Postal Regulatory Commission
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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 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

COMPLAINANTS' RESPONSE TO THE POSTAL SERVICE'S MOTION TO DISMISS
(July 5, 2011)

Complainants, by and through their counsel, submit their Response to the Postal Service's Motion to Dismiss.

To no one's probable surprise, Complainants respectfully, but strongly, urge this Honorable Commission to deny the Service's Motion.

INTRODUCTION

In its Proposed Rules and public pronouncements, the Postal Service has asserted a number of matters. First, it has asserted that it has the authority to "erase" "consolidation" from 39 USC § 404(d) by regulation. Second, it has similarly asserted that it may, by regulatory fiat, remove "postmaster" as a defining characteristic of a "post office," despite 39 USC § 1004(i)(3). Finally, as Chairman Goldway has observed:[1], "numerous articles have appeared in the press identifying facilities in a number of states

[1] See Chairman Goldway's June 8, 2011, letter to Postmaster General Donahoe, attached as Attachment "A" at 1.

that have been closed, or that have been evaluated for potential closing, or shortly will be evaluated for potential closing" and "[t]he Commission has received an increased number of post office closing appeals, hundreds of inquiries from citizens, and . . . concerned members of Congress [and] [t]hus, it appears that the Postal Service may already be engaged in a nationwide change in service without prior notification to the Commission as Title 39 requires." In the face of this, the Postal Service nonetheless contends that it "has made no determination at this time" to close post offices on a nationwide basis[2]. Motion at 21.

The common element of these three matters is that the Postal Service has claimed legal authority which it does not possess: the authority to alter statutory language by regulation, and the authority to determine Commission jurisdiction. It is these claims of authority which Complainants challenge. The Postal Service seeks to dismiss Complainants' challenge by arguing that its claimed authority may not be questioned at this time, because, notwithstanding its actions, it has not yet determined to fully exercise its claimed authority.

STATEMENT OF LAW

The Postal Service's Motion to Dismiss is premised on four assertions which are fundamentally wrong:

[2] This seems to be contradicted by Postmaster General Donahoe's recent statement that the Postal Service will be closing about half of its 32,000 postal facilities within the next six or seven years. See the PMG's statement, dated June 27, attached as Attachment "B," at 2.

(1) The Service's post office closings, and the changes it is making in the rules for closings, are only internal personnel or "employment relations" matters; Motion at 9, 12, and 13.

(2) The Postal Accountability and Enhancement Act (PAEA) really just confirms the Postal Service's discretion to do anything it labels as a "postal employment matter," and such matters, regardless of their service consequences, are not subject to Commission review; Motion at 6, 8-13, and 38-39.

(3) Consolidating post offices, and announcing planned closures, works no hardship on customers or postmasters; Motion at 33-34.

(4) So long as the Postal Service only "proposes" acts for which it has no authority, or for which it should first seek an opinion from the Postal Regulatory Commission, no one can stop it. Motion at 1-40.

I. LEGAL QUESTIONS ABOUT AGENCY AUTHORITY MERIT IMMEDIATE REVIEW

The Postal Service states in its Motion to Dismiss that Complainants' claims are "premature, speculative, and without merit." Motion, 6. The Postal Service further asserts that it "has not adopted, amended, or repealed any regulations," emphasizing that its Proposed Rule is not final, and that "it is possible—as far as Complainants or anyone else knows—that the Postal Service could modify the contested aspects of the proposed rule[.]" Motion at 7, 25.

Courts have long acknowledged that legal questions—such as whether an agency has exceeded its statutory authority—are ripe for judicial review, regardless of

exhaustion of administrative remedies or an agency's own determination as to the finality of a decision.

Statutory Interpretation is not the Service's Exclusive Domain

The Postal Service's authority to treat a word in a statute as obsolete raises a legal question which establishes ripeness and merits review, as the Supreme Court pointed out in *Abbot Labs v. Gardner*. In that case, the Court focused on whether an agency had "properly construed" a statute. *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). The Supreme Court held that the agency's statutory construction presented a "purely legal" issue "appropriate" and thus ripe for judicial resolution. *Id.*

The D.C. Circuit has followed the Supreme Court in recognizing that statutory interpretation issues establish ripeness and merit judicial review. In *Atlantic Richfield Co. v. Dep't of Energy*, the D.C. Circuit considered whether an agency had statutory authority to adjudicate price control disputes and impose related sanctions, even though opponents suggest the issue was not ripe for review. *Atlantic Richfield Co. v. Dep't of Energy*, 769 F.2d 771, 774 (D.C. Cir. 1985). The D.C. Circuit explained that such statutory interpretation issues raised legal questions that "are the day-to-day business of ***the courts***." *Id.* at 783 (emphasis added). Consequently, the D.C. Circuit held that the statutory interpretation issues were ripe for judicial review. *Id.* at 784.

In the present case, the Postal Service claims authority to circumvent statutory requirements relating to post office consolidation procedures. Its Proposed Rule states that "The governing statute does not define 'close' and 'consolidate,' nor does it offer any guidance as to the distinction between the two terms." The Postal Service asserts

that due to its "procedural harmonization" which "exceed[s] the procedural requirements of its operating statute," the "conversion of an independent Post Office to a subordinate Postal Service operated facility would no longer constitute a 'consolidation' that triggers discontinuance proceedings." 76 Fed. Reg. 17794, *et seq*.

By "eras[ing] the effect of administrative designations"—namely, the current distinction between the heightened procedural protections of post offices and the lesser protection customarily afforded stations and branches—"the Postal Service does not consider it reasonable to continue applying discontinuance procedures to facility re-designations [also known as 'consolidations'] that do not entail any practical effect for customers." That is not how Congress saw things in 1976 when it specifically passed a statute to stop the Postal Service from closing small and rural post offices or turning them into stations or branches.

In other words, because the postal customers may not always recognize the difference between post offices, stations, and branches, the Postal Service sees no need to continue providing the statutorily-mandated procedural protections when a consolidation takes place. While the Postal Service may not consider it reasonable to apply discontinuance procedures to consolidations, Congress reached a different conclusion and changed the law for the express purpose of ensuring that appeal processes were available when independent post offices were to be turned into stations or branches.

The Postal Service does not merely replace one "reasonable and valid" interpretation of "consolidation" with another. It effectively renders the word "consolidation" obsolete and strips it from the statute. This not only represents a "sharp

break with prior interpretations," it represents an agency selectively ignoring a significant portion of its authorizing statute in order to accomplish its own goals. Under Supreme Court and D.C. Circuit precedent, however, the Commission and the courts—not the Postal Service—should determine whether the Postal Service may do so.

Exhaustion Would Not Cure Statutory Misinterpretation

If an agency exceeds its statutory authority, a court may still review that agency's actions even when a challenging party has not exhausted all administrative remedies[3].

The D.C. Circuit has held that when "the purposes of the exhaustion requirement would not be significantly advanced by postponing judicial consideration," a challenging party need not satisfy the exhaustion requirement. *Atlantic Richfield Co.*, 769F.2d at 782. The D.C. Circuit considered this exception from a policy standpoint, reasoning that "[t]he primary objective of the exhaustion doctrine is promotion of administrative and judicial efficiency by avoiding 'premature interruption of the administrative process.'" *Id.* at 781 (citing *McKart v. United States*, 395 U.S. 185, 193.) Further, the Court explained, "[e]xhaustion of available administrative remedies allows the agency to apply its expertise, discover and correct its errors, and build a factual record to enable judicial review." *Atlantic Richfield Co.*, 769 F.2d at 781. When "'no factual development or application of agency expertise will aid the court's decision,'" and when an agency has exceeded its statutory authority, a challenging party need not exhaust administrative remedies. *Id.* at 782 (citing *Barlow v. Collins*, 397 U.S. 159, 166).

[3] Of course, the Postal Service recognizes that the "exhaustion" doctrine does not apply to Commission proceedings; the Postal Service just wishes it did. Motion at 25.

In the present case, the requirement to exhaust administrative remedies is inapplicable to the Complainants' challenge to the Postal Service's statutory authority to even consider its Proposed Rule. In the first place, there is no administrative remedy to exhaust. The Postal Service acknowledges in its Proposed Rule that it is "exempt from the notice and comment requirements of the Administrative Procedures Act," and that it is merely inviting comments by publishing the rule in the Federal Register. Additionally, even if there were administrative remedies available, there is no set of facts that would allow the Postal Service to exceed its statutory authority, and thus, no need for the Commission to wait for further development of a factual record in order to preserve administrative and judicial efficiency.

The Commission May Evaluate the Postal Service's Proposed Rule Regardless of Finality

An agency may label a decision as final or non-final, but agency characterization does not matter—the reviewing authorities determine whether a decision is truly final.

En banc, the D.C. Circuit has held that courts—not agencies—determine when an agency decision is final. In *Cont'l Air Lines v. CAB*, the D.C. Circuit considered whether an agency had made a final decision. *Cont'l Air Lines v. CAB*, 522 F.2d 107, 124 (D.C. Cir. 1974). For evaluating finality, the D.C. Circuit held that "[t]he label an agency attaches to its action is not determinative." *Id.* Instead, the D.C. Circuit explained, "[t]he action may be reviewable even though it is ***merely an announcement*** of a rule or policy that the agency has not yet put into effect." As long as the agency's decision is unlikely "to be abandoned or modified before it is actually put into effect," the D.C. Circuit stressed, then judicial review thereof will neither waste the judiciary's time

nor disrupt the agency's decision-making process. *Id.* at 125. The issue will be ripe for judicial review.

In the present case, despite the Postal Service's characterization of its Proposed Rule as non-final, its course of conduct shows that its decision is unlikely to be abandoned or modified. The Postal Service is clear in its determination that it has the authority to change the meaning of the statute by regulation, but it argues that the Commission is powerless to act until the Service formally adopts its change. Under D.C. Circuit precedent, such labels and characterizations by agencies do not matter; reviewing authorities—not agencies—determine finality. Further, even if the Postal Service's labels and characterizations were accurate, D.C. Circuit precedent still permits review of mere proposals. Moreover, because the Postal Service has unambiguously manifested its claim of authority, review would not waste the Commission's time or disrupt the Postal Service's decision-making process. In fact, review now will preserve Commission jurisdiction, save the Postal Service from pursuing actions which Congress has barred, and spare the public and Postmasters from decisions they are making based on the Service's unfounded claims of authority.

II. CONGRESS, NOT THE POSTAL SERVICE, DEFINES THE POSTAL REGULATORY COMMISSION'S AUTHORITY AND JURISDICTION.

The gravamen of Complainants' Complaint is that the Postal Service, through several distinct but coordinated acts and claims of authority, is significantly changing the postal services available to the nation. The pre-2006 Postal Rate Commission already had broad discretion to review service changes, as a corollary to its authority over rate and classification changes. Congress, in the Postal Accountability and Enhancement

Act (PAEA), substantially increased and broadened the Postal Regulatory Commission's authority. The Complainants have asked the Commission to exercise that increased authority to protect the public through a temporary stay and declaratory judgment.

The Postal Service, in the most extensive section of its Motion to Dismiss, misses the point of both the Complainant's Complaint and of the PAEA. Motion at 6-15. First, the Service attempts to ignore the statutory forest by focusing on some isolated trees: In discussing the PAEA the Service points to 39 U.S.C. § 3662 and states that it "limits the Commission's subject-matter jurisdiction," puts "express limits on the Commission's complaint jurisdiction," "narrowly limit[s] the Commission's jurisdiction," and reflects a "trend in the legislature history to narrow the Commission's complaint jurisdiction," rather than recognizing that, under the PAEA, Congress expected the Postal Regulatory Commission to do more to enhance Postal Service accountability through active oversight. Motion at 6, 8, 10, and 11.

Second, in the face of the Postmaster General's declaration that the Postal Service expects to close half of its facilities (see Attachment "B"), while proposing to short-circuit the public's appeal rights, the Service characterizes this as merely an "internal aspect[]" concerning "staffing and network-management," or a matter of "employment relations," or a "postal employment matter[]." Motion at 9, 12, and 13. (In a related claim, the Postal Service argues that Congress' definition of a "postmaster" as the "manager in charge of a post office" imposes absolutely no limitation on "the Postal Service's authority to determine the staffing and scope of its retail facility network." 39 U.S.C. § 1004(i)(3) (emphasis added); Motion at 38, 39.)

The "big picture" is that Congress, in the PAEA, expanded Postal Regulatory Commission jurisdiction and oversight. The very title of the Postal Accountability and Enhancement Act explains its intent: to enhance the accountability of the Postal Service, and this was not to be accomplished by postal introspection. The Congress transformed the Postal Rate Commission into the Postal Regulatory Commission, with expanded regulatory authority.

In furtherance of that enhanced accountability, Congress tripled the length of 39 U.S.C. § 3662 and charged the Commission not just to review the formal acts and declarations of the Postal Service, but to step in when "the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404(a), or 601, or this chapter (or regulations promulgated under any of those provisions)…." 39 U.S.C. § 3662(a).

In doing this, the Congress put one of the Postal Service's "general powers," the power over its rules and regulations, under the Commission's purview. The same section also placed postal policy, one of the Postal Service's "general duties," eight of its "specific powers," and the postal monopoly under Commission review. 39 U.S.C. § 3662(a).

While the Postal Service strains to find meaning for the Commission's review authority over its rules and regulations (see Motion at 13-14), *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006), provides the key: "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 that analysis." As the Postal Service ultimately admits: "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." Motion at 14.

III. NATIONWIDE POST OFFICE CLOSINGS ARE A REALITY, NOT A MERE PROPOSAL

The Postal Service insists that a nationwide change in service has not occurred, and that "if a program is developed to discontinue Post Offices on a scale that would effect a nationwide change in service," the Postal Service would then comply with the requirements of § 3661. Motion, 23. The purpose of an advisory opinion is to obtain input to potentially modify or even cease pursuing an intended course. Gradually increasing the scale of discontinuances without formally developing a program, in order to avoid classification as a "nationwide change in service," guts the requirements of § 3661.

The Postal Service has been gradually closing post offices across the nation for years, purposefully suspending post offices and electing not to replace postmasters as they retire and choosing not to renew building leases in order to close the vacant post offices. The systematic closings occurring year after year create a conundrum when attempting to pinpoint precisely when the number of closings becomes "nationwide": Is it 50 post offices per year? A thousand? Half of the existing post offices? Must the closings occur in more than ten states? Thirty states? Must the doors be closed and the communities abandoned before an advisory opinion is sought? There appears to be a *de facto*, but nonetheless clear policy of closing post offices wherever possible, but, with recent efforts to more aggressively cut costs, the creeping but widespread closings

have ramped up to a heightened level that certainly reaches the level of "nationwide change in service" that obligates the Postal Service to obtain an advisory opinion.

Indeed, the Postal Service's recent, intensified efforts have come to the attention of Congress, postal customers and employees, countless local newspapers, and recently, even the Postal Regulatory Commission.

On April 21, 2011, the Postal Service presented a "Briefing on Retail Discontinuance Policies and Management of Post Offices" ("Briefing," Attachment "G") to Congress, showing the financial drain of rural post offices compared to other post offices. Briefing, 11-15. The Briefing focuses primarily on the high cost and low revenue of rural post offices, ignored the ancillary benefits to the communities, and clearly implies that closing rural post offices would save significant Postal Service resources. *Id.* at 11-22. If the Postal Service is far enough along on its planned closings to brief Congress, it is surely past "a reasonable time" for it to seek an advisory opinion. 39 U.S.C. § 3661(b).

In response to its Proposed Rule, the Postal Service received numerous responses from postal customers and their elected representatives opposing the rule, and expressing concerns about the expected impact of the rule on their communities. The mere implication that the Postal Service believes it possesses the authority to make its proposed changes has already produced changes in behavior.[4] The tenor of many letters suggests a public perception that the Postal Service has a hit list, and some communities worry that their post office may be next. See Attachment "H" for some representative letters.

[4] See, e.g., letters from Dona C. Parrotte, Owner of Square Peg Clothing, and Orlando Blake, President of The Blake Group, Attachment "H", regarding business impacts.

Local and nationwide newspapers have taken notice of the increasing trend of closing post offices. In 1996, the Christian Science Monitor noted that "Since the early 1980s, more than 2,000 post offices have been targeted because either shrinking rural populations made them no longer viable, or, as in Livingston[, Montana's] case, the outdated building cannot keep up with an increasing flow of mail and comply with such issues as access for the handicapped."[5]

The Wall Street Journal reported in January 2011, that, "Beginning in March, the [Postal Service] will start the process of closing as many as 2,000 post offices, on top of the 491 it said it would close starting at the end of last year. In addition, it is reviewing another 16,000—half of the nation's existing post offices—that are operating at a deficit, and lobbying Congress to allow it to change the law so it can close the most unprofitable among them."[6] The same article notes that 83 post offices were approved for closing between August and November 2011, and that another 408 post offices with suspended service would not reopen.

In April 2011, The Trentonian in Trenton, New Jersey, announced the closing of the historic Chambersburg post office, which provided an update "to the review process which began in the summer of 2009 that examined approximately 3,300 stations and branches in urban and suburban areas across the country…"[7] Also in April 2011, Around Osceola reported on the community meeting to discuss the possible closure of "one of the two Osceola County [Florida] post offices on a list of hundreds the United

[5] Todd Wilkinson, *Rural American Post Offices Campaign For Deliverance from Closing*, CHRISTIAN SCIENCE MONITOR, Dec. 20, 1996, *available at* http://www.csmonitor.com. Attachment "I."
[6] Jennifer Levitz, *Postal Service Eyes Closing Thousands of Post Offices*, WALL ST. J., Jan. 24, 2011, *available at* http://online.wsj.com. Attachment "I."
[7] *Feds to close historic Chambersburg post office in Trenton*, THE TRENTONIAN, Apr. 21, 2011, *available at* http://www.trentonian.com. Attachment "I."

States Postal Service is considering closing due to budget constraints."[8] On the same day, WTOC reported on the Postal Service's consideration of the Daisy, Georgia, post office for closing: "Nancy Ross, a regional spokesperson for the U.S. Postal Service, said by phone no decisions on closures have been made on any offices. The USPS expects to close 500 offices nationwide by the end of the year, but no decisions have been made on which ones."[9]

The Postal Regulatory Commission itself noticed the significant change in service. In her June 8, 2011, letter, Chairman Goldway points out that:

> [N]umerous articles have appeared in the press identifying facilities in a number of states that have been closed, or that have been evaluated for potential closing, or shortly will be evaluated for potential closing. The Commission has received an increased number of post office closing appeals, hundreds of inquiries from citizens, and has had communications with concerned members of Congress. Thus, it appears that the Postal Service may already be engaged in a nationwide change in service without prior notification to the Commission as title 39 requires.[10]

Clearly, the Postal Service views widespread post office closings as a way to cut costs. That is not surprising since it held that view in the early 1970s, and Congress' response was to put into the law the very provision of Title 39 that the Postal Service now seeks to remove. Its course of conduct in continuously reviewing and closing post offices should not allow the Postal Service to avoid Commission review by stressing the fact that no formal determination has been made. The Postal Service has demonstrated to everyone from Congress to customers what it intends to continue to do. Regardless of whether it has made a formal statement or written declaration, the

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[8] Fallan Patterson, *Kenansville post office on closing list*, AROUND OSCEOLA, Apr. 20, 2011, *available at* http://www.aroundosceola.com. Attachment "I."
[9] Dal Cannady, *Tiny town hopes to keep post office*, WTOC, Apr. 20, 2011, http://www.wtoc.com. Attachment "I."
[10] Attachment "A."

Postal Service has certainly shown a determination to continue closing post offices on a nationwide basis.

In short, the Postal Service's practices and announcements are already producing a nationwide change in service, and this is not inadvertent.

IV. CONSULTATION IS NOT A "REMEDY" WHICH REQUIRES "EXHAUSTION," NOR IS EXHAUSTION REQUIRED WHEN THE POSTAL SERVICE ASSERTS LEGAL AUTHORITY IT LACKS.

Section 1004(b) of Title 39, United States Code, provides that recognized Postmaster organizations "shall be entitled to participate directly in the planning and development of … other programs relating to supervisory and other managerial employees."

Instead of involving the Postmaster organizations "in the planning and development" of its program for closing post offices, on April 6, 2011, a Labor Relations manager sent a huge compendium of rule changes (weighing over 1½ pounds, and about an inch thick) written out in elaborate detail.[11] The attachments included changes in 39 CFR Part 241, as well as to the Administrative Support Manual, to the Employee and Labor Relations Manual, to the Postal Operations Manual, and to the Post Office Discontinuance Guide. The letter invited "questions" or "written recommendations;" the letter did not invite "consultation" or "direct participation in the planning and development" of this program or any of these changes. On May 10, Mr. Mark Strong, the National President of the National League of Postmasters of the United States, and

[11] The April 6, 2011, letter to Mr. Mark Strong, the National President of the National League of Postmasters of the United States, is attached as Attachment "C." An identical letter also went to Mr. Robert Rapoza, President of the National Association of Postmasters of the United States.

Mr. Robert Rapoza, President of the National Association of Postmasters of the United States, jointly responded to the Postal Service's *ipse dixit*.[12] The Postmaster organizations made two important points. First, that consultation cannot cure the Postal Service's lack of legal authority:

> [W]e believe that the Postal Service does not have the legal authority to make these changes to the governing statutes. The authority to make such proposed changes is left to the Congress. Therefore, consultation between our respective organizations will not cure the Postal Service's lack of legal authority to make such changes.

The Postmaster organizations also noted that the Postal Service was not offering to involve them "in the planning and development" of the extensive changes the Postal Service had written out:

> As you know, Section 1004 provides for our direct participation in the planning and development of programs like this which relate to our members. It appears from your letter and the Federal Register notice that all the planning and development actions were taken before notifying us of your decision. While your letter invites "questions," it appears to implicitly assume that our input is not necessary.

Despite this, and after admitting that the "exhaustion" doctrine does not apply to Commission proceedings, but only to Article III Courts, the Postal Service urges the Commission to throw out the Complaint so that an illusory and dead-on-arrival "consultative process" can go forward over the issue of legal authority, even though "consultation … will not cure the Postal Service's lack of legal authority to make such changes." Motion at 25; Postmasters' May 10 letter at 1. Put another way, all the consultation in the world cannot change the statutory authority (or lack of authority) of the Postal Service.

[12] Their May 10 joint letter is attached as Attachment "D."

Even if the Commission were bound by the Constitution's "Case or Controversy" requirement and the "exhaustion doctrine" (which the Postal Service admits is not the case), even the federal courts recognize that "exhaustion" of administrative remedies[13] is not necessary when the Postal Service acts in excess of its authority, when administrative processes do not provide an adequate remedy, or where the Service has no intention of changing a policy of questionable legality.

The federal courts have recognized that "exhaustion" of administrative remedies is unnecessary when an agency is acting in excess of its authority. For example, in *Atlantic Richfield Company v. Department of Energy*, 769 F2d 771 (D.C. Cir. 1985), the D.C. Cir. Court of Appeal recognized that the scope of the Secretary of Energy's authority to issue remedial orders and impose discovery sanctions was a strictly legal issue, and that no factual development or claimed agency expertise would aid the Court in its decision. Accordingly, the Court noted that it was relatively more expert in ascertaining the meaning of statutory terms, and therefore the Court did not "impermissibly displace the [Secretary's] skill or invade the field of agency discretion" by deciding the issue. *Id*. at 782. *See also, Rollins Environmental Services, Inc. v. EPA,* 937 F2d 649, 652 (D.C. Cir. 1991). Thus, there is no reason for the Commission to give way to the Service in the determination of statutory meaning, especially for statutes defining Commission jurisdiction.

Similarly, the courts have held that exhaustion may be excused when an agency has indicated that it has no intention of changing a policy of questionable legality. *See, Taylor v. Treasury Department*, 127 F3d 470, 477 (5th Cir. 1997) (Courts will excuse the

[13] Of course, "consultation" is not even an administrative "remedy."

exhaustion requirement when the "exhaustion of administrative remedies would be futile because the administrative agency will clearly reject the claim") *See also, Tataranowicz v. Sullivan*, 959 F2d 268 (D.C. Cir. 1992) (Exhaustion would be futile where judicial resolution of the statutory issue would not interfere with the efficient functioning of the agency); and *Fox Television Stations, Inc. v. FCC*, 280 F3d 1027, 1040 (D.C. Cir. 2002).

In a decision particularly on point here, in *National Federation of Federal Employees v. Weinberger*, 818 F2d 935, 940-941 (D.C. Cir. 1987), the D.C. Circuit held that a Federal Labor Relations Authority proceeding focused on the duty to bargain would not resolve issues concerning the legality of a drug testing program. There, as here, it was recognized that the administrative mechanism would leave many of the affected employees remediless, and that exhaustion of administrative remedies was no bar to the plaintiff's suit.

In sum, there is no point, and certainly no requirement, that the Commission dismiss the Complainants' Complaint so that the Postal Service and the management organizations can "consult" regarding the Commission's jurisdiction over service changes or over post office closings or consolidations.

V. THE POSTAL SERVICE EXALTS FORM OVER SUBSTANCE, CLAIMING THE COMPLAINANTS' LETTERS TO THE GENERAL COUNSEL WERE DEFICIENT FOR LACK OF AN EXPLICIT THREAT.

Pursuant to Rule 3030.10(a)(9), the Complainants, on May 11, sent letters to Mary Anne Gibbons, General Counsel of the Postal Service, inviting her "to meet and confer" concerning the subjects of the present Complaint. 39 CFR § 3030.10(a)(9).

The letters were signed by both counsel for Complainants and included three enclosures totaling 21 pages setting forth the basis for the Complainants' Complaint. The letters were sent to the General Counsel at two separate email addresses[14], by Express Mail, and by hand delivery[15]. The letters requested a response by May 20; no response or acknowledgement of any kind has ever been received.

The Postal Service "acknowledges receipt of two email communications to its General Counsel on May 11." Motion at 27. The Postal Service also acknowledges that the correspondence "offered to meet and confer at the option of the Postal Service." *Id*. The Postal Service further admits that it did not believe any response was necessary. *Id*. Even though the Postal Service recognized the letters as "an attempt to discuss the matter," it just ignored them. *Id*.

Rule 3030.10(a)(9) only makes one straightforward and reasonable requirement: that "the Complainant attempted to meet or confer with the Postal Service's general counsel to resolve or settle the complaint…." Incredibly, in spite of completely ignoring the letters it received inviting it to "meet or confer," the Postal Service argues that its failure to respond to meet or confer was just fine, and the Complaint should be dismissed because (1) the letters contained "no specified threats of legal action before the Commission;" and (2) while the letters "present[ed] the opportunity to meet and confer," they did "not request an opportunity to meet and confer…." Motion at 27, 31.

Of course, the Commission's rule does not require threats of legal action, only that Complainants made an attempt to meet and confer. The Commission's rule also

[14] One of the two transmittal emails and cover letters are attached as Attachment "E."
[15] This letter is attached as Attachment "F."

does not require particular phrasing, or that the attempt be made as a “request” rather than as an “opportunity.” Motion at 31.

One does not like to believe the Postal Service considers some response or acknowledgement necessary only when accompanied by “threats of legal action.” Motion at 27. Nevertheless, the Postal Service’s complete failure to respond in any way to formal requests “to meet and confer” should not be rewarded by punishing the Complainants for the Postal Service’s torpor and lassitude.

CONCLUSION

For all of the foregoing reasons, the Complainants respectfully request this Honorable Commission to deny the Postal Service's Motion to Dismiss, and further request that, at the appropriate time, this Honorable Commission issue a notice and order pursuant to 39 C.F.R. § 3030.30(a)(1).

DATED this 5th day of July, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, in compliance with Rule 3030.11, a copy of this Complainants' Response to the Postal Service's Motion to Dismiss has been served on the United States Postal Service at the following address on this 5th day of July, 2011:

United States Postal Service
PRCCOMPLAINTS@usps.gov

/s/ Michelle Bushman
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