# In bid to drive up postal rates, UPS takes the PRC to the Supreme Court

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Last December, the United Parcel Service petitioned the Supreme Court to review a decision by the DC Circuit Court that upheld a ruling by the Postal Regulatory Commission concerning the cost allocation methodology used by the Postal Service.

Today the case entered a new phase as briefs opposing the UPS petition were filed by the PRC and several intervenors, including the Postal Service, Amazon, the National Association of Letter Carriers, and the Parcel Shippers association.  (UPS initial petition is [here](https://www.supremecourt.gov/DocketPDF/18/18-853/77552/20181226122249306_UPS%20Petition%20for%20Cert.pdf); the PRC brief is [here](https://www.supremecourt.gov/DocketPDF/18/18-853/95477/20190405110310785_18-853%20UPS%20-%20Opp..pdf); the intervenors’ brief is [here](https://www.supremecourt.gov/DocketPDF/18/18-853/95479/20190405114247787_18-853BriefInOppositionForIntervenorRespondents.pdf).  Other documents filed in the case can be found [here](https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public%5C18-853.html).)

UPS believes that the Postal Service has been using a method for allocating its costs that basically allows the Postal Service to charge unfairly low prices on parcels.  If UPS were to prevail in the case, more of the Postal Service’s costs would be assigned to competitive products (which include parcel shipping), and that in turn would lead to higher prices for the services with which UPS competes.  UPS could then raise its rates as well, or at least be in a better competitive position to increase its market share.

The costing issues involved in this case are very technical, so suffice to say that they involve what’s called inframarginal costs.  Currently these costs are almost entirely treated as “institutional costs” — i.e., those costs shared in common by more than one postal product.  UPS wants these inframarginal costs re-classified as “attributable costs,” i.e., those which are caused by specific products.  This would lead to more costs being assigned to parcels, and hence higher prices for parcel shipping.

The case now before the Supreme Court goes back several years.  In 2015, UPS made three proposals to the PRC for revising the cost allocation methodology (as discussed in this [still helpful post](https://savethepostoffice.com/when-titans-collide-ups-petitions-prc-change-usps-costing-methodologies/) by Mark Jamison).  Together the three proposals would have had the Postal Service distribute all of its costs to specific products, essentially eliminating the distinction between institutional costs and attributable costs.

As a matter of fact, moving toward a “fully distributed” cost methodology was one of the recommendations of [the report](https://home.treasury.gov/system/files/136/USPS_A_Sustainable_Path_Forward_report_12-04-2018.pdf) by the President’s Task Force on the Postal Service.  According to the Task Force, “the USPS’s current cost allocation methodology is outdated, leading to distortions in investment and product pricing decisions.”

In order to reduce this “distortion,” the Task Force recommended that “the USPS and the PRC develop a new cost allocation model with fully distributed costs to all products, services, and activities.”  Not surprisingly, UPS cites this recommendation (for which it probably lobbied heavily) in its December 2018 petition to the Supreme Court.

Not satisfied with the PRC’s rulings on its proposals, UPS has been looking to the courts for relief.  A PRC ruling on one of the three proposals — the one involving the “appropriate share” of institutional costs that should be contributed by Competitive products — is currently [being appealed to the DC Circuit](https://savethepostoffice.com/wp-content/uploads/2019/04/Statement-of-Issues-in-UPS-v-PRC-re-appropriate-share.pdf).  The inframarginal case has already gone through the DC Circuit, so now UPS is asking the Supreme Court to review the case.  It’s taken several years to get to this stage.

In September 2016, in [Order No. 3506](https://www.prc.gov/docs/97/97114/Order3506.pdf), the Commission denied the UPS petition regarding the inframarginal cost issue.  In 2017, UPS petitioned the D.C. Circuit for review.  In May 2018, a three-member panel of the DC Circuit [rejected the UPS appeal](https://www.cadc.uscourts.gov/internet/opinions.nsf/E9845DA7ACC1A2CD85258295004D5A06/%24file/16-1354-1732076.pdf).  In July 2018, UPS filed a [petition for a “rehearing en banc](https://savethepostoffice.com/wp-content/uploads/2018/07/UPS-request-for-rehearing.pdf),” asking the full DC Circuit to reconsider the panel’s earlier decision. The DC Circuit [denied](https://savethepostoffice.com/wp-content/uploads/2018/07/UPS-rehearing-en-banc.pdf) that petition, leaving UPS with no remaining options except for the Supreme Court.

When the DC Circuit ruled on the case, it relied heavily on what’s called [Chevron deference,](https://www.law.cornell.edu/wex/chevron_deference)  a reference to the famous Supreme Court ruling that said the courts should defer to a government agency’s interpretation of a statute, so long as the interpretation is not unreasonable and Congress has not spoken directly to the precise issue at question.

Chevron deference has been questioned by several current members of the Supreme Court, and it seems only a matter of time before the Court picks a case for review to revisit Chevron.  UPS argues that this should be that case.

When UPS first presented its petition to the Supreme Court, it was joined by the attorneys general of thirteen Republican-dominated states and a conservative legal organization called [Landmark Legal Foundation](https://en.wikipedia.org/wiki/Landmark_Legal_Foundation), which filed amicus briefs with the Supreme Court on behalf of UPS.  Their interest in the case has nothing to do with parcel pricing, of course. They want to use the case as a means to challenge the Chevron doctrine because they believe it gives federal regulatory agencies too much power.

In their briefs, the PRC and the intervenors claim the arguments presented by UPS are without merit because the cost allocation methodology used by the Postal Service is consistent with law and because the Commission’s interpretations of the relevant statutes are entirely reasonable.

Beyond that, the intervenors argue that this is simply not the right case for the Supreme Court to select in order to test Chevron.  As they state in their brief, “The case would be an exceptionally poor vehicle to reconsider Chevron” because, among other reasons, “the economics of postal costing are complex.”  “If this Court wishes to reconsider Chevron,” they suggest, “it should do so in a straightforward case of statutory interpretation, not one laden with difficult economic concepts and inscrutable jargon.”

The Supreme Court will now decide whether to grant the UPS petition and move forward on hearing the case.  It’s not likely, but you never know.

For more on the controversy over Chevron, see [this primer](https://www.everycrsreport.com/files/20170919_R44954_7b1a2c7553bbcda0c5903bd7bccefe7f6dd50db4.pdf) prepared by the Congressional Research Service and this [subsequent CRS report](https://fas.org/sgp/crs/misc/LSB10204.pdf) entitled “Deference and its Discontents: Will the Supreme Court Overrule Chevron?”  For more about the history of the inframarginal cost case, see [this previous post](https://savethepostoffice.com/ups-goes-back-to-court-on-usps-costing-methodology/) and [this one](https://savethepostoffice.com/court-turns-back-ups-bid-to-drive-up-usps-parcel-prices/).