

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 13, 2021

No. 20-1521

(consolidated with Nos. 17-1276, 20-1505, & 20-1510)

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

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

ALLIANCE OF NONPROFIT MAILERS, et al.,
Intervenors for Respondent.

On Petition for Review of an Order of the
Postal Regulatory Commission, Docket No. RM2017-3

**PAGE-PROOF REPLY BRIEF OF
THE UNITED STATES POSTAL SERVICE**

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GLOSSARY

2006 Act	Postal Accountability and Enhancement Act of 2006, Pub. L. No. 109-435, 120 Stat. 3198 (2006)
Commission	Postal Regulatory Commission
CPI	Consumer Price Index for All Urban Consumers
JA	Joint Appendix

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is undisputed that Congress required the rate-regulation system to be designed to achieve the objectives in 39 U.S.C. § 3622(b), including to “assure adequate revenues, including retained earnings, to maintain financial stability,” *id.* § 3622(b)(5), and to maintain “just and reasonable” rates, *id.* § 3622(b)(8). The Postal Regulatory Commission (“Commission”) recognized below, and does not now disavow, that those objectives cannot be satisfied if the system does not give the Postal Service a reasonable opportunity to cover its costs. And no one has disputed that a price-cap system allows such an opportunity if it provides a baseline set of rates that are compensatory but not excessive at the outset, and a going-forward formula that limits price increases but does not produce revenues that fall below costs for reasons apart from the firm’s performance.

The Commission acknowledges (at 1-2, 10-12) that the initial system’s price cap, which allowed prices for market-dominant classes of mail to adjust only in response to changes in the Consumer Price Index for All Urban Consumers (“CPI”), was an improperly calibrated formula that left the Postal Service “chronically underfunded” and unable to cover its costs at any point while it was in place. The Commission accordingly took the appropriate action of recalibrating the price-cap formula going forward to address costs over which the Postal Service had little control. But after operating for 14 years under a failed system, the Postal Service’s

current baseline set of prices is far below the Postal Service's costs. The Commission nevertheless acknowledges (at 52) that it "deliberately refused to allow the Postal Service to raise rates to a level sufficient to cover all of the Postal Service's costs." The question is whether this refusal to allow a rate reset – to provide the Postal Service with a reasonable opportunity to cover its costs – was a reasonable response to the system's failure to achieve the statutory objectives.

The Commission's brief proffers essentially three reasons for refusing to allow the baseline level of rates to be reset to a reasonable level. First, the Commission characterizes its final rule as a "compromise" or a "middle path" between the allegedly "extreme" alternatives of leaving a failed system in place without changes or allowing the Postal Service to charge rates sufficient to cover its costs. Second, the Commission asserts that, while allowing a rate reset would further the statute's "financial stability" and "just and reasonable" rates objectives, doing so would undermine other objectives. Finally, the Commission argues that, even if a rate reset would have allowed the new system to achieve the statute's objectives, the Commission was entitled to act incrementally rather than fix all the original system's failures at once. As discussed below, none of these explanations justifies the Commission's rejection of the proposed rate reset. Accordingly, the case should be remanded, and the Commission should be directed to reconsider the proposed rate reset.

ARGUMENT

I. THE COMMISSION’S “SPLITTING THE DIFFERENCE” RATIONALE DOES NOT JUSTIFY ITS DENIAL OF A RATE RESET, PARTICULARLY BECAUSE IT IS BASED ON A MISCHARACTERIZATION OF THE POSTAL SERVICE’S PROPOSAL.

The Commission’s brief (at 3, 25, 38-39, 51-52, 57) defends its final rule as a “middle path” between two “extreme” and “diametrically opposed” alternatives: the Mailers’ view that the Postal Service should be given no new pricing authority (and thus must rely exclusively on cost-cutting to achieve financial stability), and the Postal Service’s alleged view that it should be permitted to solve all its financial difficulties, including cost coverage, entirely by raising prices. The Commission broadly claims that its rejection of both “extremes” is entitled to deference, as is its adoption of a “compromise” that would enable the Postal Service to raise prices (through adjustments in the price cap) but not allow prices to achieve “a level sufficient to cover all of the Postal Service’s costs.”

As an initial matter, the Commission’s “compromise” defense is not responsive to the Postal Service’s challenge. The Postal Service is not quibbling with the extent to which the Commission considered the parties’ positions or the manner in which it resolved other questions in the rulemaking, but instead is contesting the Commission’s rejection of a specific proposal – a rate reset – that would repair a flaw that the Commission found in the initial system. The

Commission does not disavow its uncontested finding that the system cannot satisfy the “financial stability” and “just and reasonable” rates objectives under 39 U.S.C. § 3622(b)(5) and (b)(8) without affording the Postal Service a reasonable opportunity to charge prices that would cover its costs. JA__ - __ (Order_5763_at_339-40); *accord* Comm’n Br. at 10-11 (recognizing that the initial ratemaking system was intended to enable the Postal Service to achieve sufficient revenues to cover its costs).¹ The Commission recognizes (at 2, 12, 44) that the system failed to achieve those objectives and acknowledges (at 43, 48) that

¹ At one point in its appellate brief, the Commission (at 52) appears to suggest that the “just and reasonable” objective is directed to whether individual products and classes cover their attributable costs – *i.e.*, the costs directly associated with that particular product or class of products. While an individual product’s price is certainly “unreasonable” if it too low even to cover its own costs, the Commission recognized that the “just and reasonable” objective also more broadly requires that rates be set to ensure that revenues are aligned with expenses overall. *See* JA__ - __ & n.437 (Order_5763_at_339-40_&n.437) (stating that holding prices “chronically underwater” violates the “just and reasonable” objective, recognizing that price-cap systems “do not aim to set rates below costs,” and framing the issue as “realign[ing] the ratemaking system to correct for th[e] divergence” “between the changes in CPI-U and the growth in Postal Service expenses and revenue after the [Act]”); JA__ & n.213 (Order_4257_at_113_&n.213) (interpreting the “just and reasonable” requirement in a manner “consistent” with how that phrase has been interpreted “in other regulatory environments,” in which rates must “fall within a ‘zone of reasonableness,’ where rates are neither ‘less than compensatory’ nor ‘excessive,’” quoting *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984)). Indeed, “reasonable” rates are generally understood to encompass not merely coverage of the specific costs of the relevant activity, but also a positive rate of return for the firm over and above those specific costs, to avoid “threatening . . . the financial integrity of the” regulated firm. *See, e.g., Farmers Union Cent. Exch.*, 734 F.2d at 1502, 1505.

resetting rates would further the achievement of those objectives, but concedes (at 52) that it nevertheless refused to allow a rate reset. The instant petition challenges the reasonableness of that refusal.

The fact that the Commission (properly) rejected the plea from other parties to maintain a broken system without any changes at all does not itself justify the refusal to make necessary repairs to that system. The Administrative Procedure Act's reasoned-decisionmaking standard requires a regulator to do more than point out that it gave neither party everything it sought. *Cf. Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1120-21 (D.C. Cir. 2015) (APA requires a reasoned decision, not merely "split[ting] the difference" between two parties' positions). Otherwise, the Commission could defend virtually any conclusion as a reasonable exercise of discretion simply by characterizing the positions of opposing parties as "extreme" and "diametrically opposed" and noting that its ultimate decision fell somewhere between those two polar opposites. More to the point, the task of repairing a broken system requires actual, complete repair, not merely toleration of a still-broken system based on the middle ground between parties' litigating positions. To return to an analogy from the Postal Service's opening brief, a flat bicycle tire must be both patched and reinflated to make the bicycle serviceable; patching the tire alone might be more than nothing, but that does not mean that the problem is solved.

In any event, the Commission’s “middle path between extremes” argument is based on a mischaracterization of the Postal Service’s proposal. Contrary to the Commission’s assertion (at 45), the Postal Service did not seek to “respond to its financial challenges through rate increases alone.” The Postal Service’s position is that the system must be designed to achieve the statutory objectives, including “financial stability,” 39 U.S.C. § 3622(b)(5), which in turn means that, even if the system is built around a price cap, it must allow the Postal Service a reasonable opportunity to cover its costs.² The Postal Service’s specific proposal – allowing market-dominant rates to be reset to a reasonable level at the outset of the new regulatory period and then recalibrating the price cap going forward so that revenues do not slip below costs for reasons unrelated to the Postal Service’s actual performance – would simply put the Postal Service in the position where any regulated firm should be at the beginning of a price-cap system: with a set of compensatory but not excessive prices, and a properly calibrated price cap that places limits on future price increases but that does not let rates to fall to a

² The Mailers’ intervenor brief notes (at 1-2) that the Postal Service’s alternative proposal below was that the price-cap system be replaced by an alternative system of regulation, *see* JA__ - __ (2017 USPS Cmts. at 175-228), which the mailers claim (at 11-12) would have given the Postal Service “unfettered pricing discretion” and “unlimited pricing power.” But the Commission rejected that proposal, JA__ (Order 4258 at 33), and the Postal Service does not challenge that decision. Accordingly, much of the Mailers’ intervenor brief is devoted to rebutting an argument that no one is advancing here.

noncompensatory level due to factors over which the firm has no control. In order to sustain positive net income under such a proposed system, the Postal Service would still need to operate efficiently and manage costs within its reasonable control, but at least it would not be saddled with preordained annual net losses in the future as a result of artificially low going-in rates.

Moreover, contrary to assertions by the Commission (at 60) and the Mailer intervenors (at 3), the Postal Service's proposal would not allow it to recoup through pricing any of the more than \$80 billion in accumulated losses incurred in the 14 years before the Commission's final order took effect. The Postal Service made it abundantly clear, both in its comments below, JA__ (2018_USPS_Reply_Cmts._25), and in its opening brief in this Court, Postal Service Br. at 37, that a rate reset would be designed solely to give the Postal Service an opportunity to cover its costs (and thus attain financial stability) *going forward*. Accordingly, far from allowing the Postal Service to respond to its financial challenges through rate increases alone, the Postal Service's proposal would still leave the Postal Service with more than \$80 billion in unpaid bills, and would require the Postal Service to act efficiently to keep that deficit from growing.³ In terms of the "bike tire" analogy, the Postal Service

³ For these reasons, nothing in the Postal Service's proposal would "undo the regulatory bargain" of the initial, failed price-cap system, contrary to the Mailer intervenors' claim (at 14). The Postal Service simply seeks a fair regulatory bargain going forward in which it can cover its costs by operating efficiently within its legal constraints, rather than being forced to continue enduring annual net losses simply

proposed that the system patch the hole in the tire (i.e., adjust the price cap going forward) and fill the tire with air so that the bike is serviceable (i.e., reset rates to a reasonable level), but did not propose that the Postal Service be compensated for the period in which the bicycle was defective. Whatever the merits of a hypothetical proposal to recoup past losses, simply returning the system to a serviceable state going forward – and fixing the very problem that the Commission identified – is far from an “extreme” proposal.

The Commission also appears to misapprehend the nature of the Postal Service’s objection to the Commission’s final rule. Contrary to the Commission’s assertion (at 57), the Postal Service does not contend that the final rule’s density adjustment to the price cap “does not go far enough.” Notwithstanding some contestable details that the Postal Service does not dispute in this forum, the density adjustment is a reasonable alteration of the price-cap formula, in recognition of the facts that continued declines in density are largely outside the Postal Service’s control and will continue to place upward pressure on costs in the future. Rather, the Postal Service’s argument is that, while the density adjustment to the going-forward price-cap formula is needed to prevent the annual gap between revenues and costs from widening for reasons apart from the Postal Service’s performance, such

because its going-in prices are held to an artificially low level as a legacy of the initial system’s failures.

price-cap adjustment does not close that gap and thus does not alone provide a meaningful path for the Postal Service to cover its costs and achieve financial stability. By failing to ensure that the going-in baseline set of rates are compensatory (but not excessive) at the outset, the new system will do little more than preserve the Postal Service's present level of financial instability.

Nor is the Commission correct in asserting (at 60) that the Postal Service is seeking pricing authority to address "other causes" of its financial instability. The Postal Service agrees with the Commission that the gulf between the Postal Service's annual revenues and annual costs (and thus the cause of its unbroken 14-year string of multibillion dollar annual net losses) was both created and widened primarily by the combined impact of massive and persistent declines in mail density and a rigid CPI-based price cap that did not allow revenues to adequately respond to those declines. As the Postal Service explained in its comments below and in its opening brief, this combination has left the Postal Service with two problems going forward: its current prices are too low, and future density declines will continue widening the gap between revenues and costs. JA __ - __ (2018 USPS Cmts. at 50-55), JA __ - __ (2020 USPS Cmts. at 6-15), Postal Serv. Br. at 27-32. The Commission's density adjustment properly addresses the second problem, but does not address the first, and thus would leave future revenues at a level far below future costs for reasons other than the Postal Service's performance. The Postal Service's proposed

rate reset is designed to address that first problem, but *both* problems stem from the same root cause.

In short, the Commission's "middle path between extremes" argument is miscast. Not only does the bare invocation of a "middle path" fail to establish that the Commission acted reasonably in refusing to authorize a rate reset, it is also based on a mischaracterization of the Postal Service's position and therefore fails to respond to the argument at hand.

II. THE COMMISSION DID NOT REASONABLY EXPLAIN WHY A RATE RESET WOULD RUN AFOUL OF ANY STATUTORY OBJECTIVES.

The Commission does not disagree that its congressional mandate under 39 U.S.C. § 3622(d)(3) was to ensure that the rate-regulation system achieves the objectives in 39 U.S.C. § 3622(b), JA__ (Order_5763_at_23), JA__ (*id.*_at_284), including to "assure adequate revenues, including retained earnings, to maintain financial stability," *id.* § 3622(b)(5); and to allow "just and reasonable" rates, *id.* § 3622(b)(8), meaning rates that are compensatory but not excessive. *See Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1502-04 (D.C. Cir. 1984). And, the Commission concedes (at 42-43) that allowing rates to be reset entering the next regulatory period would further both of those statutory objectives, but maintains that the achievement of those objectives must be balanced against other, allegedly competing, statutory objectives. While we agree that the Commission was required

to read the objectives in conjunction with one another in establishing or modifying the system, the Commission does not reasonably explain how allowing recalibration of the revenue base would undermine any other objectives.

The Commission's brief posits (at 54-55) that a rate reset would undermine the "predictability and stability" objective, *see* 39 U.S.C. § 3622(b)(2), but does not square that assertion with its own uncontested interpretation of that objective's meaning. In its orders below, the Commission interpreted "predictability and stability" as requiring the ratemaking system to foster rate adjustments that are "capable of being consistently forecast" regarding both timing and magnitude and "do not include sudden or extreme fluctuations." JA__(Order_4257_at_55). The Commission's final order further concluded that this objective is achieved where a ratemaking system contains a "mechanism," such as a price cap, that limits the magnitude of individual price adjustments during the regulatory period. JA__(Order_5763_at_312).

A one-time rate adjustment to the baseline level of prices – or even a phased-in recalibration of that baseline over a period of years – does not conflict with this interpretation of the "predictability and stability" objective. *The Commission itself* recognized that price-cap systems typically allow rebasing of rates at interim periods, JA__-(Order_5763_at_311-12), and originally proposed a rate reset without suggesting that it was inherently inconsistent with "predictability or

stability.” JA__ - __ (Order_4258_at_39-45). Because the amount of any rate recalibration and the timeline of its implementation would be determined and announced by the Commission in advance, it can be forecast and would not fluctuate over time. In addition, a one-time or phased-in adjustment is certainly a mechanism that limits the magnitude of individual price adjustments, and the price cap (which the Commission’s final order contains, and which the Postal Service is not challenging here) limits further increases during the regulatory period. In short, the Commission has not reasonably explained why rebasing rates in response to the fact that current prices are now unsustainably low would run afoul of the objective in Section 3622(b)(2).

The Commission’s brief also suggests at various points (at 45, 47, 52-53) that a rate reset would be in some tension with principles of incentive regulation, thus potentially implicating the “maximiz[ing] incentives” objective in Section 3622(b)(1). But allowing prices to be set at a reasonable “break even” level going into the new regulatory period governed by the Commission’s final rule would simply return the Postal Service’s prices to the compensatory baseline level they had at the outset of the regulatory period under the Postal Accountability and Enhancement Act of 2006, Pub. L. No. 109-435, 120 Stat. 3198 (2006) (“2006 Act”). There is no real dispute that a properly calibrated price-cap system – containing both a baseline set of compensatory rates and a formula that permits prices to adjust in

response to cost fluctuations that are beyond the Postal Service's control – can both support the financial stability of the Postal Service and provide ample incentives to control costs. The Commission recognized that the original system failed because, while it contained the former (a baseline set of compensatory rates), it lacked the latter (adjustment factors for exogenous headwinds). There is no “incentive”-based reason to replace it with a system that contains the latter but not the former.

Indeed, while the goal of price-cap regulation is to make the regulated entity responsible for managing its costs and operating efficiently to live within the cap, *see, e.g., Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 177-78 (D.C. Cir. 1993), the suggestion that prices must be set and held below costs in order to encourage further cost-cutting is squarely at odds with how price caps are intended to achieve that goal. It is the existence of a price cap (which, again, the Commission's final rule contains), and not the absence of compensatory rates at the outset of the regulatory system, that provides the incentives. The Commission recognized as much when it observed that, while price-cap systems “are designed to encourage efficiency, they do not do so by holding the regulated entity's prices chronically underwater.” JA__ - __ (Order_5763_at_339-40). And trying to provoke efficiency gains by holding prices below costs is particularly inappropriate here; the main reason that the Postal Service's prices are currently below costs is that those prices have been subject for 14 years to a rigid system that the Commission concluded was

a failure precisely because it produced inadequate revenues and thereby prevented efficiency-enhancing actions. JA__ (Order_5763_at_301), JA__ - __ (*id.*_at_335-36); *accord* Comm'n Br. at 44-45.

The Commission's decision to continue holding the Postal Service's revenue base below water would perhaps be explicable if the Commission had determined that the current gap between revenues and costs were the result of the Postal Service's inaction or mismanagement. To the contrary, however, the Commission acknowledged that the Postal Service reduced costs and increased efficiency during the period in which the original system was in place, JA__ - __ (Order_5763_at_294-95), JA__ (Order_4257_at_222), despite the fact that the Postal Service was not provided any new cost-cutting authority and was subject to a number of constraints that inhibit its ability to change its costs or improve efficiency. JA__ - __ (Order_4257_at_198-200). And the Commission did not point to any cost-cutting opportunities that the Postal Service failed to take advantage of or suggest that the Postal Service responded inappropriately to the inherent incentives of that price-cap system. Indeed, the Commission laments (at 44, 50-51) that it was because "the initial system's price cap did not allow the Postal Service to raise rates to cover all of its losses" that the Postal Service was forced to engage in "extraordinary measures to preserve liquidity," such as defaulting on congressionally mandated benefits payments, deferring needed capital investments, and reducing service standards.

Given these findings and observations, there is no reason to leave a chronically underfunded system in place as a means of encouraging further cost reductions.

At the very least, if the Commission's position is that the Postal Service must cut costs in order to bridge the net-revenue gap that its final rule intentionally leaves in place, then it was required to examine whether such cost-cutting opportunities even reasonably exist in practice. Here, however, the Commission identified no such opportunities, and accepted the record evidence showing that there are limited new cost-cutting opportunities available to the Postal Service under current law. JA__ - __ (Order_5763_at_340-41). The only logical inference is that further cost-cutting is thwarted not by inadequate incentives, but by inadequate opportunities.

The Mailers' intervenor brief makes abundantly clear, and the Postal Service is well aware, that large customers have benefited from paying unsustainably low prices in the past and are not eager for that to change. And it may well be that business considerations will counsel against setting prices to a fully compensatory level. But Congress left specific pricing decisions to the Postal Service's Governors, 39 U.S.C. § 404(b); the Commission's role is to set the outer boundaries of pricing authority under a system that is designed to, among other things, assure the Postal Service's financial stability. The Commission acknowledges that its revisions to the system have failed to achieve that objective, and that failure cannot be justified in the name of promoting efficiency.

III. THE COMMISSION DID NOT RELY ON INCREMENTALISM IN JUSTIFYING ITS DECISION TO REJECT A RATE RESET, AND THUS CANNOT ADVANCE THAT ARGUMENT ON APPEAL.

Finally, the Commission argues (at 49-50) that, even though it could have allowed rates to be recalibrated going into the new regulatory period, it prudently acted incrementally by choosing to “focus first” on near-term challenges and deferring consideration of “any additional rate authority” for a subsequent rulemaking proceeding. This argument fails because it is a *post hoc* rationalization of the Commission’s appellate counsel, and this Court’s review is limited to the reasoning articulated in the Commission’s orders. *E.g.*, *Sierra Club v. EPA*, 985 F.3d 1055, 1065 (D.C. Cir. 2021); *PG&E Gas Trans., Nw. Corp. v. FERC*, 315 F.3d 383, 390 (D.C. Cir. 2003). Although the Commission invoked incrementalism during the rulemaking proceedings, it was in a very specific and distinct context, and was not in support of its denial of a rate reset. Accordingly, this Court cannot consider the argument.

As background, the Commission concluded that “financial stability” under 39 U.S.C. § 3622(b)(5) requires the system to allow the Postal Service not only to cover its total costs (which the Commission termed “medium-term” stability), JA__ - __ (Order_4257_at_165-69), JA__ (*id.*_at_248), but also to produce profits and retained earnings (which the Commission termed “long-term” stability), JA__ - __ (*id.*_at_169-71), which then can be used for purposes such as funding capital

investments or taking other efficiency-enhancing actions. JA__ - __ (Order_4258_at_35-36). In a finding that no party disputes, the Commission concluded that the system failed to assure both medium- and long-term stability, and therefore did not satisfy the statutory objective of “financial stability”. JA__ (Order_5763_at_8).

The Commission further determined that distinct types of pricing authority were needed for purposes of satisfying “medium-term” stability (cost coverage) and “long-term” stability (retained earnings). The latter form of authority (which the Commission labeled “performance-based authority”) would be conditioned on the Postal Service improving efficiency and refraining from changing its service standards, but the former (which the Commission labeled “supplemental” authority, and which ultimately included the density adjustment to the price cap) would not. *Compare* JA__ - __ (Order_4258_at_39-45) *and* JA__ - __ (Order_5337_at_59-103) *with* JA__ - __ (Order_4258_at_46-73) *and* JA__ - __ (Order_5337_at_104-50). *See also* JA__ (Order_5763_at_30) (density adjustment is aimed at addressing “net losses,” i.e., medium-term stability).

In its final order, the Commission elected to defer its attempt to implement “performance-based authority,” deciding that it would instead consider, in a subsequent rulemaking, whether and how to provide conditional pricing authority aimed at producing retained earnings and long-term stability.

JA__ (Order_5763_at_158), JA__ (*id.*_at_166). In justifying that decision, the Commission explained that it was not required to finalize all forms of pricing authority in a single rulemaking, and that “implementation of the performance-based rate authority proposal is not an immediate need” and could produce “unintended consequences.” JA__ - __ (Order_5763_at_160-66), JA__ - __ (*id.*_at_297-98), JA__ (*id.*_at_348). No party has challenged the Commission’s decision to defer the consideration of “performance-based” authority to a separate rulemaking.⁴

In its appellate brief, however, the Commission relies on incrementalism to justify an entirely different decision: to reject the Postal Service’s proposal for a rate reset aimed at covering costs and achieving “medium-term” stability. The Commission’s final order did not suggest that cost coverage would be a topic of that later rulemaking and thus presented no reason to believe that the subsequent rulemaking will address the final order’s deficiencies in allowing the Postal Service to cover its costs. *See Advocates for Hwy. & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1147 (D.C. Cir. 2005) (rejecting as “entirely unconvincing” agency’s argument that the challenged final rule is “first installment of an incremental program” that will ultimately correct any failures of the final rule

⁴ The Commission also suggested that an incremental approach was appropriate with respect to prices for “underwater” classes of products – i.e., classes of products that did not even cover their “attributable” costs, such that the Postal Service was actually losing money simply by offering the product. JA__ - __ (Order_5763_at_159-60). No party has challenged that aspect of the Commission’s order, either.

to “fulfil its statutory obligations”; reasoning that the other purported elements of that “incremental program” are directed at other issues). Accordingly, whatever force the “incrementalism” justification may have in the abstract, it was not articulated by the Commission itself as a basis for rejecting a rate reset, and therefore cannot be considered on review now.

CONCLUSION

For the reasons stated above and in the Postal Service’s opening brief, the Commission’s refusal to reset the revenue base to a level that would give the Postal Service a reasonable opportunity to cover its costs is unreasonable, unreasonably explained, and contrary to the record evidence. Accordingly, this case should be remanded for further proceedings.

Dated: July 19, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief of the United States Postal Service complies with this Court's order of March 8, 2021, because it contains 4,526 words as measured by Microsoft Word, a word processing system that includes footnotes and citations in word counts. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it uses proportionately spaced, 14-point type.

/s/ Morgan E. Rehrig _____
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Dated: July 19, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on July 19, 2021, the foregoing brief was electronically filed with the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that counsel for the Respondent and the Intervenors are registered as ECF filers and that they will be served by the CM/ECF system.

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