

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

DOUGLAS CARLSON,
Petitioner,

v.

POSTAL REGULATORY
COMMISSION,
Respondent.

No. 18-1328

**POSTAL REGULATORY COMMISSION'S RESPONSE TO
PETITIONER'S MOTION TO EXPEDITE**

Respondent Postal Regulatory Commission (PRC) hereby respectfully responds to petitioner Douglas Carlson's motion for expedition of this case. As explained below, although this case does not appear to satisfy this Court's criteria for expedition, we ordinarily would not object to having this case briefed and argued on an expedited basis so long as the respondent is not required to file a brief less than thirty days after petitioner serves his opening brief. The situation is complicated, however, by the fact that appropriations for the Department of Justice lapsed on December 21, 2018, and the Postal Regulatory Commission ran out of funding on January 11, 2019. In these circumstances, the Court should not require respondent to prepare its brief during a time period when respondent and its counsel are without funding.

1. In the absence of a statute requiring expedited consideration of an appeal, this “Court grants expedited consideration very rarely.” D.C. Circuit, *Handbook of Practice and Internal Procedures* § VIII.B. A party seeking expedition “must demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge”; the Court will also consider whether “the public generally, or ... persons not before the Court, have an unusual interest in prompt disposition.” *Id.* The reasons supporting expedition must be “strongly compelling.” *Id.*

2. This case involves a challenge to a decision of the PRC authorizing the United States Postal Service to increase the rate that it charges for stamped First-Class letters. *See* PRC, *Order on Price Adjustments for First-Class Mail, USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes* (Order No. 4875).¹ Petitioner notes that this change will take effect on January 27, 2019, and that once that change takes effect, no mailer who pays the higher rate will be able to obtain reimbursement, even if the rate increase is ultimately set aside. *See* 39 U.S.C. § 3681.

3. Petitioner makes no effort to quantify the extent to which he personally will be injured by the rate increase, relying instead on the impact of the rate increase on the general public. *See* Mot. 19. There is thus no reason to believe that the impact on petitioner himself of having this case briefed and argued in the regular course will be

¹ <https://www.prc.gov/docs/107/107054/Order%20No.%204875.pdf>.

anything more than de minimis. We agree with petitioner, however, that any injury he incurs will be irreparable. And we agree with petitioner that the case has implications for the broader public.

4. Petitioner argues at length that his challenge is substantial. While a detailed response to petitioner's arguments should await merits briefing, we note now that we do not agree that petitioner has any probability of succeeding on the merits of his claim. After observing all notice and comment requirements, the PRC upheld a price increase that petitioner concedes conforms to the price cap limitations specified in 39 U.S.C. § 3622(d). *See* Order No. 4875, at 19. The PRC's order explained that the proposed rate increase satisfied all statutory and regulatory requirements and fell within the Postal Service's "pricing flexibility" as preserved by the Postal Accountability and Enhancement Act. *See id.* at 19-20.

5. While it does not appear that this case meets this Court's strict standards for expedited consideration, we would ordinarily have no objection to having this case expedited so long as respondent receives at least thirty days within which to prepare its brief. *See Handbook of Practice and Internal Procedures* § VIII.B. ("An order granting expedition does not automatically shorten the briefing schedule."). Circumstances are complicated, however, by the fact that both respondent and its counsel have been impacted by the lapse in appropriations. Absent an appropriation, Department of Justice attorneys are prohibited from working, even on a voluntary basis, except in

very limited circumstances, including “emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342. It is presently unknown when funding will be restored by Congress.

Accordingly, if this Court does grant petitioner’s motion to expedite, it should make the deadline for the filing of respondent’s brief contingent upon the restoration of funding for respondent and the Department of Justice, and the time for filing respondent’s brief should be tolled for the duration of any period between the filing of petitioner’s brief and the restoration of appropriations.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the requirements of Federal Rule of Appellate Procedure 27(d). It contains 720 words.

/s/ Joshua M. Salzman
JOSHUA M. SALZMAN

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that a copy of the foregoing will be transmitted by both mail and email to petitioner at the following address:

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s/ Joshua M. Salzman

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