commission noted, the “Postal Service, like other firms, is expected to recover all of the costs caused by its operations.” Order at 120 (JA ____). For all of these reasons, the Commission concluded that based on the information available, the findings of the FTC Report concluding that the Postal Service operates at a “net competitive disadvantage,” remain valid. Order No. 4402 at 61, 65, 97 (JA ____).

As the Order notes, UPS’s claims of unfair competition are also belied by the overall performance of the package delivery industry, which has grown substantially while UPS and other competitors have thrived and become more profitable. While the Postal Service has increased its share of the package delivery business, that share remains relatively low. *See* Order at 135-37 (JA ____). Indeed, the Order understates the evidence of record, which showed that UPS is targeting total revenue growth of between four and six percent in 2018-2019, has a “strong history of returns on capital” and “industry leading margins,” achieved “exceptionally strong revenue and yield growth” in FY 2017, and reported a total revenue increase of more than eight

percent while “growth opportunities are accelerating.” *See* ASI NPRM Comments at 17 (JA ____). UPS counters that the Commission has not undertaken a product-level inquiry on the point, *see* UPS Br. at 52-53, but points to no evidence that it has suffered any harm at the product level. The evidence UPS does advance on this point is outside the record, including the Postal Service’s “latest 10-Q at the time of the Order,” UPS Br. at 49, and the conclusions of a report that, as the Commission found and UPS does not dispute, provided no new evidence. *Id.* at 51-52.

Finally, intervenors note that UPS’s threshold assumption that the Commission should “level” the competitive playing field by suppressing price competition from the Postal Service is deeply unfair to mailers, shippers, and ultimately consumers. Fairness to those stakeholders suggests that the Postal Service, like any other competitor, should be allowed to price to incremental cost when needed to attract business. No private carrier, including UPS, is required to recover from any subset of its product offerings an arbitrary percentage of its institutional costs. In making its appropriate share determinations, the Commission has wisely applied its discretion to avoid impairing or destroying the many consumer benefits that have accrued from the Postal Service’s full participation in a vigorously competitive package delivery industry.

In sum, the Commission did not assume away the possibility of unfair competition, as UPS wrongly asserts. Instead, it reasonably found that that the Postal

Service was not engaged in unfair competition and that 39 U.S.C. §§ 3633(a)(1) and 3633(a)(2) already provide substantial protection against the possibility of unfair competition. The Commission's decision to nonetheless include a further safeguard—an increased appropriate share—against unfair competition was well within its discretion and caused no injury to UPS.

III. UPS IS INCORRECT THAT THE COMMISSION DID NOT EXPLAIN OR JUSTIFY ITS FORMULA-BASED APPROACH

As set out above, the statute expressly and unambiguously vests the Commission with the discretion to eliminate the minimum contribution requirement. The Commission declined to eliminate the appropriate share in light of the “state of flux, innovation and growth” in the package delivery business. Order No. 4402 at 96, 98 (JA ____). The Commission then determined to establish a formula to set an appropriate share. Given the absence of any Commission findings that competitive conditions or any unique or disproportionate costs required retaining an appropriate share requirement, the Commission's decision may be best viewed as a prophylactic measure in the event that future developments suggest a competitive problem to be addressed.

The formula consists of two components: one intended to measure changes in the Postal Service's pricing power and the other to measure changes in its position in the package delivery business. The Commission explained that the two elements of the formula capture different considerations within the statutory criteria: “(1) the

existence (or nonexistence) of evidence suggesting that the Postal Service has benefitted from a competitive advantage with respect to competitive products; (2) changes to the Postal Service's market share with respect to competitive products since the Commission's last review; and (3) changes to the package delivery market and to the Postal Service's competitors since the Commission's last review." Order, at 102 & n.181 (JA ____).

The first element of the formula, the "competitive contribution margin," is meant to capture the changes in the Postal Service's market power. UPS complains that "if the Postal Service manages to obtain significant market power but then stops *increasing* its market power, the appropriate share will not change." UPS Br. at 54 (emphasis in original). The Commission properly found that the Postal Service does not have or exercise market power now, so a formula that includes changes in market power is adequate to the task.

The second element of the formula, the competitive growth differential, is designed to assess the growth or decline of the Postal Service's competitive position from year to year. As modified, it directly incorporates Postal Service's share of the package delivery business into the calculation of the appropriate share, and "changes in the market and to competitors, such as overall market growth, firm entry or exit from the market and innovation, are reflected by both of the modified components." Order No. 4742 at 50-51 (JA ____).

UPS complains that this does not reflect *why* the Postal Service's share is changing, so that it would be "punished" if it were to win business on the merits and rewarded if UPS or others took business away from it on the merits. UPS Br. at 55. UPS's own brief, however, takes the Postal Service's increase in share by itself as evidence that it may be pricing improperly and acknowledges that there is no evidence in the record one way or the other as to whether the Postal Service is "operating better or more efficiently than its private competitors." *Id.* at 49. UPS does not suggest how such evidence would be obtained, and the Commission is entitled to consider in its formula an increase in share as an indication of whether the Postal Service might be obtaining an unfair advantage, just as UPS itself has. *See Leather Indus. of Am., Inc. v. EPA*, 40 F.3d 392, 403 (D.C. Cir. 1994) ("An agency has discretion to design rules that can be broadly applied, sacrificing some measure of 'fit' for administrability."); *Am. Pub. Gas Ass'n v. FPC*, 567 F.2d 1016, 1046 (D.C. Cir. 1977) ("Courts cannot fairly demand the perfect at the expense of the achievable."); *Ass'n of Am. Publishers, Inc. v. Governors of U.S. Postal Serv.*, 485 F.2d 768, 773 (D.C. Cir. 1973) (Rate setting is not "an exact science," and perfection is not "mandatory.").

UPS's argument that the Commission failed to provide a reasoned explanation of the operation and weighting of the components of the formula, *see* UPS Br. at 55-57, is contradicted by the record below. Far from being "unexplained," the

Commission provided legal and economic justifications for the equal weighting of the two components of the formula, including a detailed analyses in response to UPS's comments. *See* Order at 99 (citing Order No. 4742 at 43-46) (JA ____).

UPS's argument that the start value of 5.5 percent, the prevailing minimum contribution requirement, is "irrational" also fails. Using the prevailing actual appropriate share of 5.5 percent is not irrational. The Commission explained that it proposed to roll forward the formula from FY2007 to assess changes in competitive conditions since the enactment of the PAEA; thus, it planned to use 5.5 percent, the appropriate share in FY2007, as the start value. UPS's counterproposal to use a start value of 30.9 percent is a transparent attempt to preordain the results to produce a minimum contribution requirement that would force the Postal Service to set its prices above competitive levels. Furthermore, the Commission offered a detailed explanation why it elected to use the prevailing appropriate share as the start value and why it rejected UPS's proposals—a three-year average of competitive products' share of attributable costs or revenue share—as discredited variations of fully distributed costing proposals. *See* Order at 95-98 (citing Order No. 4742 at 37-41) (JA ____).

As some of the intervenors commented, the Commission was not required to adopt a formula, and it could have assessed the competitive factors more qualitatively. The Commission responded by explaining that it views margins as an

accepted indicator of pricing power, and a large growth in the Postal Service's share of competitive product sales is a possible indicator that competitive factors might warrant an increase in the appropriate share. Any problems created by the necessary imprecision of the formula are attenuated by the minimum contribution requirements likely to be generated by the proposed formula, its recursive nature, and the Commission's commitment to conduct an annual review of the contribution levels. *See* Order at 97-98; Order No. 4402 at 15, 30-31, 52, 82, 88, 98-99 (JA ____).

CONCLUSION

For the reasons stated above, the Order is fully consistent with the Commission's statutory obligations and this Court's prior holdings, and supported by substantial evidence in the record and a reasoned explanation. The petition for review should be denied.

Respectfully submitted,

_____/s/_John Longstreth_____

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September 12, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief that are exempted by Fed. R. App. P. Rule 32(f), the brief contains 9,002 words.

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 proportional typeface using Microsoft Word 2016 in Times New Roman 14-point font.

/s/ John Longstreth

John Longstreth

September 12, 2019

STATUTORY AND REGULATORY ADDENDUM

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. § 3633. Provisions applicable to rates for competitive products

(a) In general. — The Postal Regulatory Commission shall, within 18 months after the date of enactment of this section, promulgate (and may from time to time thereafter revise) regulations to —

(1) prohibit the subsidization of competitive products by market-dominant products;

(2) ensure that each competitive product covers its costs attributable; and

(3) ensure that all competitive products collectively cover what the Commission determines to be an appropriate share of the institutional costs of the Postal Service.

(b) Review of minimum contribution. — Five years after the date of enactment of this section, and every 5 years thereafter, the Postal Regulatory Commission shall conduct a review to determine whether the institutional costs contribution requirement under subsection (a)(3) should be retained in its current form, modified, or eliminated. In making its determination, the Commission shall consider all relevant circumstances, including the prevailing competitive conditions in the market, and the degree to which any costs are uniquely or disproportionately associated with any competitive products.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September 2019, true and correct copies of this brief were served by filing electronically with the Court through the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. There are no other parties to be served.

/s/ John Longstreth
John Longstreth

September 12, 2019