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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF THE NATIONAL ASSOCIATION OF POSTMASTERS OF THE UNITED STATES, THE LEAGUE OF POSTMASTERS, MARK STRONG, ROBERT RAPOZA, MARILYN SHAW, AND MARILYN HILL	Docket No. C2011-3

UNITED STATES POSTAL SERVICE MOTION TO DISMISS

(June 13, 2011)

Pursuant to Rule 3030.12(b), the United States Postal Service submits its motion to dismiss the Complaint filed by the National League of Postmasters ("NLP"); the National Association of Postmasters of the United States ("NAPUS"); Robert Rapoza, the President of NAPUS; Mark Strong, the President of NLP; Marilyn Shaw, the former Postmaster of the Post Office in Patterson, Iowa; and Marilyn Hill, the former Postmaster of the Post Office in McCallsburg, Iowa ("Complainants") on the grounds of lack of subject-matter jurisdiction, ripeness, failure to exhaust statutory remedies, and failure to comply with procedural requirements in the Commission's Rules of Practice and Procedure.[1] The Postal Service also moves to dismiss on grounds that the Complainants have failed to state a claim upon which relief may be granted.

BACKGROUND

On May 23, 2011, Complainants filed their Complaint with the Postal Regulatory Commission. The Complaint challenges the Postal Service's proposal to amend certain postal regulations to improve the administration of the

[1] Under Rule 3030.12(b)(1), the Postal Service's filing of the instant motion operates to postpone the filing of an answer until 10 days after the Commission's decision on this motion.

Post Office closing and consolidation process. The proposed rule was published in the *Federal Register* with a request for public comments on March 31, 2011. 76 Fed. Reg. 17,794.

The proposed rule focuses on six general modifications to improve the administration and management of the discontinuance process for all Postal Service-operated retail facilities. First, the proposed rule would clarify that Post Offices may be managed by postmasters or other personnel acting under the supervision of a postmaster, effectively permitting postmasters to service more than one Post Office, or an employee to manage the day-to-day responsibilities of a Post Office under the supervision of a postmaster without changing the designation of the retail facility. Second, the conversion of a Post Office into a subordinate classified station or branch would no longer be subjected to the notice and comment period typically applied in Post Office discontinuance actions. Essentially, the term “consolidation” would be redefined to apply only to a conversion of a Postal Service-operated retail facility to a contractor-operated unit. The other four types of proposed changes would extend the same notice and comment procedures applied in Post Office discontinuances to the discontinuance of Postal Service-operated stations and branches, permit Postal Service Headquarters management to identify retail facilities for possible discontinuance and direct initiation of feasibility studies, clarify factors that could be used to identify retail facilities for discontinuance study consistent with applicable law, and update certain administrative aspects of the discontinuance study process.

The Postal Service regarded the first two types of proposed changes – those regarding the staffing of Post Offices and the redefinition of "consolidation" – as potentially implicating the consultative process under 39 U.S.C. §§ 1004 (b) and (d).[2] Thus, the Postal Service contacted the National Association of Postmasters of the United States, the National League of Postmasters of the United States and the National Association of Postal Supervisors on April 6, 2011, to advise them of the proposed rule and provide an opportunity for them to submit any written recommendations to the Postal Service regarding the specific amendments subject to the Section 1004(b) consultative process within the statutory 60-day period.[3] The Postal Service also advised that any comments by the Complainant organizations regarding the proposed changes not subject to Section 1004(b) should be submitted in the normal 30-day statutory comment period established for the rulemaking.

On April 28, 2011, the National League of Postmasters and the National Association of Postmasters of the United States filed joint public comments for display on the Commission's website, which included a letter expressing their views on the Postal Service's proposed changes to 39 C.F.R. Part 241 and a letter from an attorney opining that aspects of the proposed rule subject to Section 1004(b) were inconsistent with certain statutes. On May 2, 2011, the Complainant organizations also sent a joint letter to the Postal Service with formal comments, along with the documents that had previously been filed with

[2] Unless otherwise noted, all occurrences of "Section" in this motion refer to the designated section of Title 39, United States Code. All occurrences of "Rule" refer to the designated section of Title 39, Code of Federal Regulations, chapter III.
[3] The Complaint was filed more than 14 days before the end of the 60-day comment period under the consultative process, which occurred on May 6.

the Commission. This May 2, 2011 correspondence was directed to the Manager, Customer Service Standardization, in accordance with instructions in the proposed rule, but the Complainant organizations later forwarded the same documents to the Office of General Counsel on May 11, 2011 with an offer to meet and confer on the comments if the Postal Service so chose. This email communication did not mention that Complainants intended to file a Complaint with the Commission regarding the proposed rule, but appeared to be advising the Office of General Counsel that comments had previously been submitted to another office within Postal Service Headquarters as a response to the Postal Service's request for comments in connection with the Section 1004(b) process.

The next communication that the Office of General Counsel received from the Complainants was the instant Complaint, which puts forth three claims based on the underlying rulemaking. First, Complainants contend that the proposed rule's description of "consolidation" conflicts with 39 U.S.C. § 404(d) and established case law. Second, Complainants argue that the proposed rule's description of the postmaster's role in managing a Post Office is inconsistent with Section 1004(i)(3) and other statutory and case authority. According to Complainants, the Postal Service should have given notice under Section 1004 before public disclosure of the proposed rule. Also as part of the second claim, Complainants assert that unidentified potential replacements for postmasters "do not have the requisite skills, training, or the appropriate experience and directives to manage postal operations or conduct appropriate community relations," and that implementation of this aspect of the rule could "jeopardize compliance with

the Sarbanes-Oxley Act." Complaint at 29-30. Finally, the Complaint contains a claim related to the Section 3661 requirement that the Postal Service obtain an advisory opinion from the Commission before implementing a nationwide change in service, but it does not explain how the Postal Service's action conflicts with this requirement.

As relief, Complainants seek a temporary stay of the Postal Service's proposed rule, and they encourage the Postal Service to avoid a Commission-imposed stay by volunteering to delay any activity related to the proposed rule until the Commission rules on the Complaint. Complainants also request a declaratory judgment that (1) the Postal Service lacks the authority to redefine "consolidation"; (2) the Postal Service lacks the authority to disassociate "postmaster" from the definition of "Post Office"; and (3) the large-scale proposed closing plan is a nationwide change in service that requires an advisory opinion.

Discussed below in detail are the bases on which this Complaint should be dismissed. Multiple grounds for dismissal exist, including lack of subject-matter jurisdiction and ripeness, failure to exhaust statutory remedies, failure to comply with procedural regulatory requirements, and failure to state a claim upon which relief may be granted. Accordingly, the Postal Service respectfully requests that the Commission dismiss this Complaint.

ARGUMENT

I. THE COMMISSION LACKS JURISDICTION UNDER SECTION 3662.

The Complaint alleges violations of two statutory provisions: Sections 401(2) and 3661. Complaint at 5, 8. For reasons discussed elsewhere in this motion, the claims under Section 3661 are premature, speculative, and without merit. The remaining claims under Section 401(2) are also premature, and assume an interpretation of the Commission's complaint jurisdiction that is overbroad as illustrated by the troubling consequences which flow from that interpretation.

For the Commission to entertain a complaint, the allegations in that complaint must fall within the Commission's authority under Section 3662. That section limits the Commission's subject-matter jurisdiction to certain enumerated statutes, or regulations promulgated under those statutory provisions. 39 U.S.C. § 3662(a); *see also* 39 C.F.R. § 3030.2. Under the Commission's rules, a complaint must clearly identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements, and it must include citations to the relied-upon section or sections of Title 39 of the United States Code, or the relied-upon order, regulation, or other regulatory requirement. 39 C.F.R. § 3030.10(a)(2).

Except for the portion of their Complaint that claims a violation of Section 3661, Complainants rely solely on Section 401(2) as a basis for jurisdiction under Section 3662(a).[4] Section 401(2) authorizes the Postal Service, as one of its

[4] The Postal Service agrees with the tacit acknowledgment that no other statute enumerated in Section 3662 is relevant to the allegations of this Complaint.

general powers, "to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title[.]" Specifically, Complainants allege that the Postal Service's proposed interpretation of "consolidation" would "change the words of the statute" or "read an entire concept out of the statute," presumably in reference to Section 404(d),[5] in violation of what Complainants believe to be Congress's intent. Complaint at 16-19. Complainants also allege that the proposed clarification of the manner in which Post Offices may be staffed is contrary to the definition of "postmaster" in Section 1004(i)(3). Complaint at 27-28.

A. The Postal Service Has Not Taken Any Action That Would Implicate Section 401(2).

Even taken on its own terms, the Complaint does not properly fall within the Commission's subject-matter jurisdiction under Sections 3662(a) and 401(2). Section 401(2) concerns the Postal Service's authority to adopt, amend, and repeal regulations. The Postal Service has not adopted, amended, or repealed any regulations along the lines of the proposed rule, particularly with regard to the relevant portions of the proposed rule. The only subject of the Complaint is a proposed rule on which the Postal Service solicited public comment, portions of which are part of the ongoing consultation with the organizational Complainants as provided in Section 1004. Because no final action to adopt, amend, or repeal

[5] This substantive portion of the Complaint does not expressly tie its claim to Section 404(d). In fact, the prayer for declaratory judgment on this claim references Section 1004(i)(3), which is plainly inapposite. Complaint at 33.

regulations has been taken, no action by the Postal Service that could arguably be inconsistent with the statute has occurred.[6] This understanding is consistent with the plain meaning of Section 401(2). As a policy matter, this plain-meaning understanding also avoids the disruptive effect that the Complainants' view would have on Postal Service operations: if parties were allowed to litigate proposed rules under Sections 3662(a) and 401(2), parties could short-circuit the normal iterative process of rulemaking and impose a "chilling" effect on the Postal Service's mere consideration of reasonable or necessary changes.

B. The Complaint Relies on an Overbroad View of Section 401(2) as a Basis for Section 3662(a) Jurisdiction.

Complainants' broad take on the relation between Sections 401(2) and 3662(a) threatens to explode Section 3662(a)'s express limits on the Commission's complaint jurisdiction.[7] The two substantive claims under Section 401(2) allege that the proposed rule is inconsistent with Sections 404(d) and 1004(i)(3). Neither of these statutes is enumerated as a basis for the Commission's complaint jurisdiction under Section 3662(a). Because of this, Complainants essentially seek to convert the reference to Section 401(2) and that provision's proscription of "inconsisten[cy] with this title" into a catch-all for the Commission to exercise complaint jurisdiction over the Postal Service's

[6] Indeed, the very purpose of proposing rules for comment is to elicit input that informs the proponent of stakeholder perspectives and commentary that can lead to alteration of rules from the form first proposed. The consultative process under Section 1004 has much the same purpose. Complainants seek by means of the Complaint to forestall the Postal Service and other stakeholders from the benefits of these procedures.

[7] This approach is particularly ironic in light of Complainants' substantive assertion that the Postal Service's proposed rule would somehow "erase" the phrase "consolidation" from statute.

compliance with any provision of Title 39, U.S. Code (or a statute in another Title of the U.S. Code that the Postal Service plays a role in implementing).

Such a reading of the Commission's complaint jurisdiction conflicts with both the text and history of the Postal Accountability and Enhancement Act (PAEA). Under the Postal Reorganization Act, Section 3662 gave the Commission jurisdiction over all complaints concerning compliance with "the policies of this title," so long as those complaints concerned rates or service. Although Congress strengthened the Commission's complaint jurisdiction in other ways, the legislative history of the PAEA indicates that Congress did not intend to broaden the Commission's complaint jurisdiction to include other matters, such as employee consultation processes, staffing decisions, or facility management. It is telling that, under both the PAEA and precursor bills to change former Section 3662, Congress consistently maintained the Postal Reorganization Act's title for Section 3662 as "Rate and service complaints." *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he heading of a section [is a] tool[ ] available for the resolution of a doubt about the meaning of a statute." (internal quotation marks and citations omitted)). This indicates that, whatever provisions it may have included within the Commission's complaint jurisdiction, Congress intended to keep the Commission's focus on rate and service, not turn it toward other internal aspects of Postal Service operations. This Complaint concerns staffing and network-management regulations, however, not postal rates or service.

In promulgating Section 3662(a) as part of H.R. 6407, the 109th Congress chose to narrowly limit the Commission's jurisdiction by enumerating in explicit detail the specific statutes that can form the basis for that jurisdiction. Congress elected this approach over earlier bills that would have given the Commission much broader jurisdiction over complaints concerning the entirety of chapters 1, 4, 6, and 36 of Title 39. *See, e.g.*, H.R. 22, 109th Cong. § 205 (2006); S. 662, 109th Cong. § 205 (2006). This language was passed by the House. But, when the Senate approved S. 662 (styled as an amendment to H.R. 22), it changed this language by limiting the Commission's jurisdiction to "the provisions of chapter 1 (except section 101(c)), sections 401, 403, 404, 404a, 601, or this chapter [chapter 36]." One of its key sponsors explained that this change –

> does not and is not intended to preclude any interested party from securing a hearing before the Postal Regulatory Commission if it believes that the rates being charged or the manner in which services being provided to that mailer or mailer group violates the act. It is my hope that in conference that we can work to assure that the Postal Regulatory Commission does not become embroiled in attempts to resolve disputes as to internal affairs or purely operational decisions of the Postal Service. This provision is intended to protect the rights of the mailing public against the potential for monopoly abuse or other unjust or unfair conduct by the Postal Service in terms of rates charged or the nature of service provided.

152 Cong. Rec. S767 (daily ed. Feb. 7, 2006) (statement of Sen. Collins) (emphasis added). The language enacted in the PAEA followed the Senate rather than the House approach, and in fact narrowed the Commission's jurisdiction even further, by replacing the reference to "chapter 1 (except section 101(c))" with only one subsection in that chapter (section 101(d)), and the

reference to “sections 401, 403, 404” with only two subsections: 401(2) and 403(c).

Given the trend in the legislative history to narrow the Commission’s complaint jurisdiction, it is unlikely that Congress would have listed specific statutory bases in a section titled “Rate and service complaints,” and then slipped in an oblique cross-reference to serve as catch-all for complaint jurisdiction over any Title 39 provision whatsoever. Indeed, at no time in the 108th or 109th Congress did either House deliberate on a proposal to give the Commission jurisdiction over all sections of Title 39. If Complainant’s position was correct, Congress’ careful crafting of the language of Section 3662 would have been meaningless.

This Congressional intent is particularly clear regarding the provisions that Complainants claim the proposed rule contravenes. Within the legislative history of Section 3662(a), Congress’s consideration shifted from inclusion of all of chapter 4 (in the House-passed bill), to inclusion of sections 401, 403, 404, and 404a (in the Senate-passed bill), and ultimately to inclusion of only Sections 401(2), 403(c), and 404a, dropping the reference to Section 404 entirely. In fact, Congress had already provided a statutory mechanism for Commission review of alleged inconsistencies with Section 404(d). *See* 39 U.S.C. § 404(d)(5). At the same time, Congress did not demonstrate an intent that Section 3662(a)’s cross-reference to Section 401(2) should allow a second bite at the apple for purported violations of Section 404(d).

As for the alleged inconsistency with Section 1004(i)(3), no bill that led to the PAEA suggested that the Commission should have jurisdiction over this provision, or any provision of chapter 10. Taken as a whole, Section 1004 creates a complex and finely-balanced process for consultation between postmaster/supervisor organizations and the Postal Service, including specific procedures for certain matters under Section 1004. *See* 39 U.S.C. § 1004(f), (g). If Congress had intended to offer the Commission's complaint process as an escape hatch from Section 1004's delicate framework and established dispute resolution options, it surely would have done so explicitly, rather than through an oblique set of cross-references. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.").

At the same time, it is apparent that Congress did not intend the complaint provision to empower the Commission to oversee the Postal Service's employment relations. In the PAEA, Congress notably declined to adopt the sole suggestion by the President's Commission on the Postal Service that the Commission have jurisdiction over an employment-related matter (pay comparability for bargaining-unit employees). *See* REPORT OF THE PRESIDENT'S COMMISSION ON THE UNITED STATES POSTAL SERVICE, EMBRACING THE FUTURE: MAKING THE TOUGH CHOICES TO PRESERVE UNIVERSAL MAIL SERVICE 44, 69, 115-16, 119, 122-23, & appx. C at 139, 177 (2003). In Section 3662, Congress never considered including the chapters governing postal employment—chapters 10

and 12—into the scope of the Commission's complaint jurisdiction, even in the earlier bills that would have given the Commission broader jurisdiction. As the scope of that jurisdiction evolved, Congress also eliminated reference to any other provision in chapters 1 and 4 that might implicate employment matters. For instance, in the Senate-passed version, the Commission was given jurisdiction over all of chapter 1, except for the one provision of that chapter that discusses employment matters (101(c)). Meanwhile, the PAEA explicitly provides that "nothing in this Act" – including the changes to the Commission's complaint jurisdiction – "shall restrict, expand, or otherwise affect any of the rights, privileges, or benefits of either employees of or labor organizations representing employees of the United States Postal Service under ... any handbook or manual affecting employee labor relations within the United States Postal Service[.]" Pub. L. 109-435, § 505(b), 120 Stat. 3236 (2006). While this provision is not directly relevant here because management associations do not have the same rights as unions, it provides further indication that Congress did not intend the Commission's redefined complaint jurisdiction (as "[some]thing in this Act") to inject the Commission into postal employment matters.

The statutory context and legislative history therefore indicate that the reference to Section 401(2) is limited, such that the jurisdiction that the Commission might have over "rules or regulations" of the Postal Service does not extend to all such rules or regulations. *See, e.g., Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase

depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”). Complainants’ “elephant-in-the-mouse-hole” approach to Sections 401(2) and 3662(a) would expand the Commission’s jurisdiction beyond Congress’s delineations in Section 3662(a).

This does not mean that the reference to Section 401(2) in Section 3662(a) is without meaning, however. Under one alternative interpretation available to the Commission, the reference to Section 401(2) could be seen as supportive of the other statutory references in Section 3662(a). Under such an interpretation, the reference to Section 401(2) would simply prevent that statute from serving as a shield behind which, by casting its actions as rules and regulations pursuant to its sole authority under that statute, the Postal Service could attempt to buffer the impact of a Commission-determined violation of Sections 101(d), 403(c), 404a, or 601 or of chapter 36 of Title 39. Put another way, the inclusion of Section 401(2) in Section 3662(a) would be seen as a way to clarify that the Commission’s complaint authority, with respect to violations of other statutes enumerated in Section 3662(a), prevails even for activities enshrined in regulations promulgated under the Postal Service’s own authority, and not just for Postal Service actions other than rules or regulations authorized by Section 401(2).

Thus, Section 401(2), as amended by the PAEA, constrains the Postal Service from adopting rules and regulations inconsistent with other provisions of Title 39 more generally. However, the Commission’s complaint jurisdiction would

only be understood to apply to Postal Service rules and regulations alleged to be inconsistent with the other statutes specifically enumerated in Section 3662(a). Claims of inconsistency with other Title 39 provisions are left, if anything, to fora with more general jurisdiction.

At a minimum, Congress did not intend that the combined effect of Sections 401(2) and 3662(a) should somehow suggest alternatives to the explicitly provided methods for dispute resolution pursuant to Sections 404(d) and 1004. This result should be clear from the analysis above, regardless of the Commission's view of the general scope of Section 3662(a)'s reference to Section 401(2).

II. EVEN ASSUMING THAT THE COMMISSION'S COMPLAINT JURISICTION IS WITHIN THE SCOPE OF SECTION 3662, THE CONTROVERSY IS NOT RIPE AS THE SUBJECT MATTER PERTAINS TO A NONBINDING, PROPOSED RULE THAT HAS BEEN PUBLISHED FOR PUBLIC COMMENT.

Complainants cannot establish that the allegations in the complaint are ripe for review. Ripeness involves determining whether decisions of a particular agency are at a stage which permits judicial resolution. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). The rationale underlying the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-149.

Two factors determine whether an administrative action is ripe for review: (1) the fitness of the issues for decision; and (2) hardship to the parties of withholding adjudicative consideration. *Id.* at 149. The "fitness" prong is further broken down into (i) whether there is a legal issue to decide and (ii) whether the decision is final. Agency action must be "final" in order to be subject to review. *See Bennett v. Spear*, 520 U.S. 154, 177 (1997). Two conditions must be satisfied for finality: "First, the action must mark the 'consummation' of the agency's decisionmaking process…. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 177-178. Section 3662 establishes a clear finality requirement, since the Postal Service can only fail to "conform [ ] with the requirements" of section 401(2) if it "adopt[s], amend[s], or repeal[s]" a "rule or regulation." In *Abbott Labs*, the Court stated that an agency decision that is "promulgated in a formal manner after announcement in the *Federal Register* and consideration of comments by interested parties is quite clearly definitive" and an agency decision with which the agency expects "compliance" is a final decision. 387 U.S. at 150-51. According to the analysis established by case law, then, the Postal Service has taken no final agency action on the matters at issue in this Complaint. Nor do Complainants face any hardship by allowing rulemaking and consultation processes to conclude what has been initiated.

A. The Postal Service Has Not Taken Final Action And Therefore, The Complaint Is Not Ripe For Review.

The proposed rule at issue here does not constitute final action by the Postal Service, and the Complaint is therefore not ripe for review. A challenge to

a proposed rule is not fit for judicial decision. *Blackfeet Nat'l Bank v. Rubin*, 890 F. Supp 48 (D.D.C. 1995), *aff'd*, 67 F.3d 972, (D.C. Cir. 1995).[8] *Blackfeet National Bank* involved a challenge by a bank to a proposed regulation by the Department of the Treasury. The court denied the plaintiff's motion for preliminary injunction and dismissed the case because the proposed regulations were not yet final. "[A]n agency action is not final if it is only tentative." *Id*. at 53. The court went on to say that "[the] defendant's proposed regulations merely serve notice on the public that the Department of Treasury is considering issuing regulations, invites public comments on the proposed regulations and announces that a public hearing will be held on the issue. Only after these procedures are completed will the agency issue final regulations. Thus, the proposed regulations still present 'a moving target.'" *Id*. at 53-54 (quoting *Franklin v. Massachusetts,* 505 U.S. 788, 797 (1992)). Thus, the proposed regulation did not have a legal effect. "[T]he proposed regulations are not definitive statements of defendant's position. Nor do they have the status of law or require anyone to comply with them in any manner." *Id.* at 54. *See also United States v. Springer*, 354 F.3d 772, 776 (8th Cir. 2004) ("An agency that exercises its discretion to propose a rule has no duty to promulgate its proposal as a final rule. Thus, it is well settled that proposed regulations have no legal effect."); *LeCroy Research Sys. Corp. v. Comm'r*, 751 F.2d 123, 127 (2d Cir.1984) ("Proposed regulations are

[8] By citing authorities that address whether agency action can be challenged under the Administrative Procedure Act ("APA"), the Postal Service does not intend to suggest such authorities imply the proposed rule at issue here is subject to the requirements of the APA. Although 39 U.S.C. § 410(a) exempts the Postal Service from the notice and comment requirements of the APA (5 U.S.C. § 533(b), (c)), the Postal Service applied APA-like procedures to the rulemaking at issue here to the extent that it voluntarily solicited public comment on the proposed rule.

suggestions made for comment; they modify nothing."); *Wuillamey v. Werblin*, 364 F. Supp. 237, 243 (D.N.J. 1973) ("A proposed regulation may be modified or abandoned. It does not have the force of law.").

The *Blackfeet National Bank* court explained that allowing judicial review of a proposed regulation would adversely affect the decisionmaking process. "In stark contrast to the lack of legal effect imposed on plaintiffs by defendant's proposed regulations, the impact of judicial review at this early state of an agency's rulemaking process is likely to interfere with the proper functioning of the agency." *Blackfeet Nat'l Bank*, 890 F. Supp. at 54-55. Furthermore, allowing parties to challenge a proposed regulation would be contrary to the interest of administrative economy. "Because the challenged regulations are not final, the Court risks judging the legality of <u>proposed</u> regulations and then having to re-examine the legality of <u>final</u> regulations which could be markedly different from the proposed regulations." *Id.* at 53 (emphasis in original). Deferring decision until "after a final agency decision will prevent it 'from adjudicating matters that in fact make no difference and are a waste of our resources.'" *Id*. (quoting *Am.Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 747 F.2d 787, 789-90 (D.C. Cir. 1984)) (emphasis in original). The same policy basis for a ripeness doctrine described in the context of judicial review by courts applies to the Complainants' attempt to seek adjudicative review by the Commission.

Here, the Postal Service has published a notice of proposed rulemaking in the *Federal Register*. 76 Fed. Reg. 17,794 (Mar. 31, 2011). The notice is identified as a "proposed rule" and specifically states that "the Postal Service

invites comments on . . . proposed amendments to the Code of Federal Regulations." *Id.* at 17,796. The notice further provides for the receipt of public comments for a 30-day period. *Id.* at 17,794. No final rule has yet been issued.

The proposed rule accordingly does not constitute final action. It is not "definitive," and is not a rule with which the Postal Service expects compliance. Instead, the proposed rule, on which the Postal Service solicited public comments, is part of a routine administrative process. If litigants could challenge agency action based on the mere publication of a proposed rule, there could be a serious "chilling" effect on agency efforts to solicit ideas and comments from the public. Consequently, following *Blackfeet National Bank*, the Commission should dismiss the complaint absent any final agency action.

B. Even If The Proposed Rule Were A Final Agency Action, The Issue Is Not Yet Ripe Because Complainants Have Not Suffered Hardship.

Complainants cannot demonstrate that postponing review will cause them hardship, in the sense that "the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163 (1967). In order to overcome lack of "fitness" under the first prong of the *Abbott Labs* approach, there must be sufficient hardship. The mere possibility of future injury does not meet the requirement that the agency's action have direct and immediate impact.

When alleged harm is only foreseeable, there is reluctance to decide an issue is ripe. *See Hinton v. Udall*, 364 F.2d 676, 680 (D.C. Cir. 1966) ("Even more formidable are the barriers the court erects in situations like the case at bar

where there is a reasonable possibility that the course of official action may be such, perhaps affected by negotiation with the suitors, that no submission to a court will be requisite.”).

When agency action is not final, the hardship standard may be even stricter. In *Blackfeet National Bank*, the plaintiff alleged loss of business as a result of a proposed regulation. *Blackfeet Nat’l Bank*, 890 F. Supp at 54. The court, acknowledging that proposed rules sometimes have an immediate impact, decided that any hardship was insufficient to overcome the lack of finality. “[C]ourts almost invariably conclude, however, that such adverse repercussions are outweighed by a notice procedure that permits the public to know what sorts of regulations are being contemplated by an agency, what rationale the agency employs to justify its proposed rules and how the agency's proposals can be challenged.” *Id.* The court further explained that “it would be virtually unprecedented for a court to set aside proposed regulations and not to permit the public comment period to go forward.” *Id.*

Complainants contend that, even though the Postal Service has not implemented the proposed rule at this time, the issue is ripe for consideration because “the circumstances are readily capable of repetition without a ruling” from the Commission and because that the Postal Service lacks the necessary statutory authority to adopt such a rule. Complaint at 6-7. Yet even if complainants could establish harm, such allegations would not arise from the proposed regulation. Complainants themselves concede that any possible harm comes only “if the Postal Service elects to implement the Proposed Rule.”

Complaint at 7. Just because the circumstances are "capable of repetition" at another time does not mean that an issue should be prematurely reviewed at this time or that any actual hardship to the Complainants has materialized. Here, where there is no final action, no immediate impact, and no hardship to Complainants, the controversy is not ripe and, therefore, the complaint should be dismissed.

III. COMPLAINANTS' CLAIM III IS PREMATURE AS THE POSTAL SERVICE FULLY INTENDS TO BRING ANY LARGE SCALE, "TOP-DOWN" PROPOSALS TO DISCONTINUE POST OFFICES TO THE COMMISSION FOR REVIEW UNDER 39 U.S.C. § 3661.

Complainants have alleged no conduct by the Postal Service that would trigger the procedures required by Section 3661. Under Section 3661, "[w]hen the Postal Service determines that there should be a [nationwide] change in the nature of postal services[,]" it is directed to request an advisory opinion before implementing the change in service. 39 U.S.C. § 3661. The Postal Service has made no determination at this time that "there should be a [nationwide] change in the nature of postal services." Claim III states that "[t]he Postal Service is required by § 3661(b) to obtain an advisory opinion from the Commission to close thousands of [P]ost [O]ffices, effecting a 'nationwide change in service.'" Complaint at 30. However, Claim III does not allege that the Postal Service has violated the requirements described in the claim. Complainants concede that the Postal Service remains in the evaluation stage of any decision to propose a nationwide change in service. *See* Complaint at 30 (recognizing that Post Offices "are undergoing the evaluation process prior to a decision to close the [P]ost [O]ffices"). Although Complainants fear that the Postal Service will

implement a nationwide change in service without following the proper Section 3661 procedures, *see* Complaint at 7, 30, they have not demonstrated that the Postal Service intends to act in violation of Section 3661. For its part, the Postal Service categorically denies any such allegations. *See Pushing the Envelope: The Looming Crisis at USPS*, 112th Cong., 1st Sess. (2011) (Response to Question 13, Post-Hearing Questions for the Record Submitted to Postmaster General Donahoe from House Oversight and Government Reform Committee Chairman Issa via House Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Chairman Ross).[9]

In general, a complaint is proper only if it identifies an actual controversy; a hypothetical conflict, or a conflict that has not yet occurred, will not suffice. *See UPS Worldwide Forwarding, Inc. v. United States Postal Serv.*, 66 F.3d 621, 625-626 (3d Cir. 1995) (setting forth the requirements for standing). "[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 987 (D.C. Cir. 2008) (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)) (internal quotations and citations omitted). As discussed above, here, Complainants allege a hypothetical controversy – the implementation of a

[9] In its response to this question, the Postal Service stated that:

> the Postal Service has initiated a rulemaking in the *Federal Register* to solicit public comment on proposed changes to the regulations governing the Post Office closure process. Once those regulations are revised, should the Postal Service determine to proceed with a centralized plan for closing a large number of Post Offices affecting service on a nationwide or substantially nationwide basis, it plans to first present any such initiative to the Postal Regulatory Commission in the form of a request for an advisory opinion under 39 U.S.C. § 3661.

nationwide change in service without requesting an advisory opinion under Section 3661 – that they fear will occur in the future. However, Complainants have not shown that the feared event has occurred, or will ever occur; for its part, the Postal Service fully intends to comply with Section 3661 if a program is developed to discontinue Post Offices on a scale that would effect a nationwide change in service. *See id.* at 989 (recognizing presumption that executive agency officials will discharge their duties in good faith).

Claim III challenges Postal Service conduct that has not occurred, and does not appear likely to occur in the future. Accordingly, Claim III is not ripe for adjudication, and thus it should be dismissed.

IV. THE COMPLAINANTS HAVE NOT EXHAUSTED REMEDIES EXPRESSLY MADE AVAILABLE TO THEM BY STATUTE.

Even if the Complaint articulated claims properly within the Commission's complaint jurisdiction, the Commission should decline to entertain it because Complainants have failed to exhaust procedures expressly made available to them by statute. Section 1004(b) establishes a consultative process whereby the Postal Service must present certain proposed programs affecting postmasters and postal supervisors to their representative organizations, give those organizations an opportunity to provide input, and take full and fair consideration of that input. Section 1004(d) further requires the Postal Service to undergo a similar process if, after the Section 1004(b) consultation, the Postal Service decides to proceed with the program. The same organizations that have brought this Complaint, along with their constituents, are currently in the midst of this joint deliberative process with the Postal Service.

The Postal Service has been mindful that the aspects of the proposed rule at issue in this Complaint are subject to consultation under Sections 1004(b) and (d). On April 6, 2011, the Postal Service sent the Complainant organizations a letter opening consultation on the proposed interpretation of "consolidation" and the proposal about Post Office staffing and requesting their feedback within 60 days.[10] In response, the Postal Service has received various return communications from the Complainant organizations with their feedback. At the time the Complaint was filed, the 60-day period had not expired, and Complainants had further opportunities to provide feedback with the Postal Service or to seek consultation in other ways within the scope of Section 1004(b). For its part, the Postal Service has kept faith with Section 1004(b) by waiting for any further comments from the organizations within the 60 days. The Postal Service has always intended to give full and fair consideration to such comments, as Section 1004(b) requires. Complainants should not be rewarded for preferring the drama of litigation over a deliberative process Congress created specifically for them. Nor should the Commission allow itself to become a venue for employee associations to publicize and air challenges to matters reserved solely to established consultative processes with Postal Service management.

Even if the Postal Service had concluded its consultations and deliberations under Section 1004(b), further proceedings under Section 1004(d) would be necessary before the Postal Service could make a final decision to

[10] The letter also requested input on aspects of the proposed rule not subject to Section 1004(b), to be provided on the same terms as other public comments. The Complainant organizations provided such feedback, which the Postal Service will take into account, along with other public comments, in any final rule.

implement its proposed program. At this early juncture in the process, it is possible – as far as Complainants or anyone else knows – that the Postal Service could modify the contested aspects of the proposed rule, in which case no further consultations might be needed under Section 1004(d). Or the Postal Service could intend to proceed, but make modifications in the course of the Section 1004(d) process. Whatever their speculative opinions about the Postal Service's eventual intent, Complainants have no reasonable basis for claiming that further consultation would be futile at this early stage in the process.

Although the "exhaustion" doctrine typically applies to Article III courts applying the Constitution's "Case or Controversy" requirement, there are sound policy reasons for the Commission to apply a similar approach in this case (assuming the Commission had jurisdiction over the Section 401(2) claims, which the Postal Service submits that it does not). Complainants should not be encouraged to deliberately bypass the specific consultative scheme that Congress created for such matters. Moreover, efficient use of Commission resources recommends against entertaining a complaint when the Postal Service still has multiple opportunities to reconsider – based on further input from the Complainants – whether to give concrete effect to the contested proposal. *See Montes v. Thornburgh*, 919 F.2d 531, 537 (9th Cir. 1990) (describing the policy rationale for a "prudential" exhaustion doctrine, even where not required by statute, as follows: "(1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative

scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review"). Thus, even if the Complaint were within the Commission's jurisdiction (which it is not), the Complainants have yet to exhaust the deliberative process statutorily required, especially absent any actionable decision on the Postal Service's part.

V. COMPLAINANTS HAVE FAILED TO COMPLY WITH THE REQUIREMENT IN 39 C.F.R. § 3030.10(a)(9) TO MEET OR CONFER WITH THE POSTAL SERVICE.

Complainants have also failed to comply with the procedural precondition that they meet and confer with the Postal Service prior to filing a complaint pursuant to Rule 3030.10(a)(9). Therefore, Complainants should be foreclosed from initiating a complaint until such time as they have met this requirement.

The Complaint alleges that Complainants "provided a letter to the General Counsel for the Postal Service on May 11, 2011, setting forth their position that the proposal is not consistent with the underlying statutory authority granted the Postal Service by Title 39." Although the correspondence identified by the Complainants invited the Postal Service to discuss the Complainant organizations' feedback on the proposed rule if the Postal Service so chose, the letter did not formally put the Postal Service on notice that Complainants intended to file a complaint with the Commission and that they were attempting to fulfill the meet and confer requirements of Rule 3030.10(a)(9). Nor was that how the letter to the General Counsel was understood. Further, Complainants assert that alleged *ultra vires* acts of the Postal Service and "legal questions relating to the statutory authority of the Postal Service to propose or adopt the Proposed

Rule are matters of law," which allegedly can not be resolved through discussions or negotiations. Complaint at 8-9. These assertions are not valid legal bases for waiving the meet and confer requirements of Rule 3030.10(a)(9). Accordingly, this Complaint should be dismissed without prejudice as a procedural matter even if, as a matter of law, the Commission finds that the legal claims in the Complaint are ripe for litigation.

The Complainants' May 11, 2011, correspondence fails to meet the purpose of the rule, which is to put the Postal Service on notice that a complaint may be forthcoming and to provide the possibility of resolving the matter without the need for filing a formal complaint. The Postal Service acknowledges receipt of two email communications to its General Counsel on May 11. However, the attached cover letter and comments did not suggest an impending complaint before the Commission, nor did they affirmatively request an opportunity to meet and confer. Rather, the Complainants' correspondence passively offered to meet and confer at the option of the Postal Service. The Postal Service was directed to contact counsel for NAPUS and the League by May 20 with no specified threats of legal action before the Commission. As a result of the correspondence's ambiguity and the context of ongoing consultations, the Postal Service did not interpret this letter as a formal meet-or-confer request under Rule 3030.10(a)(9), but rather as a courtesy copy to the General Counsel and an attempt to discuss the matter outside the consultative process. Therefore, the Postal Service did not believe a response was necessary by the date established unilaterally by Complainants. The Complainants filed their Complaint with the

Commission just three days after that response deadline, without any further communication with Postal Service counsel giving notice of the litigation's imminence.

The sound policy behind the Commission's meet-and-confer requirement would be vitiated if Complainants' approach were deemed satisfactory. Pursuant to Rule 3030.10(a)(9), a complainant must

> [i]nclude a certification that states that prior to filing, the complainant attempted to meet or confer with the Postal Service's general counsel to resolve or settle the complaint, why the complainant believes additional such steps would be inadequate, and the reasons for that belief[.]

The Commission clarified the level of effort necessary to comply with this requirement in its Order No. 195, *Order Establishing Rules for Complaints and Rate or Service Inquiries* ("Order No. 195"), Docket No. RM2008-3, March 24, 2009. As a prerequisite to filing a complaint, the complainant must first notify the Postal Service's General Counsel of its concerns and permit the parties to meet or confer regarding them. Thereafter, the Postal Service is provided a reasonable time to resolve the issue(s), inform the complainant that more time is required, or inform the complainant that resolution is unlikely. As the Commission explained, "[t]he goal of the meet or confer provision is to ensure that complainants attempt to resolve their issues with the Postal Service prior to bringing a more formal proceeding to the Commission for its consideration." Order No. 195 at 15-16. To achieve this end, the Postal Service must be permitted a reasonable opportunity in which to do so.[11] Here, this simply did not

[11] As the Postal Service has not actually published a final rule on the contested issues, Complainants cannot legitimately claim that the matter is beyond hope of resolution at

occur, and the Postal Service urges that it should not be denied the opportunity to meaningfully discuss a possible resolution of this matter, based solely on the Complainants' unilateral supposition as to the outcome.

Perhaps recognizing that they did not sincerely attempt to meet or confer with the Postal Service as required by Rule 3030.10(a)(9), Complainants argue that Rule 3030.10(a)(9) compliance should be forgone because they consider meeting or conferral to be futile. In establishing the requirement, however, the Commission specifically rejected a proposal to "carve out an exception to the meet or confer requirement" in cases for which settlement attempts were presumed to be futile or unduly burdensome, as Complainants suggest here. In its Order No. 195, the Commission advised that

> while superficially appealing, [this proposal] could result in unnecessary litigation over the issue of whether a meet or confer attempt would be futile. The meet or confer requirement is not burdensome. It is a procedural mechanism which could lead to resolution of issues prior to a complaint being filed. For these reasons, the Commission does not create an exception to the meet or confer requirement of rule 3030.10(a)(9).

Id. at 16-17. Thus, the Commission has already affirmatively determined that there is no exception to the meet and confer requirement of Rule 3030.10(a)(9). By effectively flouting that decision, Complainants have unnecessarily consumed Postal Service and Commission resources with needless litigation on the pretense that a futility exception exists, when the underlying issues are already subject to a consultative process and could also be resolved through actual

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this time, even assuming a "matter" exists at this premature stage. Of course, the consultative process is also ongoing.

efforts to notify the Postal Service of an impending complaint, and to meet or confer on its substance.

Various United States District Courts also have established what affirmative steps are sufficient to satisfy a meet-and-confer requirement as it relates to standard motions practice in federal courts. In *Bolger v. District of Columbia*, 248 F.R.D. 339 (D.D.C. 2008), the plaintiffs filed their motion to compel without the mandatory certification that they had satisfied their burden to meet and confer with the defendant. The plaintiffs were permitted to establish to the court that they had in fact done so by providing evidence of their extensive efforts. Specifically, the plaintiffs showed that they had engaged in discovery with the defendant over a 14-month period, including four hearings, and had been in contact with the defendant regarding its concerns. However, the defendant had not responded to the plaintiffs. *Bolger v. District of Columbia*, 248 F.R.D. at 343-344. Relying on *Bolger*, another court explained that conferment requires the parties to actually meet and engage in two-way communication to meaningfully discuss the contested issue and that sending correspondence explaining the issues did not satisfy this requirement. *Robinson v. Napolitano*, No. CIV.08-4084, 2009 WL 1586959, at *3 (D.S.D. June 4, 2009) (citing *Bolger*, 248 F.R.D. at 343-344, and *Shuffle Master, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 170-171 (D. Nev. 1996)).

Under either of the Complainants' conflicting characterizations of their actions, those actions did not meet the straightforward requirement of Rule 3030.10(a)(9). To the extent the Complainants attempt to cast their May 11,

2011, correspondence as an attempt to initiate meet-or-confer discussions, that correspondence merely presents the opportunity to meet and confer as an option to discuss the Complainants' comment and opinion letter; it does not request an opportunity to meet or confer to attempt to resolve or settle an anticipated complaint. Then again, the Complainants argue that Rule 3030.10(a)(9) compliance is unnecessary given their legally unsupported assumption that the supposed *ultra vires* actions of the Postal Service could not be resolved through discussion. The Commission has already established that such assumptions are immaterial to Rule 3030.10(a)(9) compliance. At bottom, the Complainants took no meaningful actions to pursue the requirement to attempt resolution or settlement. Consequently, the Complaint should be dismissed.

VI. COMPLAINANTS' CLAIMS NOS. 1 AND 2 BOTH SUFFER FROM SERIOUS MISSTATEMENTS OF LAW; COMPLAINANTS, ACCORDINGLY, HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

As a final, alternative grounds for dismissal, Claims 1 and 2 of the Complaint fail to state a claim because they are based on flawed statements of law. The following arguments proceed on the hypothetical assumption, rather than a concession, that the Complaint is within the Commission's complaint jurisdiction and that all procedural prerequisites have been met.

A. Redefinition of "Consolidation"

The Complaint charges the Postal Service with attempting to "eliminat[e] a statutory provision[and] to alter the jurisdiction of the Postal Regulatory Commission." Complaint at 4-5. The Complaint then rehashes the text of Section 404(d) and, finding no explicit definition of "consolidation" with which to

contradict the Postal Service's explanation of the terms' textual ambiguity, nevertheless attempts to convert selective quotations from legislative history and case-law into a conclusion that the term is, in fact, "defined" in the statute itself. Complaint at 10-19. A more contextual view of the matter, however, reveals that the Postal Service is well within its authority to adopt a new interpretation of an ambiguous term in a statute it is charged with implementing.

1. Rationale for Proposed Change

As an initial matter, the Complaint ignores the full context of the proposed changes. Overall, the proposed rule expands the circumstances in which full-blown discontinuance studies are used, hence it increases the overall transparency of discontinuance decisions affecting Postal Service-operated retail facilities. Previously, stations and branches studied for discontinuance were studied in a faster, less intensive process. *See* Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches ("SBOC Opinion"), Docket No. N2009-1, March 10, 2010, at 48-57, 61-65 (exploring differences between the discontinuance processes for Post Offices and for stations and branches).

Contrary to longstanding arguments by the Postal Service resting on much of the same legislative history and case law on which Complainants rely, the Commission, its Public Representatives, labor organizations, and others have asserted that customers perceive no functional difference between an independent Post Office and a classified station or classified branch. *See, e.g.*, SBOC Opinion at 52, 64; Comments of American Postal Workers Union, AFL-CIO, Eugene Area Local No. 679, PRC Docket No. A2011-4, January 21, 2011,

at 1-3. While the Postal Service continues to disagree with the proponents of this view as to whether that lack of perceived difference has legal relevance, the Postal Service acknowledges some practical vitality for the proposition. As a result, it is difficult to understand what concrete purpose would be furthered by continuing to apply discontinuance procedures to the conversion of one retail facility type to another, when customers will not see any significant difference in service.[12] In contrast, customers are more likely to experience or perceive an impact from the replacement of a Postal Service-operated retail facility with a contractor-operated retail facility.

"Consolidation," in its former sense of changing an independent Post Office into a station or branch of another independent Post Office, has been exceptionally rare over the last 20 years. This rarity illustrates two parallel factors. First, a discontinuance study is a major effort requiring the devotion of considerable employee and customer resources; so the Postal Service does not lightly commence such efforts. Second, and perhaps more critically, the Postal Service as an ongoing business gains relatively little from conversion of a Post Office into a classified station or branch, since the basic business requirements to collect, process, and deliver mail, while providing all types of customers

[12] Complainants' view that the conversion of an independent Post Office into a station or branch results in "an inferior level of service" and "a facility standard that promotes second-rate services to countless communities," Complaint at 22, runs counter to the Commission's longstanding view that there is no difference between a Post Office and a station or branch from a customer service perspective. If the Commission's view is correct, then it stands to reason that such facility type conversions, in and of themselves, do not run afoul of Sections 101(b) and 404(d)(2)(A)(iii), as the Complaint purports.

access to the mail do not change in a conversion.[13] From the perspective of postal customers, the conversion has only minimal impact, as few customers are aware of the distinction between different types of retail units. Were the definition of "consolidation" to remain unchanged, then the Post Office discontinuance process might be applied serially: first to change a Post Office into a station or branch, then to discontinue that station or branch (although explained above is why this would be unlikely in practice). This would elevate process over substance, since customers would face real change only in the latter instance of actual discontinuance. Therefore, the net effect of the proposed rule is to make the full discontinuance process applicable to all Postal Service-operated retail facilities, without also making that process apply when customers do not face a real change in their access to retail services.

Unlike classified stations and branches, contractor-operated retail facilities can be closed without being subject to the discontinuance process. Relationships established by means of a contract have alternative mechanisms for governing the termination or other changes in a relationship.[14] It is more important, then, that customers and other stakeholders have an opportunity to provide input when a Postal Service-operated retail facility is converted into a contractor-operated retail facility than when a conversion results in classified station or branch.

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[13] Both of these factors further illustrate why the Postal Service has published its consideration of de-linking the one-to-one correspondence between postmaster and Post Office. Business today is conducted nationally and internationally, not among and between Post Offices.

[14] Commission decisions regarding discontinuance of community Post Offices – which are contract units – and its more recent disavowal of interest in reviewing such decisions, illustrate this point.

2. Legal Authority for Change

The Complaint's legal analysis appears to overlook the fact that most of the authorities on which it relies, some of which date back to the 1970s, were premised on Postal Service regulations in effect at the time and did not speak to whether the Postal Service was somehow precluded from changing those regulations. That the Postal Service's previous interpretation of "consolidation" was found to be reasonable does not mean that interpretation is the only reasonable and valid one. *See Citizens for the Hopkins Post Office v. United States Postal Serv.*, 830 F. Supp. 296, 299 (D.S.C. 1993) ("This court finds the definition of 'consolidation' advanced by the Postal Service [in its then-current regulations] to be one which is reasonable[.]" (emphasis added)).[15]

The United States Supreme Court has long held that an "initial agency interpretation [of a statute] is not instantly carved in stone" and that any agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984). This is the case even where a revised interpretation "represents a sharp break with prior interpretations." *Id.* at 862. Because the plain language of the statute is silent and ambiguous as to the intended definition of "consolidation," and because the Postal Service is charged with implementing Section 404(d), the Postal Service is free to revise its

[15] The Complaint appears to misquote this sentence of the *Citizens for the Hopkins Post Office* opinion as referring to "the [sic] one which is reasonable." Complaint at 14. This error may help to explain why Complainants read the opinion as supporting their conclusion that the Postal Service's historical interpretation of "consolidation" is the only permissible one, rather than one of multiple interpretive possibilities. The actual quotation supports the latter view.

interpretation of the statute so long as its interpretation is reasonable. *See id.* at 842-43; *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991); *see also Citizens for the Hopkins Post Office*, 830 F. Supp. at 298-99 ("The term 'consolidation' as used in § 404(b) [now 404(d)] is not defined in the statute. Consequently, this court will begin with the principle that the construction placed on a statute by the agency charged with administering it is entitled to considerable deference and should be upheld if reasonable."). As described above, the Postal Service has explained why it is reasonable to revise its interpretation of "consolidation" thereby sensibly and reasonably giving effect to larger regulatory changes that will increase transparency and public participation.

The Complaint also cites a pleading filed by the Postal Service in an ongoing federal action to support its view that the instant rulemaking somehow undoes an indelible aspect of postal law. Complaint at 15. Complainants fail to note that the subject matter of the litigation and the quoted pleading itself concern Postal Service regulations in effect at the time. They do not prejudice the Postal Service's authority or discretion to revise those regulations at a later time. An agency is entitled to defend its actions based on its legal interpretation and regulations in effect at the applicable time, rather than on later policies and regulations. As the Postal Service noted in its proposed rule and reiterates here, the proposed rule, if eventually enacted, would not be retroactive and would not affect any actions taken by the Postal Service under previous regulations. *See gen'ly, Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding

that agency regulations are not retroactive except as specifically authorized by Congress).[16]

In sum, the proposed reinterpretation of "consolidation" is within the Postal Service's authority to administer the statutory scheme. Rather than eliminate the notion of "consolidation" from the statute, the Postal Service is seeking to adopt a new interpretation to the statutory term, while continuing to apply the discontinuance procedures established by Congress to consolidations as distinct from closings. The proposed interpretation is reasonable in its own right and goes a long way toward closing the gap between respective Postal Service and Commission positions. It also fits into the larger framework of changes to orient discontinuance processes more appropriately around customer expectations – as the Commission has recommended for years – and to increase public transparency and participation. Therefore, Complainants' Claim 1 is without legal merit.

B. Staffing of Post Offices

Claim 2 of the Complaint expresses the view that the Postmaster Equity Act, Pub. L. No. 108-86 (2003), precludes the proposed change to 39 C.F.R. § 241.1 such that a Post Office may be operated or managed by non-postmaster personnel. Complaint at 23-28. As codified in Section 1004(i)(3), the Postmaster Equity Act defines a "postmaster" as "an individual who is the manager in charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors." Contrary to Complainants' belief, the proposed rule

[16] The argument in this paragraph applies equally to Complainants' references to the same litigation with respect to Claim 2. *See* Complaint at 25 fn.4, 26.

does not "disregard[ ] the plain language" of the Postmaster Equity Act, either in terms of the statute's text or its context vis-à-vis Section 404(d).

The Postmaster Equity Act serves the purpose of requiring consultation by the Postal Service with groups representing middle management tiers regarding, among other things, pay policies and schedules.[17] It was not intended to — and unambiguously did not — modify the Postal Service's authority to determine the staffing and scope of its retail facility network. *See* 39 U.S.C. §§ 403(b)(1), 403(b)(3), 404(a)(3), 1001(e)(4)-(5). Although Complainants attempt to blur the lines with generic case-law quotations about reading statutes as a whole, Complaint at 27-28, Congress was explicit in framing Section 1004(i)'s definitions as applicable only "for purposes of this section." 39 U.S.C. § 1004(i).[18] *Cf. United States v. Cons. Life Ins. Co.*, 430 U.S. 725, 760 (1977) (White, J., dissenting) (finding a definition under section 801(c)(2) and (3) of the Internal Revenue Code of 1954 to be inapplicable to rules for taxing the income of life insurance companies from modified coinsured contracts under section 820 of the Internal Revenue Code of 1954, because the definition was applicable only "for purposes of … subsection 801(a)"); *Thomas v. U.S. Bank Nat. Ass'n ND*, 575 F.3d 794, 798 (8th Cir. 2009) (construing preemption language "for purposes of this section" in 12 U.S.C. § 1831d(a) as meaning that "conflicting state constitutions or statutes are not preempted for every and all purposes, but only for purposes of 'this section'"). Congress could have applied Section 1004(i)'s

[17] Notably, Complainants make no mention of the Postmaster Equity Act's limited "purpose, structure, and history," notwithstanding their own case-law quotations about the importance of such interpretive considerations. *See* Complaint at 28.
[18] This oversight is ironic, given Complainants' view that it is the Postal Service that "disregards the plain language of 39 USC 1004(i)(3)." Complaint at 27.

definitions to the Title 39 more broadly or even to Section 404(d) in particular, but it did not do so. Therefore, the definitions that govern the limited context of the Postmaster Equity Act make that Act inapplicable to this rulemaking.

Even if the Postmaster Equity Act had some import in this context, the proposed rule would not be inconsistent with the definition of a "postmaster" therein. The Postmaster Equity Act does not require that each postmaster manage only one Post Office or that every Post Office be individually staffed by a postmaster. Indeed, in many cities, postmasters are responsible for a main Post Office and several classified stations and branches, which the Commission has repeatedly described as having no functional difference from Post Offices. The Postal Service is confident that other postmasters would be similarly capable of overseeing operations at more than one retail facility. Without a statutory basis for the claim that a Post Office must be staffed by a postmaster, the Complaint rings hollow in its assertion that this aspect of the proposed rule would constitute a consolidation without provision of Section 404(d)'s discontinuance procedures. *See* Complaint at 30.

Decisions about the staffing of Post Offices are within the Postal Service's general authority to manage Post Offices and staff appointments under the Postal Reorganization Act. The proposed rule is consistent with the definition of a postmaster under the Postmaster Equity Act, exercises appropriate and reasonable rule-making authority under the Postal Reorganization Act, and would streamline postal operations in order to reduce costs and enhance value. Therefore, it is a reasonable exercise of the Postal Service's authority to

administer its statutory objectives, and it is not inconsistent with Title 39 of the U.S. Code.

CONCLUSION

For the foregoing reasons, the Postal Service respectfully moves the Commission to dismiss the complaint with prejudice.

Respectfully submitted,

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