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

UNITED STATES POSTAL SERVICE,

*Petitioner,*

NATIONAL POSTAL MAIL HANDLERS UNION,

*Intervening Petitioner,*

v.

POSTAL REGULATORY COMMISSION,

*Respondent,*

AFFORDABLE MAIL ALLIANCE et al.,

*Intervening Respondents.*

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**CORRECTED REPLY BRIEF OF PETITIONER  
UNITED STATES POSTAL SERVICE**

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## GLOSSARY

CPI	Consumer Price Index
Order	<i>Order Denying Request for Exigent Rate Adjustments</i> , Order No. 547, Docket No. R2010-4 (Sept. 30, 2010)
PAEA	Postal Accountability and Enhancement Act
PRC	Postal Regulatory Commission

## SUMMARY OF ARGUMENT

1. The PRC's brief attempts to retreat from the rigid interpretation of "due to" that underlay its denial of the Postal Service's exigent rate request and to recharacterize its order as resting on a general "relatedness" standard. In the order under review, however, the PRC faulted the Postal Service for failing to "isolate" and "quantify the impact of the recession on postal finances" and to "show that its proposed rate adjustments are *tailored to offset* the *specific* effects of the claimed exigency," JA 151, 212 (emphasis added) — a demanding test that can be termed, without exaggeration, a "strict offset requirement." The PRC now claims that it denied the request because the Postal Service "did not make even a rudimentary attempt to relate the proposed price increase to the effects of the recession." PRC Br. 18. The PRC's attempted retreat runs head-on into the plain language of its order and creates a pervasive *Chenery* problem with the PRC's attempt to defend its order in this Court.

2. The PRC's strict offset requirement was premised on an indefensible reading of the statutory text, which may explain the PRC's unwillingness to defend it. The "due to" clause of § 3622(d)(1)(E) appears in the part of the statute directing the PRC to promulgate regulations creating a framework for considering exigent rate requests, not the part setting forth the standard for the PRC to evaluate the

merits of exigent rate requests — a standard clearly set off by the introductory phrase “provided that the Commission determines.” At most, therefore, the “due to” clause might allow the PRC to promulgate regulations specifying the content of exigent requests, with clear, *ex ante* guidance, as a way to guard against exigent requests lacking even a “rudimentary” relationship to the extraordinary or exceptional circumstance relied upon. The PRC, however, has not promulgated any such regulations and did not rest its decision on its regulations. Instead, it rested its decision on its view that *the statute* unambiguously imposed a far more demanding nexus test that provided a basis for rejecting an exigent rate request without even reaching the statutory standard for evaluating such requests.

3. The Postal Service’s request clearly satisfied the general relatedness standard that the PRC now advocates, further confirming that this was not actually the standard the PRC applied below. The Postal Service demonstrated, and the PRC did not dispute, that unprecedented, recession-related postal volume losses were costing the Postal Service billions of dollars in annual revenue and greatly accelerating the deterioration of the Postal Service’s longstanding business model, which was premised on the historical trend of *increasing* volume to meet the ever-rising costs of fulfilling its obligation to provide universal service. In response to the Great Recession and associated volume and revenue losses — which the PRC agreed

were “extraordinary or exceptional” — the Postal Service proposed rate increases that were projected to increase revenue by roughly \$3 billion per year. The PRC does not explain why this submission failed to satisfy the general “relatedness” standard it defends in its brief. Nor does the PRC reveal what additional information the Postal Service could have submitted to meet that standard. The PRC’s oft-repeated claim that the Postal Service did not even *try* to make a bare, threshold showing of relatedness is a gross distortion of the record.

4. The PRC and its supporters further demonstrate the arbitrariness of the PRC’s decision when they contend that the Postal Service’s request could not satisfy the “relatedness” requirement simply because the Postal Service was experiencing a broader financial crisis caused by multiple factors and because it formulated a comprehensive plan to deal with that crisis. The existence of a broader crisis increased, rather than diminished, the significance of the major revenue losses the Postal Service experienced as a result of “extraordinary or exceptional” recession-related volume declines, and in no way eliminated the PRC’s statutory responsibility to provide relief from those losses. The PRC’s reasoning bizarrely punishes the Postal Service for responsible management and makes the statutory safety valve least useful when it is most needed. In addition, it is illogical to deny safety valve relief by pointing to costs (such as congressionally mandated retiree health benefits

payments) that are completely outside of the Postal Service's control. The Postal Service's costs are relevant to the issue of exigent relief only if they are avoidable through "honest, efficient, and economical management." 39 U.S.C. § 3622(d)(1)(E).

5. The Postal Service did not have fair notice of the PRC's interpretation of "due to" as imposing a strict offset requirement. Neither the statute, nor the PRC's regulations, nor the numerous questions the PRC posed to the Postal Service during the proceedings below, nor the comments of the Public Representative alerted the Postal Service that the PRC would impose such a demanding test. Moreover, the PRC's suggestion that the Postal Service simply file a new request is the height of unfairness given that the PRC has now further muddied the waters by backtracking from the strict standard it articulated below and expressly declining to explain what showing the Postal Service would have to make to prevail on a future request. The PRC's effort to kick the can down the road also ignores the undisputed exigency of the Postal Service's financial crisis.

## ARGUMENT

### I. The PRC's Interpretation of "Due To" Is Contrary to Law.

#### A. The PRC Interpreted "Due To" as Imposing a Strict Offset Requirement, Not the General "Relatedness" Requirement to Which the PRC Retreats in Its Brief.

In its brief, the PRC tries to sweep under the rug the interpretation of the statutory phrase "due to" that it adopted below. In doing so, the PRC defends a decision very different from the one it actually issued, which leaves the decision under review essentially undefended. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (agency decision must stand or fall on agency's reasoning in the administrative proceeding).

In its order, the PRC correctly found that the massive, unprecedented volume declines experienced by the Postal Service in connection with the Great Recession constituted "extraordinary or exceptional" circumstances. That finding is undisputed in this Court. The Postal Service demonstrated that those recession-related volume losses were already costing the Postal Service billions of dollars in annual revenue and that they would continue to negatively impact revenue for years to come. Despite that evidence, the PRC stated it had no choice but to deny the Postal Service's request as not "due to" extraordinary or exceptional circumstances because the Postal Service had failed to "isolate" and "quantify the impact of the recession on postal finances" and to "show that its proposed rate adjustments are *tailored to offset*

*the specific effects* of the claimed exigency.” JA 151, 212 (emphasis added); *see also* JA 214 (faulting the Postal Service for failing to “identify and quantify” its “losses attributed to the exigency”).

The Postal Service has fairly characterized the PRC’s demanding “due to” test as a “strict offset” requirement. It is clear from the order that the Postal Service could not have satisfied the PRC’s interpretation of “due to” unless it presented “detailed economic evidence showing that the proposed increase would generate income equal to the losses caused by the extraordinary or exceptional circumstances.” Postal Serv. Opening Br. 5.

The PRC and its supporters, however, reject that characterization. The PRC now claims that it never required the Postal Service to “design price increases to recapture precisely [the] amount of revenue” that “would be lost due to the recession.” PRC Br. 18. Instead, the PRC attempts to recast its decision as resting on a far more relaxed, general “relatedness” standard. The PRC thus contends that it demanded only a “rudimentary effort to relate” the request to the exigent circumstances and that the Postal Service failed even that minimal threshold test. *Id.*; *see also, e.g., id.* at 17 (Postal Service “made no attempt to relate the requested price increases to those circumstances”). Intervenors and amici in support of the PRC echo that revisionist reading of the PRC’s order. *See* AMA Br. 16; Sen. Collins Br. 30 n.6.

This effort to rewrite the order under review will not work. The PRC and intervenors may quibble with the Postal Service's use of the phrase "strict offset," but "offset," in conjunction with demands for a "tailored" and "specific" showing, comes straight from the order under review. One will search the PRC's order in vain for any reference to a "rudimentary effort to relate" test. It would have been far more cumbersome, but no more accurate, to refer to the PRC's test as the "tailor[ing] to offset the specific effects' of the exigency" test. But quibbles about precise wording aside, the PRC cannot escape the reality that its order employed a test akin to strict scrutiny, and it comes before this Court defending something akin to rational basis. That recharacterization of the order under review not only avoids the serious problems with the PRC's actual order, it leaves the PRC's mistaken statutory interpretation essentially undefended. *See Chenery, supra.*

**B. The PRC's Strict Offset Requirement Was Contrary to the Plain Meaning of the Statute.**

The PRC believed its strict offset interpretation was mandated by the text of § 3622(d)(1)(E). *See, e.g.,* JA 174, 228, 234. It did not purport to rely on either its regulations or any discretion that may be afforded it under the statute. Nonetheless, the PRC and its supporters reflexively invoke deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), without pausing to consider whether the PRC actually exercised any interpretive authority that Congress may have implicitly

delegated to it, or whether — as is clearly true in this instance — the PRC “believe[d] that its interpretation [was] compelled by Congress.” *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002). In doing so, they ignore this Court’s oft-repeated instruction that *Chevron* deference “is reserved for those instances when an agency recognizes that the Congress’s intent is not plain from the statute’s face.” *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006); *see also, e.g., Sec’y of Labor, Mine Safety & Health Admin. v. Nat’l Cement Co. of Cal., Inc.*, 494 F.3d 1066, 1073 (D.C. Cir. 2007) (*Chevron* deference was not appropriate because the agency had “incorrectly treated the statute as unambiguous and interpreted it accordingly”). Therefore, as the Postal Service already explained and the PRC does not refute, the PRC’s decision cannot stand unless the statute unambiguously requires the PRC’s interpretation. *See* Postal Serv. Opening Br. 33-34.

The opposite is true: The PRC’s rigid interpretation of “due to” was clearly wrong, as is suggested by the PRC’s decision to abandon it before this Court. “Due to” is merely part of the statute’s procedural direction to the PRC to promulgate regulations to consider exigent rate requests. The substantive standard that Congress supplied to govern those requests is set forth clearly in the statute: whether the proposed increases are “reasonable and equitable” and “necessary” to the

maintenance of quality postal services. The one thing that “due to” unambiguously cannot do is supplant that explicit statutory standard for judging the merits of exigent rate requests.

The PRC argues that the location of “due to” in a direction to promulgate rules does not diminish its significance because “other plainly substantive provisions of the statute” were also “enacted as directions to” the PRC. PRC Br. 27. But the PRC’s argument ignores the fact that in crafting § 3622(d)(1)(E), Congress chose to place “due to” *before* the words “provided that the Commission determines,” which introduce the substantive standard by which the PRC is to evaluate the merits of an exigent rate request. Whatever flexibility the PRC might enjoy — under *Chevron* step two, not step one — to infer substantive standards from directions to promulgate regulations, it cannot use such a direction to supplant a substantive standard provided directly by Congress in the next phrase of the statute. In this context, Congress made unmistakable what the PRC was to promulgate and what the PRC was to “determine[],” namely, whether the request was “reasonable and equitable” and “necessary.” The PRC cannot duck that question by placing novel and countertextual weight on the seemingly innocuous words “due to.”<sup>1</sup>

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<sup>1</sup> The PRC’s brief never quotes § 3622(d)(1)(E) in full, which may contribute to its misunderstanding of the statute’s structure.

The ordinary meaning of “due to” is “because of,” as the PRC and its supporting intervenors accept. *See* PRC Br. 25; Sen. Collins Br. 22. That meaning, combined with the placement of “due to” in the portion of the statute directing the PRC to promulgate rules to govern the consideration of exigent requests, makes clear that “due to,” at most, addresses the threshold standard for whether a request was properly filed as an exigent request and thus needs to be evaluated pursuant to the safety valve provision’s substantive standard. The “due to” clause does not itself supply that substantive standard. In keeping with the procedural nature of the “due to” clause, the PRC presumably could promulgate regulations expanding on the “due to” clause by specifying what information the Postal Service must submit with its request. Such regulations might serve the purpose of enabling the PRC to verify that a purported exigent request was properly filed as such and merited consideration within the framework for such requests.<sup>2</sup>

The PRC, however, has not promulgated such regulations and, in any event, did not make any finding below that the Postal Service’s filing of an exigent rate adjustment request was not actually prompted by the “extraordinary or exceptional” circumstances relied upon by the Postal Service and confirmed by the PRC itself. The PRC’s only potentially relevant regulation simply requires a “complete

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<sup>2</sup> Such regulations would answer Senator Collins’ concern that the Postal Service not be allowed to “circumvent the price cap.” Sen. Collins Br. 28.

explanation” of how the proposed increases “relate to” the exigent circumstances. 39 C.F.R. § 3010.61(a)(3). Although the PRC mentioned this regulation in its order and faulted the Postal Service for failing to satisfy it, *see* JA 205, 207, the PRC did not rest its decision on the regulation but on what it thought the statute unambiguously commanded, *see id.* at 174, 228, 234. Nor, of course, did that regulation give the Postal Service any notice of the demanding “tailor[ing] to offset the specific effects” of the exigency — a.k.a. strict offset — requirement. There is little doubt that the Postal Service satisfied the “relate to” standard of the regulation. *See* Part I.C, *infra*.

More broadly, the PRC and its supporting intervenors appear to suggest that § 3622(d)(1)(E)’s statutory safety valve, including the “due to” clause, must be interpreted as restrictively as possible in order to vindicate congressional intent. *See, e.g.,* JA 207 (the “exception to the price cap . . . is to be narrowly construed”); AMA Br. 23 (“Congress made the exception narrow”). But this argument betrays a total misunderstanding of the role of safety valve provisions like § 3622(d)(1)(E). A safety valve’s operation, by definition, runs counter to the general direction of the broader statute. But that does not mean that the safety valve is undermining the statute’s purposes or that it should be narrowly construed. As this Court has recognized, unduly narrowing a statutory safety valve can itself frustrate the purposes of the statutory or regulatory scheme: A “limited safety valve permits a more rigorous

adherence to an effective regulation. To hold the safety valve too rigidly is to interfere with the relief that was contemplated as an integral part of the firmness of the overall, enduring program.” *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 641 (D.C. Cir. 1973).

The rule against unduly narrowing statutory safety valves is a corollary of the more general principle, regularly reiterated by the Supreme Court, that “no legislation pursues its purposes at all costs...and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). In the PAEA, Congress balanced the goal of providing incentives for efficient postal management with the need to ensure that the Postal Service has the financial stability and resources required to carry out its universal service obligation. *See* 39 U.S.C. § 3622(b). Congress struck that balance by adopting *both* a firm price cap *and* a robust safety valve. As both provisions are integral parts of the statutory scheme, there is no justification for placing a thumb on the scales to elevate the price cap and constrict the safety valve contrary to the statute’s plain terms.

Senator Collins attempts to bolster the argument for narrow construction of § 3622(d)(1)(E) by asserting that Congress “rejected” a “flexible” House-passed

standard for when exigent rate increases are authorized and “adopted the Senate’s more stringent standard” in its place. Sen. Collins Br. 10. This is incorrect. In fact, the final version of the PAEA reflected a compromise between a House version of the safety valve — which would have authorized above-CPI rate increases whenever the PRC determined that “such increase is reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient and economical management, to maintain” quality postal services, without reference to exigent circumstances — and a Senate version that would have limited increases to “unexpected and extraordinary circumstances.” *See* H.R. 22, 109th Cong., 1st Sess., § 3622(e) (Jan. 4, 2005); S. 662, 109th Cong., 1st Sess., § 3622(d)(1)(D) (Mar. 17, 2005). As the National Postal Mail Handlers’ Union has well demonstrated, *see* NPMHU Br. 5-14, the final bill incorporated significantly more flexibility than the Senate-passed version. The PAEA adopted the House’s standard for evaluating the merits of an exigent request without significant alteration. The PAEA also incorporated the Senate’s language into the instruction to the PRC to promulgate rules for administration of the safety valve, while simultaneously relaxing that language by substituting “exceptional” for “unexpected” and replacing the conjunctive “and” with a disjunctive “or.” Thus, neither the language nor the

legislative history of the original Senate version provides any basis to ignore the plain terms of the safety valve actually adopted in the PAEA.

**C. The Postal Service’s Request Clearly Satisfied the General “Relatedness” Standard that the PRC Now Advocates.**

Perhaps the strongest evidence that the PRC in fact applied an erroneous strict offset test and not the “rudimentary effort to relate” test it defends in its brief — apart from the plain language of its order — is that the Postal Service’s request clearly satisfied the more relaxed test. The PRC’s contention that the Postal Service “made no attempt to link the requested price increases to the claimed exigency” blatantly distorts the record. In addition, the argument by the PRC and its supporting intervenors that the contribution of other factors besides the recession to the Postal Service’s broader financial crisis somehow prevented a “relatedness” finding is illogical and perverse. The PRC’s approach makes the safety valve least useful when it is most needed. It also punishes the Postal Service for acting responsibly by crafting a comprehensive plan to deal with all of its financial difficulties, which were not caused exclusively, but surely were exacerbated, by the Great Recession.

1. **The Evidence Submitted by the Postal Service Was More than Sufficient To Establish that the Request Was “Related” to the “Extraordinary or Exceptional” Circumstances.**

The Postal Service presented evidence that (i) the Postal Service suffered substantial financial harm attributable to the extraordinary or exceptional circumstance, and (ii) the exigent rate request was designed as a reasonable and measured response to that harm. It is hard to see what more the Postal Service should have done to convince the PRC that it was making “a rudimentary attempt” to demonstrate a relationship between its request and the exigent circumstances.

The Postal Service submitted extensive evidence concerning the impact of the recession on its finances, the projected revenue gains from the proposed rate increases, and the overall dimensions of its broader financial crisis. This evidence was more than sufficient to establish three key points: *First*, the unprecedented and continuing volume losses associated with the recession had already cost the Postal Service billions of dollars in lost revenue and would continue to cost billions in annual revenue going forward. *Second*, the Postal Service’s requested rate adjustments were designed as a reasonable and restrained response to those ongoing recession-driven losses, which the PRC agreed were “extraordinary or exceptional.” *Third*, the requested rate adjustments were *not* designed to achieve the magnitude of revenue

increases that would be necessary to resolve the Postal Service's broader financial crisis.

It was impossible for the Postal Service to pin an exact number on its losses that were attributable to the recession, given the difficulty of isolating the recession's impact from other factors (such as the pre-existing issue of electronic diversion), especially because the other factors were not independent variables (for example, the strains of the recession accelerated electronic diversion). The difficulty of any precise demonstration was exacerbated by the fact that the recession-driven decline in mail volume had accelerated throughout the recession and was continuing at the time of the request. Nonetheless, the Postal Service was able to calculate its losses from the overall volume decline in FY 2007-2009 to be roughly \$5 billion, of which "nearly three-quarters" occurred in 2009 alone. *See* JA 43, 56 n.8 (Corbett Statement); *id.* at 225 (PRC Order). The Postal Service further estimated that approximately two-thirds of the volume losses were "generally related to the economy, the employment levels, the least level of money people are spending on retail, advertising, and on investments" — in other words, the recession — and that the remaining one-third was "directly related to electronic migration." Tr. Vol. 1 at 24 (Corbett testimony). Those figures — all of which were presented to the PRC in connection with the

Postal Service's request — suggested that the Postal Service lost at least \$2.5 billion in 2009 alone due to recession-related volume declines.<sup>3</sup>

Moreover, there are a number of reasons why the \$2.5 billion figure actually *understates* the impact of the recession on postal finances. For one thing, even though the Postal Service's CFO stated that one-third of its volume losses were “directly” traceable to electronic diversion, some of those volume losses were undoubtedly caused by the recession, which accelerated the pace at which financially strapped businesses and consumers switched from mail to cheaper electronic alternatives. *See id.* at 15; JA 55 (Corbett Statement). For this reason, the PRC erred when it assumed that none of the one-third of volume losses the Postal Service attributed to electronic diversion could also be attributable to the recession. *See* JA 226. Further, looking only at the revenue impact of the absolute *decline* in mail volume understates the recession's impact on postal finances because it ignores the revenue impact of expected economy-driven volume *increases* that did not materialize. As the Postal Service explained, mail volumes historically increased on

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<sup>3</sup> That is, two-thirds of three-quarters of \$5 billion. The PRC took issue with certain aspects of the Postal Service's methodology, but its quibbles did not undermine the central point that the Postal Service was suffering continuing, multi-billion dollar annual losses *due to* the recession. For example, the PRC suggested that “[i]nclusion of any volume loss” after the recession formally ended in June 2009 “in an analysis of the impact of the extraordinary or exceptional circumstance would appear to be problematic.” JA 226. That is an absurdly technical objection, given that the recession's devastating impact on businesses, consumers, and mail volumes did not suddenly end on that date, and in fact continues to this day. Moreover, this hypertechnical quibble simply confirms that the PRC was applying a strict offset standard, not a looser “relatedness” standard.

a year-over-year basis (even in the face of electronic diversion in the years immediately prior to the Great Recession) with very few exceptions, which in turn enabled the Postal Service to fund the costs of its ever-expanding delivery network — costs that are necessary to provide retail, processing, and delivery activities that are consistent with the Postal Service’s universal service obligation. *See* JA 24 (Exigent Request); *id.* at 43 (Corbett Statement); *id.* at 181 (PRC Order); *cf.* PRC Br. 5. The recession damaged postal finances not only by causing mail volume to *decline*, but also by reversing the broader trend in which the long-term growth of the economy actually *increased* mail volume.

Thus, the Postal Service clearly established that it was experiencing ongoing, multi-billion-dollar annual losses because of the “extraordinary or exceptional” recession-driven volume declines. The PRC may not have agreed with every aspect of the Postal Service’s methodology for estimating its losses, but it never cast any serious doubt on that basic fact. Against that backdrop, the Postal Service’s request for rate adjustments that would have boosted annual revenue by approximately \$3 billion, *see* JA 205; PRC Br. 43, was a reasonable, measured, and restrained response to the exigency facing the Postal Service. The request was for significantly less than the \$6.5 billion the Postal Service was then forecasting it would lose in 2010. *See* Postal Serv. Opening Br. 14. Even though it is impossible to determine the

recession's monetary impact on the Postal Service with absolute precision, the Postal Service presented more than enough evidence to demonstrate that its exigent request was at least "related" to the circumstances the PRC found to be "extraordinary or exceptional."

Yet according to the PRC's appellate brief, the Postal Service did not make "even a rudimentary attempt to relate the proposed price increase to the effects of the recession." PRC Br. 18. The PRC's explanation of its order is implausible in light of the evidence submitted by the Postal Service that clearly established "relatedness." That the PRC found this evidence so unsatisfactory confirms that it was interpreting "due to" to require not just proof of "relatedness," but a detailed and precise showing that — in the PRC's own words — the "proposed rate adjustments are tailored to offset the specific effects of the claimed exigency." JA 212. As explained above, that approach was inconsistent with the statute. Requiring the Postal Service to make its case with the level of precision demanded by the PRC would render the safety valve useless in confronting exigent circumstances and contravene Congress's intent, given the practical difficulty inherent in disaggregating the mutually reinforcing challenges facing the Postal Service and quantifying them with precision on an expedited basis.

The PRC's behavior in the proceedings below further confirms that the PRC's brief mischaracterizes its order. If the PRC had truly believed, as it now claims, that

the Postal Service had “made no attempt to link the requested price increases to the claimed exigency,” *id.* at 31, it could easily have asked the Postal Service to provide that information. Instead, the PRC made seven separate requests for detailed financial information from the Postal Service without so much as hinting that the Postal Service had failed at the threshold to make even a “rudimentary” showing of relatedness. That course of action would be inexplicable if the PRC had actually been applying the test it now seeks to defend.<sup>4</sup>

## **2. The Postal Service’s Evidence of Relatedness Was Not Undermined by the Existence of a Broader Financial Crisis.**

The PRC and its supporting intervenors argue that the Postal Service’s request could not have been “due to” the extraordinary or exceptional circumstance — the recession and its impact on postal volumes — because the Postal Service’s impending financial crisis is not *solely* attributable to the effects of the recession but stems as well from other factors, such as the congressionally imposed retiree health benefits prefunding requirement. *See, e.g.*, PRC Br. 31 (“the Postal Service’s own submissions demonstrated that factors other than the recession and associated

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<sup>4</sup> In addition, as the Postal Service pointed out in its opening brief, the PRC already had access to a vast amount of financial data provided by the Postal Service, both in routine filings and in connection with other PRC proceedings. Yet the PRC chose not to examine any of that data to fill the gaping hole it claims to have found in the Postal Service’s request, despite agreeing that the Postal Service faces a financial crisis caused at least in part by extraordinary or exceptional circumstances. This refusal to consult readily available data was all the more notable given that the PRC’s order engaged in a wide-ranging discussion of the Postal Service’s financial condition that relied upon data drawn from the Postal Service’s quarterly financial statements and the PRC’s “annual compliance determination” proceedings. *See, e.g.*, JA 79, 83-85.

volume declines were largely responsible for its financial duress”); AMA Br. 28 (asserting as a basis for the PRC’s decision that “the Postal Service’s most important problems were long term and structural”); Sen. Collins Br. 30 (“the real issue the Postal Service should be addressing is its chronic, long-term structural problems”). These arguments echo the PRC’s reasoning in the order under review, which argued at length that the “principal cause” of the financial crisis was “the overly optimistic [retiree health benefits] prefunding schedule,” not the recession. JA 215; *see id.* at 215-27. These arguments are irrelevant to the merits of the Postal Service’s exigent request, and their persistence highlights the illogical and arbitrary approach the PRC took to evaluating that request.

The Postal Service has never contended *either* that its financial crisis was entirely the result of extraordinary or exceptional circumstances *or* that it is entitled to an exigent rate increase sufficient to resolve the entire crisis. The Postal Service agrees that other factors besides the recession have contributed to its dire financial situation. Consistent with that understanding, the Postal Service requested an exigent rate increase that was designed to respond to *one specific element* of its financial crisis: the multi-billion-dollar losses caused by “extraordinary or exceptional” recession-related volume declines. At the same time, the Postal Service pursued other avenues to address other contributing factors to its overall financial

difficulties. Indeed, the Postal Service made clear that its exigent request was only one part of its long-term strategy for returning to solvency. The Postal Service's strategic plan reflected the reality that some of its financial problems were within the scope of the PAEA's safety valve and could therefore be addressed by the PRC through an exigent request, while other problems (such as the prefunding requirement, six-day delivery mandate, and limitations on closing unprofitable post offices) fell outside the scope of the safety valve and therefore required action by Congress. *See* USPS, ENSURING A VIABLE POSTAL SERVICE FOR AMERICA: AN ACTION PLAN FOR THE FUTURE 10-15 (2010).<sup>5</sup> The Postal Service appropriately addressed each element of its plan to the decisionmaker responsible for that issue, be it the PRC or Congress; it did not ask the PRC to grant an exigent adjustment large enough to solve all its problems. Assertions that the recession was not the sole or primary cause of the Postal Service's broader financial crisis are, therefore, beside the point.

No one disputes that the Great Recession caused a sharp decrease in volume — and thus in revenue — or that the decrease contributed significantly to the Postal Service's financial crisis. Indeed, the PRC found that the recession and associated volume decline constituted an extraordinary or exceptional circumstance. The fact that the proposed rate adjustment would not have solved all the Postal Service's

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<sup>5</sup> [http://www.usps.com/strategicplanning/\\_pdf/ActionPlanfortheFuture\\_March2010.pdf](http://www.usps.com/strategicplanning/_pdf/ActionPlanfortheFuture_March2010.pdf)

problems was not a justification for the PRC to punt back the entire problem to Congress, including the aspect of the broader problem that Congress directed the PRC to use the safety valve to mitigate. To hold otherwise would make the safety valve least useful where it is most needed, when a “perfect storm” of circumstances — some extraordinary or exceptional and within the PRC’s authority to address, others not — are pushing the Postal Service toward insolvency.

Not only would the PRC’s approach unduly restrict the availability of safety valve relief; it would also discourage prudent management by the Postal Service. Bizarrely, the PRC would prevent the Postal Service from obtaining legitimate safety valve relief simply because the Postal Service was candid about the multiple factors contributing to its financial crisis and because it acted responsibly in crafting a comprehensive plan for dealing with all of those factors. *See* JA 213 (“The inclusion of the planned exigent price increase as an element of a long-term plan . . . belies the notion that there is, in fact, an exigency which requires exceptional rate relief”). Congress could not have intended such a result.

Finally, the PRC’s insistence on identifying costs facing the Postal Service arising from factors other than the recession — such as a “lack of operating flexibility” and the retiree health benefits prefunding requirement — as the real causes of the Postal Service’s “financial predicament,” PRC Br. 33, reveals an equally

fundamental lapse of logic. Whenever postal revenue declines due to exigent circumstances, it will be possible to say that the revenue losses would not pose a problem if the Postal Service's fixed costs were correspondingly lower. But that observation is irrelevant under the PAEA unless the costs in question were avoidable through "honest, efficient, and economical management." 39 U.S.C. § 3622(d)(1)(E). And in this case, the PRC did not find any failure of postal management — to the contrary, it went out of its way to praise the Postal Service's cost-reduction efforts. (Indeed, the PRC's laudatory comments regarding the efforts of postal management strongly suggest that the statutory requirement that proposed increases be "necessary" to the maintenance of quality service "under best practices of honest, efficient, and economical management" was satisfied. *See* Postal Serv. Opening Br. 20-21.) It is especially perverse for the PRC to rely on unavoidable and, in many cases, congressionally mandated costs — like the prefunding requirement — to defeat a finding of "relatedness." This is akin to telling a laid-off worker that she would be fine even without her paycheck if only she did not need food and shelter.<sup>6</sup> Where the Postal Service has shown that its revenue declined due to extraordinary

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<sup>6</sup> The PRC's assertion that the real problem facing the Postal Service was its unavoidable costs implies that the safety valve is not available to respond to a sudden, severe decrease in revenue due to volume losses until *after* Congress has addressed the problem by reforming the Postal Service's fixed cost structure. This certainly was not the understanding of Senators Collins and Carper, both of whom recognized that a revenue decline associated with substantial volume losses could be an appropriate basis for an exigent rate increase. *See* Sen. Collins Br., attachment 1, at 2.

or exceptional circumstances and that it has practiced honest, efficient, and economical management, the existence of costs outside of the Postal Service's control is not evidence that the need for revenue is not "related" to the exigent circumstances.<sup>7</sup>

## II. The Postal Service Did Not Have Fair Notice of the PRC's Interpretation of "Due To."

As explained above, the PRC interpreted the statutory phrase "due to" as imposing a strict offset requirement, not — as the PRC now claims — a general relatedness requirement. This erroneous interpretation led the PRC to deny the Postal Service's request despite the fact that the Postal Service clearly demonstrated that its request was designed to address financial harm it had suffered as a result of recession-driven volume declines that the PRC agreed constituted "extraordinary or exceptional" circumstances.

Neither the statutory text, nor the PRC's regulations, nor any information requests issued by the PRC gave the Postal Service any notice that it was required to "isolate" and "quantify" the "impact of the recession on postal finances" and to "tailor[]" its request "to offset the specific effects of the claimed exigency" with anything approaching the degree of mathematical precision demanded by the PRC.

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<sup>7</sup> The PRC errs in stating that "the Postal Service operates as a corporation." PRC Br. 4. The Postal Service is "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201. Congress expressly "declined to create the Postal Service as a Government corporation." *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 746 (2004).

The PRC is not well-situated to argue that the Postal Service had adequate notice of the PRC's strict offset interpretation of "due to" given that the PRC's brief disowns that interpretation.

Nonetheless, the PRC and its supporting intervenors rely heavily on the comments of the Public Representative, an individual appointed by the PRC to participate in the proceedings and "represent the interests of the general public." 39 U.S.C. § 505; *see, e.g.*, PRC Br. 42-43; AMA Br. 38-39. In the first place, there is no support for the novel proposition that someone other than the agency can provide the requisite notice of what the agency demands. The Public Representative is just that: a representative of the public, not the PRC. He was only one of several dozen commenters below and did not speak for the PRC, and the PRC never gave the Postal Service any indication that it shared his concerns. The PRC's reliance on the Public Representative's comments thus only serves to underscore the PRC's failure to fulfill its own obligation to provide notice. Nor could the Public Representative's comments have provided the missing notice in any event. Although the Public Representative did not support the proposed rate adjustments, he did not argue that the Postal Service's request should be denied based on the "due to" clause of § 3622(d)(1)(E), nor did he suggest that the Postal Service should be required to match its request to its recession-driven losses with the high degree of precision

required by the PRC's strict offset approach. Moreover, his comments were submitted *after* the Postal Service presented its request for an exigent rate increase and so could not possibly have provided the requisite notice.<sup>8</sup>

The PRC's failure to give the Postal Service fair notice of its "due to" test was particularly egregious given that the exigent rate request proceedings are designed to facilitate a helpful back-and-forth between the PRC and the Postal Service. The PRC held three days of hearings at which its members posed questions to postal officials, and it made seven separate requests for additional information from the Postal Service, each of which was answered in full. The PRC thus had every opportunity to advise the Postal Service if it in fact believed, as it now claims, that the Postal Service had not made "even a rudimentary attempt" to demonstrate relatedness, and to explain what additional information the Postal Service would have to submit to make that showing. The PRC never did so. Indeed, to this day the PRC has not explained what the Postal Service must do to satisfy the PRC's "due to" test.

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<sup>8</sup> In light of the PRC's focus on the Public Representative's comments in the proceedings below, it bears mention that just a few months earlier, another Public Representative had argued forcefully *in favor* of an exigent rate increase far larger than the one the Postal Service ultimately sought. See Public Representative Comments on Annual Compliance Report 2009 at 2, 9 (Feb. 3, 2010); Public Representative Reply Comments 6, 8-11 (Feb. 23, 2010). In those comments, the Public Representative had no difficulty identifying the recession as the root cause of the need for the increase, see Public Representative Comments on Annual Compliance Report 2009 at 9, 18, 21, and he did not suggest that the "due to" clause would be an obstacle to the proposed rate increases. (The Public Representative's comments can be accessed at <http://www.prc.gov>.)

The PRC chides the Postal Service for not immediately filing a second exigent rate request, but its improper focus on the broader financial crisis as the true source of the Postal Service's problems suggests that any such request would be for naught. In any event, the Postal Service did not immediately submit a new request because the PRC's unworkable and unjustified strict offset test eliminates the practical utility of the safety valve, and the Postal Service is entitled to have its request considered under the proper standard as determined by this Court. Moreover, the PRC's current retreat from the strict standard applied in its order has compounded the notice problem. If the Postal Service were to file a new request at this point, it is impossible to say what information that request would have to include, or with what level of precision the Postal Service would have to "tailor" its proposed rate adjustments, in order to win the PRC's approval.

Indeed, the PRC contends that the Postal Service's request was so deficient that there is no need for the PRC even to "opine on the level of precision required" to show "relatedness." PRC Br. 40. Thus, at the same time the PRC is arguing that the Postal Service should simply file a new request, it is expressly refusing to identify the standard that would govern such a request. The PRC's approach is inconsistent with the entire notion of an exigent request and with the PRC's statutory obligation to resolve exigent requests on an expedited basis. *See* 39 U.S.C. § 3622(d)(1)(E). As all

parties recognize, the Postal Service faces insolvency in a matter of months. By the end of September 2011, the Postal Service will not be able to pay all of its bills. *See* Postal Serv. Opening Br. 14-15. The Postal Service does not have time to participate in a trial-and-error process of filing successive requests without knowing what standard it is supposed to meet. It is beyond dispute that the Postal Service is entitled to *some* above-CPI rate increase to address its enormous recession-related volume losses. The PRC should not be allowed to avoid its statutory responsibility by dragging out the exigent rate adjustment process until it is too late and Congress is forced to step in.

## CONCLUSION

For these reasons and the reasons set forth in the Postal Service's opening brief, the Court should grant the petition for review.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a)(1), I hereby certify that this brief complies with the length limitations set forth in Fed. Rule App. Proc. 32(a)(7) because it contains 6,975 words, as counted by Microsoft Word, excluding the parts of the brief that are exempted by Fed. Rule App. Proc. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

*/s/ Paul A. Mezzina*

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February 1, 2011

## CERTIFICATE OF SERVICE

I certify that on February 1, 2011, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system, except for the following, who were served a copy of the foregoing by U.S. Priority Mail, proper postage prepaid:

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