ORAL ARGUMENT SCHEDULED ON SEPTEMBER 9, 2014

No. 14-1009
(consolidated with No. 14-1010)

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

ALLIANCE OF NONPROFIT MAILERS, et al.,
Petitioners,

v.

POSTAL REGULATORY COMMISSION,
Respondent.

UNITED STATES POSTAL SERVICE,
Intervenor for Respondent.

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

**REPLY BRIEF FOR MAILER PETITIONERS
AND SUPPORTING INTERVENORS**

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

July 10, 2014

Matthew D. Field
Ian D. Volner
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004-1601
(202) 344-4800
mfield@venable.com
idvolner@venable.com
Counsel for Association for Postal Commerce, Association of Marketing Service Providers, and Direct Marketing Association, Inc.

David M. Levy
Matthew D. Field
John F. Cooney
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004-1601
(202) 344-4732
dlevy@venable.com
mfield@venable.com
Counsel for Alliance of Nonprofit Mailers, American Catalog Mailers Association, American Forest & Paper Association, Association of Marketing Service Providers, Direct Marketing Association, Inc., Major Mailers Association, MPA—The Association of Magazine Media, National Association of Presort Mailers, and Quad/Graphics, Inc.

James E. Anderson
HOWE, ANDERSON & STEYER, P.C.
1250 Eye Street, N.W., Suite 650
Washington DC 20005
(202) 296-5680
janderson@haspc.com
Counsel for the Envelope Manufacturers Association

David F. Stover
2970 S. Columbus Street, No. 1B
Arlington VA 22206-1450
(703) 998-2568
postamp@crosslink.net
Counsel for the Greeting Card Association

Tonda Rush
CNLC, LLC
P.O. Box 5737
Arlington VA 22205
(703) 237-9801
tonda@nna.org
Counsel for the National Newspaper Association

William B. Baker
WILEY & REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7255
wbaker@wileyrein.com
Counsel for National Postal Policy Council and Newspaper Association of America

Gregory S. Jacobs
POLSINELLI P.C.
1401 Eye Street, N.W.
Suite 8000Washington DC 20005
(202) 626-8368
gjacobs@polsinelli.com
Counsel for Printing Industries of America

Donna Hanbery
HANBERY & TURNER, P.A.
33 South 6th Street, Suite 4160
Minneapolis MN 55402
(612) 340-9350
hanbery@hnclaw.com
Counsel for Saturation Mailers Coalition

Keith Kupferschmid
SOFTWARE & INFORMATION INDUSTRY ASSOCIATION
1090 Vermont Avenue, NW
Washington, DC 20005
(202) 789-4442
keithk@siia.net
Counsel for Software & Information Industry Association/American Business Media

William J. Olson
Jeremiah L. Morgan
John S. Miles
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070
wjo@mindspring.com
Counsel for Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

* Authorities on which we chiefly rely are marked with an asterisk.

Postal Regulatory Commission Decisions

Miscellaneous

* Authorities on which we chiefly rely are marked with an asterisk.

GLOSSARY OF TERMS

A.	Joint record appendix filed by the petitioners
Market dominant product	A postal service over which the USPS exercises enough market power to satisfy 39 U.S.C. § 3642(b). 39 U.S.C. §§ 102(6), 102(8), and 3621. Rates on market-dominant mail products are regulated under 39 U.S.C. § 3622.
Order	Postal Regulatory Commission ("PRC") Order No. 1926, Order Granting Exigent Price Increase, in PRC Docket No. R2013-11, *Rate Adjustment Due to Extraordinary or Exceptional Circumstances* (December 24, 2013) (www.prc.gov/Docs/88/88645/Order_1926.pdf) (A.___).
PRC	Postal Regulatory Commission (before 2007, Postal Rate Commission)
USPS	United States Postal Service

STATUTORY AND REGULATORY PROVISIONS

These appear in the addendum to the mailers' Blue Brief.

SUMMARY OF ARGUMENT

Neither the Commission nor the USPS disputes that (1) the Postal Service had the burden of proving causation; (2) the macroeconomic (recession-related) variables in the USPS model indicated that the recession caused far less volume loss than the Commission found; and (3) the Commission's attribution of the volume losses associated with the non-linear intervention variables rested solely on the supposed correlation in time between those variables and the macroeconomic variables. The Commission's reliance on this supposed correlation was arbitrary and capricious. As the Commission correctly recognized elsewhere in its Order, and as this Court has held repeatedly in analogous contexts, mere correlation does not prove causation. *Tex Tin Corp. v. EPA*, 992 F.2d 353, 356 (D.C. Cir. 1993).

Moreover, the factual premise of the Commission's reasoning—that the non-linear intervention variables and the macroeconomic variables correlate closely—is false. The two sets of variables do not correlate closely. The Commission and the USPS try to paper this over with charts that depict the *annual* changes in the variables, rather than the *cumulative* effect. The superficial similarity of the resulting lines cannot obscure their fundamental differences. The charts, like those in the mailers' initial brief, show that, while the macroeconomic variables began to recover along with the general economy in 2010, the hypothetical volumes associated with the non-linear intervention variables showed no comparable recovery, or continued to decline. Thus, the very data on which the Commission and the USPS rely confirm that the Postal Service failed to prove causation.

The USPS's remaining arguments for treating the non-linear intervention variables as recession related are *post hoc* rationalizations that the Order did not adopt. The Order may not be upheld on these grounds. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The Commission's attribution to the recession of the volume losses associated with the trend component of the macroeconomic variable for First-Class Single-Piece Mail (i.e., employment) was also arbitrary. The mailers pointed out that this attribution contradicted prior testimony of another USPS witness (and Mr. Thress's colleague). An econometric expert for the mailers also showed that most of the decline in mail volume associated with the trend component of the employment variable merely continued a long-term decline that began years before the 2007–2009 recession. Mailers' Blue Br. 44–45. The Respondents offered no cogent response to these points.

Finally, the Respondents fail to respond meaningfully to the mailers' challenges to the finding that recovery of losses sustained by the USPS before Fiscal Year 2013 was "necessary" within the meaning of 39 U.S.C. § 3622(d)(1)(E). The Commission simply assumed that because the USPS "needed" *some* additional liquidity, the USPS "needed" $2.8 billion in added contribution, and the Commission should award it. The Commission offered no findings to justify this amount, and nothing in the statute authorized the Commission to make this leap.

Because the USPS failed to meet its burden of proof, the award of the $3.2 billion rate increase should be overturned, and the matter remanded for findings consistent with Section 3622(d)(1)(E).

ARGUMENT

I. THE COMMISSION'S FINDING THAT THE RECESSION CAUSED THE VOLUME LOSSES ASSOCIATED WITH SEVERAL VARIABLES IN THE THRESS MODEL WAS ARBITRARY AND CAPRICIOUS.

The responses of the Commission and the USPS to the mailers' initial brief leave most key points unrefuted. The respondents do not dispute that: (1) the USPS had the burden of quantifying the losses that were due to the 2007–2009 recession rather than electronic diversion or other causes; (2) the econometric model offered by the USPS to justify its rate increase had *no* explanatory variables that directly measured electronic diversion; (3) much of the $2.8 billion in losses attributed by the Commission to the recession was associated with "non-linear intervention" variables or the "trend" component of the macroeconomic variable for Single-Piece First-Class Mail; (4) the non-linear intervention variables were essentially catch-all placeholders for unidentified "other" causes that the USPS and PRC simply *interpreted* as being recession-related; and (5) the trend component of the employment variable for Single-Piece First-Class Mail was largely a continuation of volume declines that began years before the onset of the recession. Mailers' Blue Br. 5–6, 17–23, 37. Instead, the Commission and the USPS argue that the Commission made adequate findings to justify its interpretation of these variables. These arguments are without merit, as explained in parts A and B below. First, however, we reply to two general defenses asserted by the respondents.

1. The Commission and the USPS argue that, because the econometric issues are "technical," the Commission's disposition of them merits judicial deference. PRC Br. 19–21, 47–48 (citing cases); USPS Br. 1. The mailers do not disagree; to the contrary, the mailers rely on the same standard of review in defending the Order against the USPS's challenges in 14-1010. Mailers' Green Br.

2, 12. But the standard, while "forgiving," "does not create a rubberstamp." *BNSF Ry. Co. v. STB*, 741 F.3d 163, 167–68 (D.C. Cir. 2014). An agency decision must be overturned as arbitrary and capricious when (1) the reviewing court cannot "discern a reasoned path from the facts and considerations before the [agency] to the decision it reached'"; (2) the agency's findings are unsupported by "'[such] relevant evidence as a reasonable mind might accept as adequate to support a conclusion'"; (3) the result reached is internally inconsistent or "illogical on its own terms"; or (4) the agency has "'fail[ed] to respond meaningfully' to objections raised by a party."[1] Neither the Commission nor the USPS acknowledges these well-settled limitations on judicial deference.

2. The USPS (but not the Commission) asserts that the mailers' challenge to the volume losses attributed to the recession is "surprising" because Prof. Lundblad, a mailer witness, submitted an econometric analysis estimating that the recession reduced mail volume and USPS earnings by more than the Commission found. USPS Br. 4. The Commission never adopted this comparison,

---

[1] Mailer Petitioners' Br. 35–36 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 27, 43 (1983); *Am. Fed'n of Gov't Emps. v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006) (citations omitted); *AEP Tex. N. Co. v. STB*, 609 F.3d 432, 441–44 (D.C. Cir. 2010); *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 216 (D.C. Cir. 2011); *LePage's 2000, Inc. v. PRC*, 642 F.3d 225, 230–31, 234 (D.C. Cir. 2011); *GameFly, Inc. v. PRC*, 704 F.3d 145, 148–49 (D.C. Cir. 2013); *BNSF*, 741 F.3d at 168).

and it is therefore a *post hoc* rationalization of appellate counsel. In any event, the argument compares apples and oranges.

Professor Lundblad estimated only the gross losses in mail volume that were attributable to the recession. He was not asked to analyze what portion of those losses should be disallowed because of the USPS's obligation under Section 3622(d)(1)(E) to mitigate its losses by downsizing its costs. The Commission, unlike Prof. Lundblad, did make this adjustment, which should be upheld for the reasons explained on pages 32–46 of the Commission's brief and pages 8–17 of the Mailers' Green Brief. Applying the Commission-imposed time limits on recovery to the recession-related losses calculated by Prof. Lundblad lowers his loss estimates to 13.2 billion pieces and $968 million in contribution—a fraction of the $2.8 billion in extra contribution authorized by the Commission.[2]

A. The Commission's Attribution of the Volume Losses Associated With the Non-Linear Intervention Variables Was Arbitrary and Capricious.

The mailers explained in their initial brief that the Commission's attribution to the recession of volume losses associated with several non-linear intervention

[2] MPA et al.-LR-R2013-11/1, MPA et al.-LR-R2013-11-1 – Improved Approach.xlsx, Tab "Rev & Cont Calc_08_14", cells J32 and L32 (A.____) (adjusted by setting volumes losses on this tab to zero for years once the new normal is reached consistent with PRC approach).

variables in the USPS model was arbitrary in several respects. First, the Commission's theory—that those variables appeared to correlate in time with certain macroeconomic variables in the model—effectively reversed the statutory burden of proof by treating correlation as tantamount to causation. Second, the threshold premise of the Commission's reasoning—that the non-linear intervention and macroeconomic variables in fact correlated closely—was illusory. Mailers' Blue Br. 37–44.

(1) The respondents assert that the Commission did not reverse the burden of proof, but merely found that the USPS "carried its burden." PRC Br. 47; USPS Br. 16–17. This is hairsplitting. The Commission's finding that the USPS "carried its burden" rested solely on the Commission's finding that the non-linear intervention variables and certain macroeconomic variables correlated closely. This is the same kind of statistical reasoning that the Commission held in an analogous context was insufficient to prove causation because the intervention variables may reflect two or more distinct "drivers of mail volume"—the recession and "technological innovations" (*i.e.*, electronic diversion)—that "move in the same negative direction." Order_at_76 (A.___). Hence, accepting correlation to prove causation for the non-linear intervention variables effectively changed the burden of proof.

The Commission's brief underscores this inconsistency. In response to the USPS petitioner's brief, the Commission defends not treating other variables in the USPS model as recession-related on the ground that the USPS's burden of proof on causation requires a "more rigorous estimation technique," a "degree of analytical precision," and a more "persuasive," "robust," and "compelling showing" of a "close causal nexus" between each putative explanatory variable and the recession. Commission Br. 23, 24, 31. By contrast, the burden of proof purportedly used by the Commission to justify accepting the non-linear intervention variables as recession-related is merely "more likely than not." *Id*. at 53, 55.[3]

(2) The Commission and the USPS alternatively insist that correlation *does* prove causation: if the non-linear intervention variables turned down and then up at about the same time as the macroeconomic variables—i.e., were "in sync"—the Commission could infer causation from this. PRC Br. 52–54; USPS Br. 16–17. "In sync," however, is just another term for "correlated."

[3] The USPS (at 16) defends this disparate standard of proof on the ground that the $2.8 billion awarded by the Commission is less than the "$39.8 billion" sought by the USPS. $2.8 billion, however, is a large number in its own right. The USPS cites nothing to suggest that Congress intended to exempt a $2.8 billion exigent increase from the proof requirements of Section 3622(d)(1)(E) on the theory that this amount is somehow *de minimis*.

The courts have made clear that inferring causation from correlation—even close correlation—is arbitrary and capricious when the agency or other fact finder affirmatively fails to rule out a significant potential confounding variable that could explain the correlation. Mailers' Blue Br. 39–40 (discussing *Tex Tin Corp. v. EPA*, 992 F.2d 353, 356 (D.C. Cir. 1993)). *Accord In re Navy Chaplaincy*, 738 F.3d 425, 429 (D.C. Cir. 2013) ("Correlation is not causation.") (citation omitted); *Meister v. Med. Eng'g Corp.*, 267 F.3d 1123, 1129 (D.C. Cir. 2001) (the "mere simultaneous existence of" silicone breast implants and scleroderma was insufficient to establish causation); *Brown v. Entertainment Merchs. Ass'n*, ___ U.S. ___, 131 S. Ct. 2729, 2739 (2011) (courts have rejected studies purporting to show that exposure to violent video games harms children in part because "nearly all of the research is based on correlation, not evidence of causation").

These prior judicial decisions recognize a basic principle of statistics: Even near-perfect correlation does not prove causation without a sound theoretical explanation for the correlation. Otherwise, the correlation could merely reflect a "spurious relationship," in which "two or more variables are correlated," but "are not causally related." Megan L. Shannon, *Spurious Relationship, in* M. S. Lewis-Beck *et al.*, *SAGE Encyclopedia of Social Science Research Methods* (2004) (http://srmo.sagepub.com/view/the-sage-encyclopedia-of-social-science-research-methods/n952.xml). "A large value of *r* [the correlation coefficient] means only that the dependent variable marches in step with the independent one: Possible reasons include causation, confounding, and coincidence." David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in Reference Manual on Scientific Evidence* 264 (3d ed. 2011). Well-known examples of spurious relationships include the close correlation between the monthly changes in stock prices on the New York and London stock exchanges in 1929 and the inverse of monthly changes in solar radiation, Edward R. Tufte, *The Visual Display of Quantitative Information* 15 (2001), and the near-perfect correlation of 0.992082 during 1999–2009 between (1) U.S. spending on science, space and technology and (2) suicides by hanging, strangulation and suffocation. Tyler Vigen, *Spurious correlations*, www.tylervigen.com (last visited July 5, 2014). To infer causation from correlations of this kind would be "silly." Tufte, *supra*.

(3) The Respondents also fail to defend the threshold premise of the Commission's reasoning—that the non-linear intervention variables and the macroeconomic variables actually were closely correlated. They contend that the charts in the mailers' initial brief obscure the correlation between these variables by depicting the USPS's *cumulative* losses, rather than the *annual* or *incremental* effects of the non-linear intervention and macroeconomic variables on mail

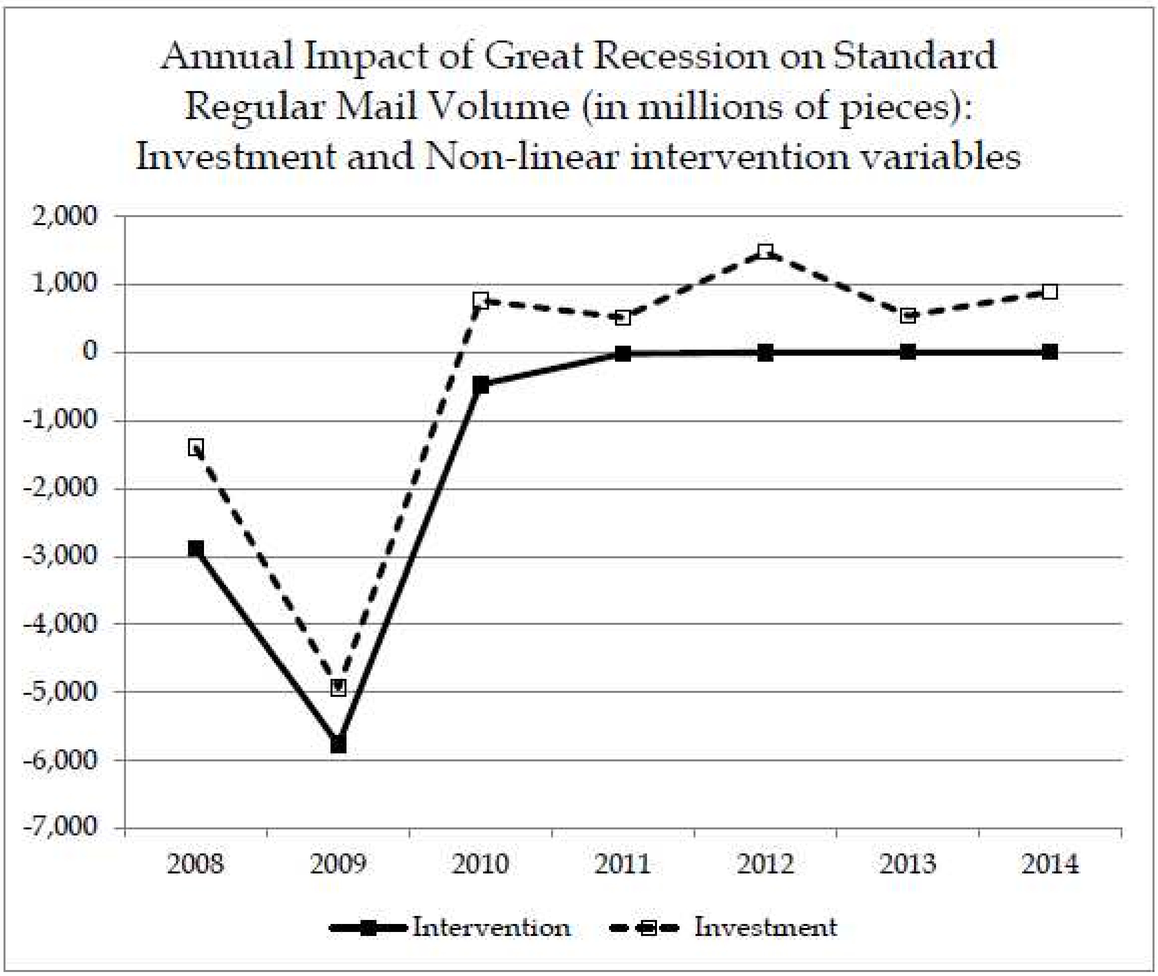
volume. *Compare* Mailers' Blue Br. 41, 43 figs. 5 & 6), *with* PRC Br. 56 (figure) and USPS Br. 12 (figure), 18. In fact, it is the respondents who obscure the actual relationship (or lack thereof).

Respondents' charts essentially depict the first derivative of the curves in the mailers' charts. While this transformation is mathematically unobjectionable, the respondents' use of the transformed data is misleading. The key information in the transformed charts is not the feature that the respondents want the Court to focus on—the slope of the curves—but the *absolute* level of the values. The values show that the mail volumes associated with the non-linear intervention variables declined and never increased, even while the economy recovered. These facts refute any notion that the non-linear intervention and macroeconomic variables were "in sync."

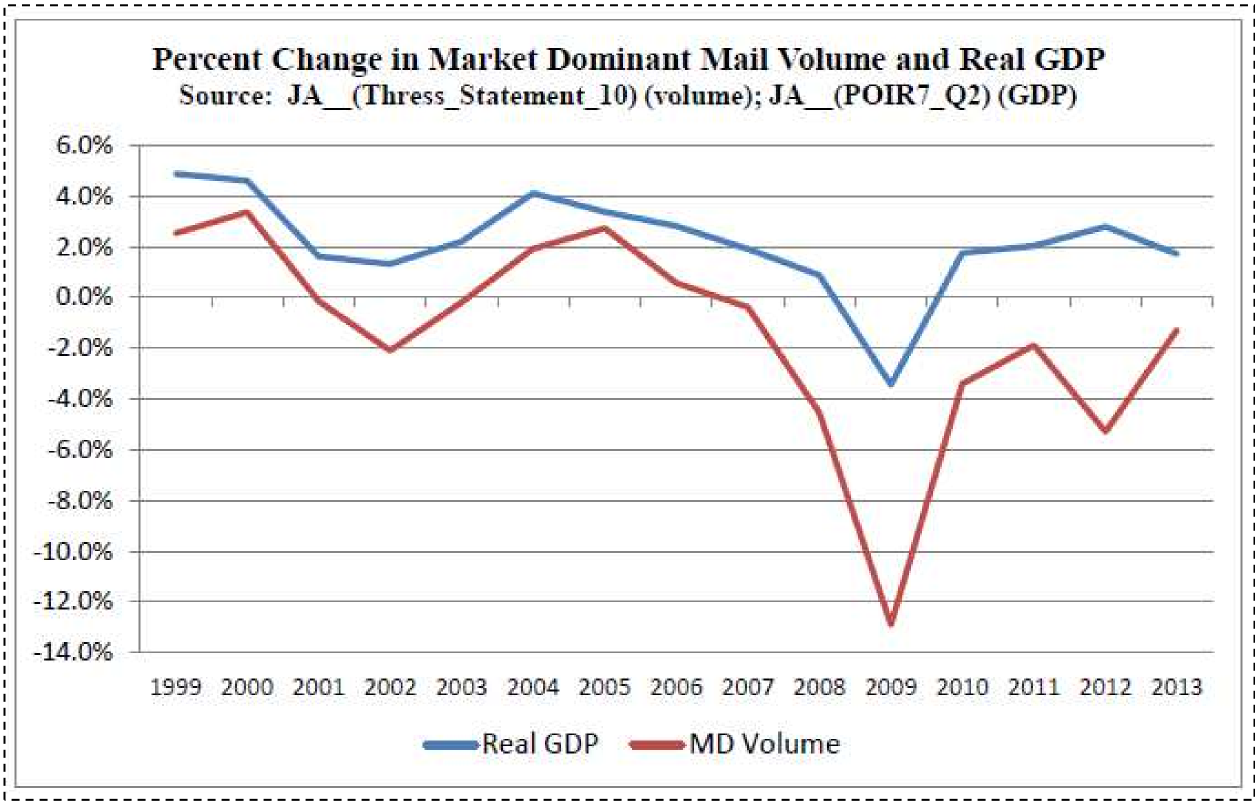
The chart on page 56 of the Commission's brief (reproduced below) shows that the "investment" (macroeconomic) variable produced a gain in Standard Regular Mail volume beginning in 2010 and continuing each year through 2014, the last year shown.[4] By contrast, the annual changes in mail volume associated with the non-linear intervention variable remained negative in 2010, and flat-lined

[4] We focus on this variable because the PRC emphasized it, and it is by far the most significant.

at zero in 2011 and succeeding years. Stated otherwise, mail volume associated with the macroeconomic variable was on a path to recovery beginning in 2010, while the mail volume associated with the non-linear intervention variable *never recovered* to its 2007 level (or even 2008, 2009 or 2010 levels) because the year-to-year changes *never became positive again.*



The USPS (but not the Commission) attempts a similar sleight-of-hand with the chart on page 12 of its brief:



The points on the vertical axis reveal a similar divergence between the macroeconomic variable (here, real GDP) and the total volume of market-dominant mail. The annual change in real GDP was negative only in 2009, and has been positive every year beginning in 2010, as one would expect in an economic recovery. Total market dominant mail volume, by contrast, *has declined every year since 2007*—including in 2010 and subsequent years. The "Real GDP" line serves as a proxy for recession-related volume losses, which should be captured by macroeconomic variables. The vertical difference between the two lines thus is effectively the unexplained "other" variation. The USPS approach would have attributed all of the difference to the recession; the PRC approach attributes a significant fraction of the difference to the recession. Absent a legally sufficient showing of causation, *none* of the difference may be attributed to the recession.

(4) The USPS (but not the Commission) asserts (at 18–19) that the Commission did not infer causation solely from the supposed correlation between the non-linear intervention and macroeconomic variables, but also "confirmed" the validity of the inference from the "economic theory" of the USPS model. The record reveals no such findings. To the contrary, the Commission found, as USPS witness Thress admitted, that the non-linear intervention variables had *no* intrinsic economic meaning: "Intervention variables and trends indicate that something happened, they do not attempt to explain *why* that something happened."[5] Moreover, the Commission specifically rejected the extrinsic justifications offered by Mr. Thress for interpreting the intervention variables as proxies for recession-related effects. Order_at_67, 73–79 (A.______) (rejecting USPS claim that the rate of Internet substitution had leveled off since 2007); *id*._at_63,_68–69 (A.____) (rejecting USPS claim that the negative trends of several macroeconomic variables

[5] Order_at_75 (A._____) (emphasis in original); *id*._at_71,_75–76 (A._____); Mailers' Blue Br. at 19 (citing admissions of USPS witness Thress).

omitted by Mr. Thress from his model justified interpreting the trend and intervention variables as recession-related); Mailers' Blue Br. 25–28 (discussing Order); Mailers' Green Br. 5–7 (same).

(5) The USPS tries to fill this gap by resurrecting factual arguments that it presented unsuccessfully to the Commission below. Specifically, the USPS asserts:

- Its model provided "credible proof" of causation and recognized a "whopping" amount of electronic diversion. USPS Br. 1–4, 8–9.
- The mail-intensive sectors of the economy (advertising, real estate, and credit card lending) were harder hit than average. *Id*. at 5–6.
- The overall economy has not fully recovered. *Id*. at 6.
- The recession permanently changed long-run patterns of consumer behavior. *Id*. at 7.
- Electronic diversion did not accelerate much during the recession. *Id*. at 2, 11. 12–13.

- It is "plausible" that the recession caused electronic diversion to accelerate. *Id*. at 14–15.

- The Court should pay no attention to the USPS's admissions such as "Electronic Diversion is the Primary Driver of First-Class Mail Volume Decline" and "The Economy is NOT the Main Cause of Diversion." *Id*. at 10; *cf*. MPA Comments_at_8–14 (A._____) (quoting the USPS 5-Year Plan and other USPS admissions).

These arguments are *post hoc* rationalizations. The Commission expressly rejected most of them, and adopted none of them. *See* Order_at_60–82 (A.___); Mailers' Blue Br. 25–28 (discussing Order); Commission Br. 25–32, 34–36 (discussing Order); Mailers' Green Br. 5–7 (discussing Order). Accordingly, the arguments may not be considered by the Court. *SEC v. Chenery*, 332 U.S. at 196. An "agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *LePage's 2000*, 642 F.3d at 231 (quoting *FPC v. Texaco, Inc*., 418 U.S. 380, 397 (1974), and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962)).

B. The Commission's Attribution of the Volume Losses Associated With the Trend Component of the Macroeconomic Variable For Single-Piece First-Class Mail Also Was Arbitrary and Capricious.

Neither the Commission nor the USPS offers any cogent defense of the Commission's interpretation of all volume losses associated with the trend component of the employment (macroeconomic) variable for Single-Piece First-Class Mail as recession-related. *Compare* Mailers' Blue Br. 44–45 with PRC Br. 49–50; USPS Br. 7.

The Commission tried to justify its interpretation on the theory that "both components [of the employment variable] typically respond to the business cycle when using macroeconomic data." Order_at_71 (A.____) (cited in PRC Br. 49–50). Beyond alluding to a similar assertion by USPS witness Thress, however, the Commission cited nothing in the record to support this claim. PRC Br. 50 (quoting Order_at_72 (A.____)).

Moreover, the Commission offered no response to prior testimony for the USPS in a previous rate case by Peter Bernstein, a vice-president at Mr. Thress's consulting firm, acknowledging that economic factors—*i.e.*, cyclical variables—"act as better explanations for short-term variations in volume growth around an existing trend." PRC Docket No. R2006-1, Testimony of Peter Bernstein (USPS-T-8) at 9 (quoted in Lundblad_at_9 (A.____)). The Commission also ignored a demonstration by the mailers' expert Prof. Lundblad that 80 percent of the year-to-year decline in employment was the continuation of a long-term trend that was under way in 2002 or earlier—many years before the onset of the recession. Mailers' Blue Br. at 45 (citing Lundblad_at_9,_27–29) (A.____). The Commission's "'failure to respond meaningfully' to objections raised by" the mailers "renders its decision arbitrary and capricious." *BNSF*, 741 F.3d at 168; *Cape Cod Hosp.*, 630 F.3d at 216.

The Commission's brief belatedly argues that Prof. Lundblad's analysis was invalid because he compared the effects of the employment trend variable during 2002–2007 with 2008–2012, a period that included the economic recovery in 2011 and later years. PRC Br. 51–52. This is yet another *post hoc* rationalization. The argument was not adopted by the Commission itself, and may not be relied on to uphold its action. *SEC v. Chenery*, 332 U.S. at 196.

In any event, the pre-2007 employment trend variable explains most of the post-2007 volume decline associated with the employment variable *even when the data for 2011 and 2012 are excluded.* From FY 2002 to FY 2007, the employment trend variable reduced the volume of all shapes of First-Class Single-Piece Mail by an average of 400 million pieces per year.[6] While this negative trend accelerated to an average of 596 million pieces per year in the FY 2008 to FY 2011 period,[7] most of the decline in volume was readily explained by the continuation of the substantial negative trend that began years before the recession. The same is true for the period from FY 2008 through FY 2010, when the average annual volume loss was 690 million pieces.[8] Hence, a majority of the downward trend between 2008 and 2010 was a continuation of the downward trend of the variable during the 2002–2007 period.

Finally, the Commission defends its approach on the theory that failure to attribute to the recession the volume losses in Single-Piece First-Class Mail volume associated with the trend component of the employment variable would imply that the recession had no effect at all on the volume of certain categories of mail, "which seemed 'implausible.'" PRC Br. 50 (citing Order at 73). This is nonsensical. Refusing to attribute the volumes associated with the trend component of a macroeconomic variable to the recession would still allow the

---

[6] Sum of PRC Library Reference PRC-LR-R2013-11/1, PRC-LR-R2013-11-1.xlsx, tab "Forecast Lvl," cells D6:D11, D21:D26 and D36:D41 divided by 6 (A._____).

[7] Sum of *id*., tab "Forecast Lvl," cells D12:D15, D27:D30 and D42:D45 divided by 4 (A._____).

[8] Sum of *id*., tab "Forecast Lvl," cells D12:D14, D27:D29 and D42:D44 divided by 3 (A._____).

attribution of volumes associated with the cyclical component. If the USPS failed to establish such attribution for some categories of mail, the proper conclusion is not that the recession had no effect on those categories, but that the USPS did not submit a study adequate to meet the USPS' burden of proof under Section 3622(d)(1)(E). Order_at_77 (A.____).

II. THE COMMISSION FAILED TO MAKE REASONED FINDINGS THAT RECOVERY OF PRE-2012 LOSSES WAS NECESSARY.

The mailers also challenge the Order for unjustifiably finding that recovery of losses incurred before Fiscal Year 2012 was "necessary to enable the Postal Service, under best practices of honest, efficient and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States." Mailers' Blue Br. 46 (referencing Section 3622(d)(1)(E)). Neither the Commission nor the USPS offers a cogent response to this criticism.

The Commission acknowledges that the "necessary" test is separate from the "due to" test, and that the USPS must satisfy both. Commission Br. 39–40. Moreover, neither the Commission nor the USPS disputes that an exigent rate increase was *not* "necessary" before Fiscal Year 2014 in the sense of necessary to continue providing mail service. Without an exigent rate increase, the USPS continued to deliver the mail—at a generally high level of service performance—even during the nadir of the USPS' liquidity in 2012 and 2013. *See* Postal Regulatory Commission, *Annual Compliance Determination Report for Fiscal Year 2013* 99 (March 27, 2014), *available at* www.prc.gov/Docs/89/89500/2013%20ACD%20Final%20(2).pdf (finding that the level of service provided for most mail products in Fiscal Year 2013 "met or exceeded annual service performance targets").

The USPS dismisses the significance of these facts on the ground that there is "no statutory or regulatory basis for concluding that the Postal Service is required to file an exigent increase within any specific period of time." USPS Br. 20 n.8. This is an attack on a straw man. The Mailer Petitioners do not contend here that the USPS violated any statutory deadline by failing to resubmit an exigent rate increase proposal before late 2013. The mailers' point is that the USPS's performance is empirical confirmation that an exigent increase was unnecessary for the USPS to continue providing its services. MPA Comments_at_54–55 (A.___).

The USPS, apparently recognizing that a rate increase that the USPS managed to live without for six years may not have been "necessary," invokes *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819), for the proposition that "necessary" may mean only "convenient" or "useful." USPS Br. 19. The USPS reads too much into *McCulloch*. It held only that the degree of rigor to be read into the word "necessary" depended on the context in which the word was used. *McCulloch*, 17 U.S. at 415 ("This word, then, like others, is used in various senses, and, in its construction, the subject, the context, the intention of the person using them are all to be taken into view.") In Section 3622(d)(1)(E), the word "necessary" appears in the context of a qualifying phrase indicating that an above-inflation rate increase is a last resort, to be allowed only after all reasonable alternative remedies have been exhausted: the increase must be "necessary to enable the Postal Service, *under best practices of honest, efficient and economical management*, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States." *Id.* (emphasis added).

Moreover, the overarching intention of the drafters of Section 3622(d)(1)(E) was to induce the USPS to control its costs. The USPS's "continuing obligation" to pursue "cost reductions and greater efficiency" is "at the heart of" the Section. Order_at_175 (A.___). The legislative history of the exigent increase provision during its 11-year gestation in Congress confirms this. The provision, as initially drafted, would have made above-CPI rate increases relatively easy for the USPS to obtain. Mailers, regulatory experts (including the then-chairman of the PRC), and representatives of the Administration repeatedly expressed concern to Congress that a broad exception of this kind could destroy the effectiveness of index regulation, and reintroduce cost-of-service regulation and its breakeven guarantee by the back door. In response to these concerns, Congress made the proposed exception to the pricing constraints progressively more narrow and restrictive:

> In general, the exigent rate provisions evolved from a less restrictive to a more restrictive standard. As the language changed from one Congress to the next, requirements relating to both exigency and the Commission's determination became more strict and difficult to meet.

Order No. 547_at_13–24) (A.___).

Finally, the Commission and the USPS argue that an exigent rate increase was "necessary," despite the continued delivery of the mail without an exigent increase, because the USPS needed to build up its liquidity and make new capital investments for the *future*. PRC Br. 57; USPS Br. 19–20. The Order never explained, however, why this rationale would justify the $2.8 billion in additional liquidity awarded by the Commission, rather than some smaller amount.

The $2.8 billion, added to the USPS's $2.6 billion of liquidity at the end of Fiscal Year 2013, would produce total liquidity of about $5.4 billion:

USPS Year-End Liquidity (Cash + Unused Borrowing Capacity) (amounts in billions)	
FY 2007	$ 11,699
FY 2008	$ 9,232
FY 2009	$ 8,890
FY 2010	$ 4,161
FY 2011	$ 3,488
FY 2012	$ 2,319
FY 2013	$ 2,638

Order_at_117 (A.____). The Order never explained why the USPS "needs" $5.4 billion in liquidity rather than $4.2 billion (USPS liquidity at the end of Fiscal Year 2010), $3.5 billion (liquidity at the end of Fiscal Year 2011, when the USPS chose not to request an exigent increase), or even $2.3 billion (liquidity at the end of Fiscal Year 2012, when the USPS again chose not to request an exigent increase).

Respectfully submitted,

/s/

David M. Levy
Matthew D. Field
John F. Cooney
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004-1601
(202) 344-4732
dlevy@venable.com
mfield@venable.com
Counsel for Alliance of Nonprofit Mailers, American Catalog Mailers Association, American Forest & Paper Association, Association of Marketing Service Providers, Direct Marketing Association, Inc., Major Mailers Association, MPA—The Association of Magazine Media, National Association of Presort Mailers, and Quad/Graphics, Inc.

Matthew D. Field
Ian D. Volner
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004-1601
(202) 344-4800
mfield@venable.com
idvolner@venable.com
Counsel for Association for Postal Commerce, Association of Marketing Service Providers, and Direct Marketing Association, Inc.

James E. Anderson
HOWE, ANDERSON & STEYER, P.C.
1250 Eye Street, N.W., Suite 650
Washington DC 20005
(202) 296-5680
janderson@haspc.com
Counsel for the Envelope Manufacturers Association

David F. Stover
2970 S. Columbus Street, No. 1B
Arlington VA 22206-1450
(703) 998-2568
postamp@crosslink.net
Counsel for the Greeting Card Association

Tonda Rush
CNLC, LLC
P.O. Box 5737
Arlington VA 22205
(703) 237-9801
tonda@nna.org
Counsel for the National Newspaper Association

William B. Baker
WILEY & REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7255
wbaker@wileyrein.com
Counsel for National Postal Policy Council and Newspaper Association of America

Gregory S. Jacobs
POLSINELLI P.C.
1401 Eye Street, N.W.
Suite 8000Washington DC 20005
(202) 626-8368
gjacobs@polsinelli.com
Counsel for Printing Industries of America

Donna Hanbery
HANBERY & TURNER, P.A.
33 South 6th Street, Suite 4160
Minneapolis MN 55402
(612) 340-9350
hanbery@hnclaw.com
Counsel for Saturation Mailers Coalition

Keith Kupferschmid
SOFTWARE & INFORMATION INDUSTRY ASSOCIATION
1090 Vermont Avenue, NW
Washington, DC 20005
(202) 789-4442
keithk@siia.net
Counsel for Software & Information Industry Association/American Business Media

William J. Olson
Jeremiah L. Morgan
John S. Miles
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070
wjo@mindspring.com
Counsel for Valpak Direct Marketing Systems, Inc., and
Valpak Dealers' Association, Inc.

July 10, 2014

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. RULE 32(a)

This brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(a)(2) because the brief contains 4997 words as counted by Microsoft Word, excluding the parts of the brief that are exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

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 proportionally spaced typeface using Word 2010 in 14 point Times New Roman.

/s/ David M. Levy

David M. Levy
Counsel for Alliance of Nonprofit Mailers et al.

July 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this brief were served today by filing electronically with the Court through the appellate CM/ECF system.

/s/

David M. Levy

July 10, 2014