

ORAL ARGUMENT NOT YET SCHEDULED
No. 10-1324

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

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

POSTAL REGULATORY COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
POSTAL REGULATORY COMMISSION

REPLY BRIEF FOR INTERVENOR
NATIONAL POSTAL POLICY COUNCIL, INC.

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GLOSSARY

ACD	Annual Compliance Determination
ACR	Annual Compliance Review
FCM	First-Class Mail
Order	Postal Regulatory Commission Order Adopting Analytical Principles Regarding Workshare Discount Methodology, Order No. 536, Consideration of Workshare Discount Rate Design, Docket No. RM2009-3 (Sept. 14, 2010)
PAEA	Postal Accountability and Enhancement Act of 2006
PRC	Postal Regulatory Commission Postal Rate Commission (prior to 2006)
USPS	United States Postal Service

SUMMARY OF THE ARGUMENT

Two alternative readings of the PAEA emerge from the briefs. The interpretation advanced by the Postal Service and NPPC is straightforward:

- “Products” are identified pursuant to Section 3642, consistent with the definition in Section 102;
- Rates for each market-dominant product are set pursuant to the ratesetting system established to give effect to the policies of Section 3622, with worksharing discounts within each product subject to the limitation in Subsection 3622(e); and
- Section 3653 provides for an after-the-fact annual determination of whether the rates for those products complied with the law, as informed by the product-specific data that Section 3652 directs the Postal Service to provide.

Applying this interpretation, the Postal Service (but for the Order under review) would set rates for First-Class Presort letters, which have been classified as a “product” pursuant to Section 3642, according to the policies and system established pursuant to Section 3622, with the discounts for different degrees of worksharing generally not to exceed 100 percent of the costs avoided as prescribed by Subsection 3622(e). Those rates would be reviewed in the annual compliance determination using Presort product data.

Under the PRC’s reading in the Order under review, Subsection 3622(e) stands alone. Because it does not read Subsection 3622(e) in context with other relevant PAEA provisions (which would demonstrate why that absence is insignificant), the PRC lacks any statutory standard by which to apply it. The PRC asserts that the concept of a “product” is not central to the statutory scheme, although its argument hinges upon the absence of that very word from Subsection 3622(e). Untethered from the statutory standard of “product,” the PRC invents a “functional analysis” that has no basis in the statute but frees it to assert a larger role in ratesetting by engaging in an unconstrained search across products and classes for any mail that might “convert.”

The PRC’s interpretation of Subsection 3622(e) prohibits the Postal Service from pricing its largest and most profitable group of First-Class Mail (Presort letters) on the basis of its costs and market needs— a result plainly never intended by Congress. Instead, the Order causes the workshare limitation to drown out all other pricing criteria so that the postage rates paid by large, sophisticated bulk mailers depend entirely on rate of a one-ounce Single-Piece stamp, a product with materially different cost and market characteristics.

The Order harms NPPC members, who account for somewhere between 60 and 80 percent of Presort letter volume, by causing their postage rates to be higher than if the Postal Service were allowed to apply *all* -- not merely Subsection

3622(e) -- of the pricing policies of Section 3622 to that product. And by forcing the Postal Service to increase rates on its most profitable mail product – Presort First-Class Letter Mail – the PRC’s errors harm the Service by accelerating electronic diversion and increasing volume losses.

As advocated by NPPC and the Postal Service, reading Subsection 3622(e) to apply the workshare limitation within, not across, products demonstrates greater fidelity to the plain language and purposes of the statute. Because the PRC has previously and correctly ruled pursuant to Section 3642 that First-Class Presort and Single-Piece letters are separate products, the Order erroneously requires Presort rates to be set as a workshare discount from the Single-Piece rate, and should be reversed.

ARGUMENT

I. THE PRC HAS FAILED TO CONSTRUE SUBSECTION 3622(e) AND THE TERM “PRODUCT” TOGETHER WITH OTHER PROVISIONS OF THE PAEA

The Order below depends entirely on whether the PAEA allows worksharing discounts to be measured across products. The Order concludes that it does by reading Subsection 3622(e) in isolation and ignoring its interrelationship with other provisions in the same Chapter of the PAEA enacted at the same time, including Sections 3642 and 3652(b). Furthermore, the Order is arbitrary and capricious

because it fails to give due effect to previous PRC rulings and produces a result that frustrates the economic efficiency purpose of Subsection 3622(e).

The PRC's interpretation violates the well-established principle that statutes must be construed to give meaning to all provisions. *S. Cal Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999). If there is ambiguity in the statutory language, a court ordinarily will defer to an agency's reasonable construction of that ambiguity. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). But the PRC cannot create an ambiguity by reading an Act of Congress "as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

A. The PRC's Interpretation Fails To Give Effect To Section 3652

NPPC's initial brief explained how Congress reduced the PRC's role in postal ratesetting when it enacted the PAEA. NPPC Br. at 14-16. Under the prior law, the PRC functioned as a primary ratemaking authority. In contrast, under the PAEA its primary function is to conduct an after-the-fact determination, pursuant to 39 U.S.C. §3653, of whether the postal rates charged in the immediately-preceding fiscal year complied with all of the provisions governing rates, of which Subsection 3622(e) is just one.

That annual compliance determination is informed and guided by 39 U.S.C. §3652, in which Congress specified what information the Postal Service must file

with the PRC in order for the agency to conduct its review. In that provision, Congress directed the Postal Service to report for the purpose of Subsection 3622(e) costs avoided by “each market-dominant product” for which a workshare discount had been in effect in the prior year.

Because Congress directed the Postal Service to report the relevant data by “product,” a plain reading of PAEA is that worksharing discounts are to be evaluated within a “product.” As the Postal Service said below, “it is illogical to suggest that section 3622(e) would apply to a relationship for which section 3652(b) does not mandate the provision of cost information.” (JA 71).

The PRC turns this on its head, suggesting that Congress used the term “product” “so that no mail is left out” and to facilitate analyses “both within and across products.” PRC Br. at 21 (*quoting* Order at 31). But the PRC cites no other statutory provision that might lend support to its interpretation, nor does it explain why the legislature could not have achieved that result simply by using more inclusive wording such as “mail type” or even “subclass.” And the PRC’s further suggestion that reporting by product enables the agency to determine compliance by “products *individually or collectively*” (PRC Br. at 21) (emphasis in brief) is irrelevant.¹ No party to this proceeding has taken the position that workshare

¹ The “products collectively” language has relevance to other purposes, such as whether Competitive Products as whole meet statutory profitability requirements.

discounts must be reviewed collectively for any purpose, and the language upon which the PRC relies (39 U.S.C. §3653(b)(1)) is a general provision that does not mention discounts at all.

In sum, the PRC's position that workshare discounts can be measured and reviewed across products disregards the plain language of the statutory provision that prescribes the exact data to be used for conducting that measurement and review. Laws must be read "to give effect, if possible, to every clause and word." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). An interpretation that fails to give effect to the plain text of Section 3652(b) cannot be correct.

B. The PRC's Concern Regarding "Evasion" Of Subsection 3622(e) Is Addressed By Section 3642

The PRC argues that applying Subsection 3622(e) only within a product would create a loophole which the Postal Service easily could "evade" by designating a type of mail as a separate "product" whenever there is a price difference. PRC Br. at 12. As NPPC's initial brief explained (at 36-37), this concern is misplaced and is rooted in the PRC's refusal to read Subsection 3622(e) in concert with Section 3642, the specific provision Congress enacted to govern the classification of products. *See* 39 U.S.C. §3642.

In response, the PRC dismisses Section 3642 as having "no bearing" and "no apparent relevance to workshare discounts." PRC Br. at 21-22. On the contrary, Section 3642 is precisely the statutory provision that prevents the Postal Service

from “evading” the worksharing limitation (or any other statutory provision) by reclassifying products willy-nilly.

Subsection 3642(b) does so by establishing both procedural and substantive standards to govern the identification of “products.” It: (1) establishes substantive criteria to govern the identification of products (39 U.S.C. §3642(b)(3)); and (2) gives the PRC authority to review the Postal Service’s proposed product classifications. Those provisions mean the Postal Service does not have unilateral authority to reclassify products to “evade” worksharing limitations or for any other purpose. The substantive provisions of Section 3642 also make evident that classifying a product involves considerations other than price. The PRC’s own jurisdiction in this area serves as a check against the agency’s concern.

The PRC’s further statement that it “does not inquire into the issue of whether groups of mail are workshared variants of other groups of mail” when considering the Postal Service’s proposed products (PRC Br. at 18) is simply incorrect. The PRC brief cites no authority other than the Order under review, and examination of the Order finds no further authority. Moreover, the PRC’s statement is contradicted by its past practice, as demonstrated by its approval of the Postal Service classification of the “Presort” mail product (then named “Bulk”) over an objection that recognizing bulk letters as a separate product could cause Presort rates to differ from Single-Piece rates by more than the costs avoided by

worksharing – the very same provision at issue in this proceeding. *See Order Establishing Ratemaking Regulations For Market-Dominant and Competitive Products*, Order No. 43 at 103 (PRC Aug. 15, 2007) (NPPC Adden_at 21).

C. The PRC’s Interpretation Is Arbitrary And Capricious

Instead of reading Section 3622(e) in context, the PRC has read it in isolation. In doing so, the PRC has misread the plain language of Sections 102(6), (8), and (9), invented a “functional analysis” divorced from any statutory basis, draws erroneous conclusions about the market, and disregarded its own precedent. For these reasons, the PRC’s interpretation is arbitrary and capricious.

1. The PRC’s narrow view that “product” is relevant only for categorizing mail as competitive or market-dominant is not consistent with the PAEA

Relying on the absence of the term “product” from Subsection 3622(e), the PRC argues that the contention that “the workshare-discount provision only applies when the two services at issue are part of the same ‘product’ has no basis in the statutory text.” PRC Br. at 11 & 17-18. It further argues that the concept of “product” within market-dominant products has “no substantive significance in the statutory scheme” (*id.* at 19) other than “primarily as a way to distinguish between market-dominant products and competitive products” for the purpose of rate regulation. *Id.*

The PRC misreads the PAEA. Congress defined “product” as “a postal service with a distinct cost or market characteristic for which a rate or rates are, or may be reasonably be, applied.” 39 U.S.C. §102(6). Nothing in that definition supports the PRC’s view that the term “primarily” refers to the market-dominant and competitive regulatory regimes. Indeed, where Congress wanted to use “product” in that context, it specifically defined “market-dominant product” and “competitive product.” *See* 39 U.S.C. §102(8) & (9).

The PRC’s related reliance on the presence of the term "subclass" in Subsection 3622(e) is disingenuous. Less than four years ago, the PRC noted that the term “subclass” “is not defined by the PAEA and, under the new ratesetting procedures, is largely an *irrelevant artifact*.” *Order Proposing Regulations To Establish A System of Ratemaking*, Order No. 26, Dkt. No. RM2007-1, ¶3065 (PRC Aug. 15, 2007) (emphasis supplied) (Reply Adden_2).

Furthermore, under the quoted PAEA definition a “product” is a subset of the term “postal service,” a term that appears in Subsection 3622(e)(2)(A)(i). A “postal service” refers “to the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto.” 39 U.S.C. §102(5). Thus, the PRC’s reliance on the omission of the term “product” in Subsection 3622(e) overlooks the term’s inclusion in the provision indirectly. Measuring a workshare discount within the

“product” – that is, a grouping of mail sharing “a distinct cost or market characteristic” – to which it applies is consistent with these provisions.

The PRC’s narrow view of the importance of the term “product” is refuted by other provisions of PAEA as well. For example, Section 3641, which concerns “experimental and new products,” uses the term “product” frequently in ways having nothing to do with the distinction between market-dominant and competitive products. 39 U.S.C. §3641. Nothing about Congress’s use of the term “product” in Section 3641 suggests a legislative intent to limit the term as did the Order under review.

Finally, the PRC’s downplaying of the role of the term “product” is inconsistent with the agency’s actions in other proceedings. For example, during the briefing of this case, the PRC ruled in the FY2010 Annual Compliance Determination that the “Standard Flats product” is not in compliance with statutory requirements. *Annual Compliance Determination Report Fiscal Year 2010* at 16 (PRC Mar. 29, 2011) (Reply Adden_4). That decision had nothing to do with “distinguish[ing] between market-dominant products and competitive products.” *Cf.* PRC Br. at 19. Instead, it evaluated whether a particular product complied with Section 101(d) of the PAEA.

2. The PRC’s “functional analysis” is not statutorily based and is overbroad

The PRC’s failure to construe the worksharing discount limitation in light of other PAEA provisions leaves it with no statutory basis by which to apply that limitation. That explains why the PRC must labor to identify some “benchmark” group that it believes “permits a meaningful calculation of cost avoided due to the workshare activity.” PRC Br. at 13. To do so, it fashioned a “functional” analysis by which it concluded “the basic uses of single-piece and presort First-Class Mail are the same, but the mode is different. Single-piece mail is used to transmit correspondence and conduct transactions at a ‘retail’ level, while presort mail is used to do much the same thing at a ‘wholesale’ level.” PRC Br. at 26, *quoting* Order at 51 (JA 368).

The first problem with the PRC’s “functional” analysis is that it has no statutory basis. Nowhere does the PRC rest its analysis on any other statutory provision, and nor does PAEA direct the agency to embark on such a theoretical excursion to implement Subsection 3622(e).

A second problem with the PRC’s “functional” analysis is that it is overbroad and unbounded. Its “functional” description of First-Class Mail – “correspondence and transactions” – simply describes First-Class Mail as a whole. Priority Mail and Express Mail likewise convey “correspondence” and

“transactions” and mailers might “convert” to those products if the price were attractive.

3. The PRC’s market analysis is arbitrary

The PRC argues that it is appropriate to apply the worksharing discount provision across products because the mailing industry treats Single-Piece and Presort mail as substitute products. PRC Br. at 26-27. This argument is circular and arbitrarily ignores the agency’s previous determination to the contrary.

First, its assertion that “the price difference between presort and single-piece mail is a rate discount for presorting” (*id.* at 12) is circular. That price difference today is a discount for “presorting” only because the PRC has required it to be so in the Order under review and previous rulings. NPPC’s initial brief explained how the PRC’s approach ignores the undisputed cost and demand differences between Single-Piece and Presorted Mail that could justify different price differences consistent with the pricing objectives and factors set forth in Section 3622(b) and (c), if the Postal Service were allowed to do so. NPPC Br. at 6-9, 28-33.

Furthermore, the PRC never addresses the implications of its previous decision that Presort letters *are* a separate product from Single-Piece, a decision that *required* that the two products differ in either demand or cost (in fact, they differ in both). NPPC Br. 28-33. NPPC pointed out in its opening brief that the

PRC's decision to evaluate worksharing discounts across products was arbitrary and capricious because it failed to give effect to that earlier decision. The PRC brief offers no answer.

While ignoring its previous decision recognizing that Presort is a separate product from Single-Piece, the PRC argues that the existence of presort bureaus "highlights" that "the decision to enter mail as single-piece or as presort is based largely on costs, rather than other factors." PRC Br. at 27. The PRC's claim grossly misconstrues the market.

The truism that there is always some small subgroup at the margin of a mail classification does not undermine the general conclusion that Single-Piece and Presort mail are not substitute products. There is nothing "alike" about the demand for and costs of mail sent by NPPC members and Single-Piece mail that might be accumulated and mailed by presort bureaus. Nor is the decision to mail at the Presort rates "largely" based on costs instead of other factors.

NPPC members account for 60 to 80 percent of all Presort mail, and NPPC members emphatically do not consider Single-Piece a substitute for Presort mail. As NPPC explained in its initial brief, large bulk mailers have well-established mailing operations, which require substantial investment in equipment and facilities, are operationally complex, and must comply with rigorous Postal Service specifications to receive optimal service (*Id.* at 7-10 & 30-33). They will no more

revert to Single-Piece than the Ford Motor Company will revert to all-black Model T's.

Lastly, the PRC's citation to data on discount elasticities is to no avail. PRC Br. at 31-33. Those elasticities appear in the Order at Table 1 (JA 372). As can be seen, the latest "discount elasticities" shown (as of November 2008) for both Single-Piece (line 2) and Workshared letters (line 7) are quite small, well less than 0.1 percent, indicating very little cross-elastic effect between the two products.

D. The PRC Cannot Explain How Stretching The Workshare Discount Limitation Across Products Is Consistent With The Economic Efficiency Policy Embodied In Section 3622(e)

The parties agree that the worksharing limitation is intended to enhance economic efficiency by encouraging that the work of preparing and sorting a mailing be done by the more efficient entity – whether the Postal Service or the mailer. PRC Br. at 16. However, the PRC cannot explain how applying Subsection 3622(e) across separate products advances that goal.

As the PRC concedes, the calculation of worksharing costs avoided must be done "in an economically meaningful way" in order to achieve the Subsection 3622(e) objective of economic efficiency. Br. at 25. For example, setting the discount rate difference between two tiers within Presort mail equal to the costs avoided gives economically meaningful information to a bulk mailer, as the demand and costs of the mail are alike but for the level of presortation.

As the PRC also concedes, for a workshare discount to be set at an economically efficient rate requires comparing the workshared mail to a “base group” that is “alike in all respects that are important to the mailer, apart from the workshared characteristics.” *Id.* at 26, *quoting* Order 536 at 20 (JA 337). It is not enough to identify some pieces of mail that might “convert” under hypothetical circumstances; the mail must be “alike” in all important respects. A “base” group and “workshared” mail can be “alike” only when they share cost and demand characteristics, which is the basis on which the PAEA defines “products.” Accordingly, a proper “base” group is part of the same product as the workshared mail, differing only by the worksharing performed to earn the discount under consideration.

The PRC’s argument runs aground at this point. Its construction requires comparing discounts in one product (Presort) to rates for a different product (Single-Piece) which, as its previous ruling recognized, has different cost and demand characteristics. Those differences were summarized by NPPC in its opening brief (at 28-33) and the PRC has no response to that discussion.

The Order is thus arbitrary in two ways. First, the Order fails to give effect to the PRC’s earlier ruling that Presort and Single-Piece mail are separate products. Second, because Single-Piece and Presort mail simply are not “alike in all respects that are important,” workshare discounts calculated from a “base” group in Single-

Piece mail *cannot* convey economically meaningful signals to Presort mailers. The PRC thus fails to advance the policy objective of Subsection 3622(e).

Under the view of the statute advanced by the Postal Service and NPPC, Section 3622(e) ensures that worksharing discounts within products would be set, as Congress intended, at economically meaningful levels. Properly applied within (not across) a product whose base rate is set on the basis of the other factors in Section 3622 and reflects its own costs and demand characteristics, a workshare discount will send appropriate pricing signals to promote economic efficiency.

II. THE PRC'S ANACHRONISTIC APPROACH HARMS NPPC MEMBERS AND THE POSTAL SERVICE

The PRC's Order does not reflect the fundamental restructuring of postal ratesetting enacted in the PAEA. As a direct consequence, NPPC members – collectively the Postal Service's largest and most profitable customers -- suffer injury by being charged rates that, by definition, are based on the costs and demand of a different product, cannot be economically efficient, and that the PRC prohibits from being responsive to market costs and demand.

The PRC's approach to worksharing discounts is essentially unchanged from pre-PAEA law. As under the old law, the PRC continues to tie Presort rates to a subgroup of Single-Piece mail in a way that effectively relegates those rates to a mathematical derivative of the Single-Piece stamp rate. That forever prevents the Postal Service from pricing NPPC members' Presort mail on the basis of the

numerous factors and policies established elsewhere in Section 3622. It also frustrates Congress's intent in the PAEA to reduce the PRC's role in postal ratesetting. NPPC Br. 13-16.

In addition to thwarting Congressional intent, the PRC's continued use of its approach under the former law harms NPPC members and the Postal Service. It does so: (1) by forcing the Presort rates NPPC members pay to be higher than their costs and demand justify; and (2) by forcing those rates to rise and fall depending entirely upon the costs of a separate product.

On the first point, NPPC has shown how its members pay higher Presort rates than justified by the product's costs and market demand. NPPC Br. at 9-11.

As for the second point, if, for example, the costs of Single-Piece mail were to rise while the costs of Presort mail were to fall, NPPC members nevertheless would see rising rates (due to the PRC's rigid linking of Presort rates to Single-Piece rates through the worksharing link) because of the increase in Single-Piece costs, instead of falling as their own mail becomes even more cost-efficient for the Postal Service. Indeed, under the PRC's approach, the rates paid by NPPC members depend not on the intrinsic costs or market needs of the Presort product at all, but *entirely* on whether presort bureaus can persuade small businesses to give them their letter mail (at privately-negotiated rates unknown to the USPS or the PRC). Under the PRC's approach, as long as any increment of Single-Piece mail

might give their mail to a presort bureau, NPPC members' rates must remain dependent upon Single-Piece rates. That is not a tenable interpretation of the PAEA.

Finally, to the extent that these errors result in higher Presort rates that accelerate the departure of NPPC members' communications from the mail to electronic alternatives, the Order ultimately will harm the Postal Service as well. Furthermore, it will harm other mailers, whose rates inevitably will rise to offset the loss of revenue from NPPC mailers. Congress did not enact the PAEA to empower the PRC to drive mail away through unrealistic regulatory practices.

CONCLUSION

For all these reasons, and the reasons set forth by the Postal Service, the petition for review should be granted.

Respectfully submitted,

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May 4, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(a)(3)(B) because this brief contains 3,983 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2003 version of Microsoft Word in 14 point Times New Roman.

/s/ William B. Baker
William B. Baker

CERTIFICATE OF SERVICE

I, William B. Baker, hereby certify that, on behalf of National Postal Policy Council, on May 4, 2011, I electronically filed this pleading with the Clerk of this Court via the appellate CM/ECF system. All parties are represented by registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ William B. Baker
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