

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

DSCF STANDARD MAIL LOAD LEVELING

Docket No. N2014-1

REPLY BRIEF OF THE UNITED STATES POSTAL SERVICE

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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I. INTRODUCTION

In its Initial Brief, the United States Postal Service (Postal Service) summarized the evidentiary record in Docket No. N2014-1, the scope of responsibilities authorized to the Postal Regulatory Commission (Commission) by 39 U.S.C. § 3661(c), and the legal standards that apply to the exercise of those responsibilities. That brief explains why the changes in the nature of service anticipated to result from the Postal Service's plan to achieve a more even distribution of the volume of Destination Sectional Center Facility (DSCF) Standard Mail pieces delivered by carriers throughout the week (the Load Leveling Plan), and the process for developing those changes, are both consistent with the relevant policies of title 39, United States Code.

At its core, the Load Leveling Plan presents a sensible initiative aimed at achieving a more even distribution of the volume of DSCF Standard Mail pieces delivered by carriers throughout the week. The initiative reduces the operational burden experienced under current service standards due to the disproportionate volume of mail with a Monday delivery expectation that results from the relationship between mail entry patterns for DSCF Standard Mail and the currently applicable service standards. The proposed service standard change is expected to generate operational flexibility that will permit implementation of a straightforward and sound solution for reducing the stress placed on the Postal Service delivery and processing network by the disproportionate share of mail volume with a Monday delivery expectation.

Because its Initial Brief addressed the major issues relevant to the request for an advisory opinion regarding the Load Leveling Plan, the Postal Service will not revisit every matter presented in it. In this Reply Brief, the Postal Service focuses primarily on

arguments propounded by various parties in their Initial Briefs to demonstrate that no participant has provided a basis for the Commission to conclude that the action proposed in this docket is inconsistent with the policies of title 39. The fact that the Postal Service has not chosen to respond to every argument presented in each participant's Initial Brief should not be interpreted as agreement by the Postal Service with points not otherwise addressed below.

The analytical sections that follow focus on three major themes. First, as described in Section II, both the Postal Service's presentation of the Load Leveling Plan and the Commission's administration of proceedings in this docket comply with the legal requirements applicable under title 39. Second, as described in Section III, the evidence presented by the Postal Service in this docket supports the issuance of an affirmative advisory opinion by the Commission. And finally, as described in Section IV, concerns raised in comments, or otherwise outside of the process for submission of evidence required by the Commission's rules, are not evidence in this docket and should not be considered by the Commission for purposes of its advisory opinion.

II. THE PROCEEDINGS IN THIS DOCKET ARE CONSISTENT WITH LEGAL REQUIREMENTS

A. The Public Representative's Statutory Interpretation Is Unworkably Broad And Inconsistent With Commission Rules.

1. The Postal Service has met its burden of showing that the Load Leveling Plan is in conformance with 39 U.S.C. § 3661.

The question at issue for the Commission when evaluating a request for an advisory opinion under 39 U.S.C. § 3661 is whether the Postal Service's proposed service change conforms to the policies established under title 39. The Public Representative, however, asserts that section 3661 requires that the Commission's

advisory opinion itself conforms to the policies of title 39, and that section 3661 does not require that the advisory opinion determine whether the Postal Service's proposed service change conforms to those policies. See Initial Brief of the Public Representative (PR Initial Brief), PRC Docket No. N2014-1 (Feb. 21, 2014), at 1, 5-6. This interpretation of section 3661 is untenable, as it provides no guidance or parameters for the Commission when evaluating a request for an advisory opinion.¹ Section 3661 may require a certification that the opinion conforms to the policies established under the Act; however, such a requirement is not mutually exclusive with the fact that the Commission's evaluation of the service change proposal should be based on the proposal's conformance with title 39.

The Public Representative's interpretation of section 3661 is also inconsistent with the Commission's rules and past practices. The Commission's rules make clear that the Postal Service's burden is to include in a request for an advisory opinion regarding a proposed service change, information sufficient "to show that such change in the nature of postal service is in accordance with and conforms to the policies established under the Act." 39 C.F.R. § 3001.74. Additionally, the Commission has explained:

The Commission's advisory opinion process is a safeguard put in place by Congress to ensure that interested persons have the opportunity to have their views considered on whether nationwide changes contemplated by the Postal Service comply with the policies established by Congress in title 39. The advisory opinion, based on evidence developed during hearings in accordance with 5 U.S.C. 556 and 557, considers whether the Postal Service's planned changes conform, in terms of its objectives and effects, to the policies of section 3661 and the remainder of title 39.

¹ The Public Representative asserts that the issue in the proceeding should be "whether this proceeding gives the parties and the Commission the opportunity to examine the potential benefits and costs of nationwide implementation of the Postal Service's proposal." PR Initial Brief at 1. The Public Representative, however, cites to no statutory or regulatory authority for this standard.

Advisory Opinion on Elimination of Saturday Delivery, PRC Docket No. N2010-1 (Mar. 24, 2011), at 6. The Commission has consistently evaluated requests for advisory opinions in the context of whether the proposed service change conforms to the policies of title 39. See, e.g., Advisory Opinion on Post Office Structure Plan, PRC Docket No. N2012-2 (Aug. 23, 2012), at 5 (“The current advisory opinion examines the POSTPlan in light of the policies of title 39 and is based on record evidence developed in accordance with 5 U.S.C. §§ 556 and 557.”); Advisory Opinion on Retail Access Optimization Initiative, PRC Docket No. N2011-1 (Dec. 23, 2011), at 4 (“This Advisory Opinion examines the RAOI in light of the policies of title 39 and the evidence in the record developed in accordance with 5 U.S.C. §§ 556 and 557.”). As such, it is clear from Rule 74 of the Commission’s Rules of Practice and Procedure, and from past Commission dockets, that the question at issue in a service change case is whether the Postal Service’s proposed service change is in conformance with title 39.

Accordingly, the Commission should reject the Public Representative’s assertion that the record in this docket is incomplete. PR Initial Brief at 1-2. Throughout its Initial Brief, the Public Representative identifies a number of questions that it believes are left unanswered by the record. Yet, the Public Representative cites to no authority supporting the position that such information is required for an evaluation of a service change. See, e.g., PR Initial Brief at 2. The Commission’s rules, on the other hand, very clearly establish the requirements for a service change case. Rule 74 of the Commission’s Rules of Practice and Procedure requires generally that a request for an advisory opinion include:

such information and data and such statements of reasons and basis as are necessary and appropriate to fully inform the Commission and the parties of the nature, scope, significance and impact of the proposed change in the nature of postal services and to show that such change in the nature of postal service is in accordance with and conforms to the policies established under the Act.

Rule 74 further requires the following specific information:

- (1) A detailed statement of the present nature of the postal services proposed to be changed and the change proposed;
- (2) The proposed effective date for the proposed change in the nature of postal services;
- (3) A full and complete statement of the reasons and basis for the Postal Service's determination that the proposed change in the nature of postal services is in accordance with and conforms to the policies of the Act.

The Postal Service's initial request for an advisory opinion, along with testimony and supporting materials, satisfied each of these general and specific requirements.

Moreover, as demonstrated in the Postal Service's Initial Brief, and as shown in section III, *infra*, the Postal Service has provided a factual record containing information "necessary and appropriate" to show that the Load Leveling Plan is in accordance with the policies established under title 39, consistent with Rule 74. The Public Representative's assertions to the contrary lack statutory, regulatory, and factual support.

2. The Public Representative relies on extra-record support for its misapplication of section 3622(d)(1)(E) that is based on its misreading of PRC Order No. 1926.

The Postal Service is charged with providing services that meet certain service-related criteria specified in sections 101(a), (b) and (e), as well as sections 403(a) and (b), and 3661(a) of title 39.² Otherwise, various other provisions of title 39 relate exclusively to the establishment of postal prices and classifications. Among these are

² Section 403(a) also, in part, addresses postal rates and fees.

sections 101(d), 403(c), 404(b), 3621, 3622, 3626, 3627, 3629, 3631, 3534, 3641 and 3642.

The statutory provisions in the latter list contain numerous criteria the Commission is to apply when reviewing postal management's plans for establishing new mail classifications or revising existing ones, and for establishing prices for new products or changing prices for existing ones. Among all of these classification and pricing criteria, at pages 24-26 of its Initial Brief, the Public Representative applies a laser focus to section 3622(d)(1)(E) which, in pertinent part, reads:

Rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances, provided that the Commission determines . . . that such adjustment is reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

39 U.S.C. § 3622(d)(1)(E).³ At page 24 of its Initial Brief, the Public Representative argues that the DSCF Standard Mail service change is inconsistent with title 39 because it fails to comply with “best practices of honest, efficient and economical management” and is neither “financially responsible” nor consistent with “public service.” There, the Public Representative cites the Commission’s discussion in Order No. 1926 of the meaning of the “best practices of honest, efficient, and economical management” standard and urges that it be applied to judge the DSCF Standard Mail service change under review in this docket. Order No. 1926 at page 127, n.119. As is demonstrated below, for three reasons, the argument is fatally flawed.

A plain reading of section 3622(d)(1)(E) makes clear that its criteria are to be

³ Similarly, section 404(b) requires that all (including exigent) postal price increases be “reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.”

employed within the very narrow context of Commission evaluation of a Postal Service proposal to raise market-dominant product prices above the price cap in exigent circumstances. To reinforce that conclusion, the Commission Order cited by the Public Representative states:

The phrase “best practices of honest, efficient, and economical management” appears directly after, and modifies, the statute’s requirement that exigent rate adjustments be “necessary to enable the Postal Service” to provide postal services. The Commission interprets this phrase as imposing a potential limit on the amount of an exigent rate adjustment that can be found to be necessary.

PRC Order No. 1926, PRC Docket No. R2013-11, (Dec. 24, 2013) at 32. But the Public Representative need not have read as far as page 32. The passage from pages 30-31 of PRC Order No. 1926 quoted in the Public Representative’s Initial Brief previously clarified that the criteria in section 3622(d)(1)(E) relate to “consideration of . . . management practices relevant to the issue of whether rate adjustments are ‘necessary.’” PR Initial Brief at 24, n.68. Thus, section 3622(d)(1)(E) by itself, and PRC Order No. 1926, repeatedly make clear that the “best practices” criteria apply only to evaluation of postal price increases.

That aside, the Public Representative’s application of its “best practices” argument at page 26 of its Initial Brief merely serves as the capstone of its deficient critique of the Postal Service’s request. There, the Public Representative claims that (some unspecified level of) *additional* operational, cost and volume impact data than were filed in support of the Docket No. N2014-1 request would constitute compliance with its concept of a section 3661 advisory opinion request “best practices” standard. The Public Representative also argues that, to obtain compliance with this standard, the Commission should order the Postal Service to “consider alternatives” to the DSCF

Standard Mail service change which the Public Representative asserts can result from “maintenance of a flexible [postal] workforce.” PR Initial Brief at 26. The Public Representative’s argument fails to acknowledge or address the record evidence of the alternative service changes that were considered by the Postal Service during the development of the initiative now under review. See USPS-T-1 at 8-11. And, to the extent the Public Representative relies on rulemaking comments that do not have the status of evidence of the matters asserted therein, it has failed to point to any record evidence of the nature of any improvement in postal workforce flexibility that could be implemented to support achievement of any alternative to the DSCF Standard Mail service change.

More importantly, the Public Representative’s “best practices” argument regarding evidentiary support required for a section 3661 request fails to acknowledge the long-standing requirements adopted explicitly for such requests in Rule 74 of the Commission’s Rules of Practice and Procedure. The Public Representative does not argue that the Postal Service has failed to satisfy any Rule 74 requirement. At most, the Public Representative’s “best practices” argument stands for the proposition that if it had *carte blanche* to re-write title 39 and the Commission’s regulations implementing section 3661, its filing requirements would be more demanding.

3. The Public Representative’s claim that the request is “premature” is based on a misunderstanding of the section 3691(a) consultation requirement.

At page 7 of its Initial Brief, the Public Representative argues that the Docket No. N2014-1 request was “filed prematurely” and thus, in combination with the procedural

schedule,⁴ the record has not been sufficiently developed “to allow the Commission to provide thorough and meaningful advice about the Load Leveling Plan.” In support of this claim, the Public Representative argues that if the Postal Service had consulted with the Commission prior to the filing of the request, such a consultation would have provided the Commission “the opportunity to discuss the type of information and study the Postal Service should undertake prior to filing a request for an advisory opinion.” PR Initial Brief at 7. The Public Representative’s understanding of the section 3691(a) consultation requirement is erroneous for the reasons explained below.

The Public Representative’s argument implies two required rounds of Commission review: section 3691 consultation between the Postal Service and the Commission in the development of a substantially nationwide service change proposal followed by what would purport to be arms-length section 3661 Commission review of the merits of the same nationwide service change proposal. However, the requirements for the filing of a section 3661 advisory opinion request were not changed by the enactment of the PAEA. Notwithstanding the Public Representative’s assertions, when the Postal Service determines to file a 3661 request, there is no additional statutory requirement for consultation.

Congress has given the Commission an important but limited advisory role regarding nationwide service changes. Consistent with that limited role, the Commission has implemented regulations specifying the information required to be submitted in support of advisory opinion requests. The Public Representative apparently considers those requirements to be inadequate to meet its preference for

⁴ The Postal Service addresses the Public Representative’s discomfort with the procedural schedule in section II.B, *infra*.

even more information and apparently prefers that the Postal Service consult with the Commission before filing any section 3661(b) request for the purpose of “discuss[ing] the type of information and study the Postal Service should undertake prior to filing.” PR Initial Brief at 7. While the Public Representative may believe that there is no end to the benefit that such pre-filing consultations may yield, there is no additional requirement for consultation in section 3661 service change cases.

B. This Docket Is Not The Appropriate Forum To Address The Public Representative’s Procedural Concerns Regarding Requests For Advisory Opinions.

The Public Representative also generally asserts that the expedited procedural schedule in this docket “prevented adequate development of the record” and then puts forth recommendations for procedural changes for future dockets. PR Initial Brief at 22-24. Such assertions and recommendations are misplaced in this docket, particularly at the briefing stage. Had the Public Representative raised concerns about the procedural schedule through motions practice, the parties could have deliberated—and the Commission resolved—such concerns. Moreover, if the Public Representative had concerns about the quality or completeness of the factual information on the record at the close of the Postal Service’s direct case, it could have pursued numerous avenues within the Presiding Officer’s procedural schedule for discovery. The Commission’s rules and procedural schedule allow for motions practice and cross-examination and these measures could have been accommodated within the Commission’s schedule. Rather than take such affirmative steps to address its concerns, however, the Public Representative instead chose to file an Initial Brief with misplaced policy arguments that

the Commission should not consider in this forum.⁵

III. THE POSTAL SERVICE HAS PRESENTED SUBSTANTIAL EVIDENCE TO SUPPORT AN AFFIRMATIVE ADVISORY OPINION

A. The Load Leveling Plan Is Straightforward And Well-Conceived.

1. A brief summary of the Load Leveling Plan is in order.

The service change at issue in this docket is straightforward and uncomplicated. Generally speaking, Standard Mail qualifying for Destination SCF rates—currently expected to be delivered by the third day after acceptance—will be subject to a four-day delivery standard if accepted on a Friday or Saturday. As demonstrated by the testimony of Postal Service witness Linda Malone, the Postal Service currently affixes color coded labels to containers of DSCF Standard Mail to specify the day of the week by which the contents of the container are expected to be delivered, based on applicable service standards. USPS-T-1 at 6-8. This system is used by postal mail processing and delivery employees to determine when containers of mail should be dispatched to necessary operations for further distribution and delivery.⁶ *Id.* at 6.

Consistent with the service standard changes under review in this docket, the Postal Service conducted a field test of the DSCF Standard Mail Load Leveling concept developed in consultation with a mailing industry workgroup. The South Jersey Operations Test employed a simple modification of the aforementioned color coding system to reflect the modified delivery expectations for DSCF Standard Mail accepted on Fridays and Saturdays. *Id.* at 12-13. The test validated the hypothesis that the

⁵ As discussed in Section II, *infra*, the Public Representative's procedural recommendations are more appropriate for PRC Docket No. RM2012-4, where the Commission is considering the rules of procedure for nature of service cases.

⁶ Based on date of acceptance and applicable service standards.

modified color coding system could be implemented in a manner that permitted local managers to adjust the processing, dispatch and delivery of DSCF Standard Mail in a manner that took into account the adjusted service standards for mail entered on Fridays and Saturdays. *Id.* at 14. Adjustments to mail processing and delivery operations during the South Jersey Operations Test consistent with the expanded service standard window for such mail permitted a more even distribution the mail delivery workload over the course of the delivery work week and other benefits described in the testimony of witnesses Malone and Anderson. USPS-T-1 at 14-16 and USPS-T-2 at 3-6, respectively. The test also demonstrated the potential for modest efficiencies in mail processing and more significant reductions in city carrier overtime workhours to be realized if implemented nationally. USPS-T-1 at 15-16.

Persuaded by the South Jersey Operations Test that the service change concept is operationally feasible to implement, the Postal Service has solicited public comment on the changes to its DSCF Standard Mail service standard regulations⁷ through a notice-and-comment rulemaking (79 *Fed. Reg.* 376) and has requested an advisory opinion from the Commission. During the pendency of the Commission's review, the Postal Service has announced plans to initiate additional testing at approximately 30 mail processing facilities. See Tr. Vol. 1 at 35-36. The Postal Service will use the results of this testing to inform its approach to implementing the service change and underlying operational changes, for determining the methods and content of communications that will inform and train employees, and for ensuring that it employs available channels for informing and preparing affected customers for change. See

⁷ 39 C.F.R. § 121.3(b)(2) and (3).

USPS-T-1 at 18-20, *see also* Tr. Vol. 1 at 36.

2. The Public Representative's observations neither invalidate nor devalue the South Jersey Operations Test.

At pages 9-12 and 26-40 of its Initial Brief, the Public Representative offers analysis and commentary on the operations data generated during the South Jersey Operations Test. As explained by witness Malone, the test served the limited purpose of validating the hypothesis that load leveling could be achieved by implementation of the proposed service standard change. USPS-T-1 at 14. At pages 9-10, the Public Representative highlights that the test revealed what it characterizes as “anomalies” that the South Jersey management team undertook to evaluate, and then argues that the Load Leveling Plan “may not be fully successful in achieving its intended effects.” Whether the Load Leveling Plan will achieve absolutely 100 percent of its intended effects throughout the postal network remains to be seen. Witness Anderson indicates how the South Jersey plant's management team will address Tuesday operations moving forward. Tr. Vol. 1 at 73. As described at pages 36-37 of Tr. Vol. 1, the goal of the additional testing at multiple sites is to develop approaches to implementation that maximize achievement of intended results.

At page 27, the Public Representative argues that the Postal Service “did not provide any basis for the witness Malone's expectation of positive results that will vary by locality.” The Postal Service regards it to be abundantly clear that those expectations are based on witness Malone's current responsibilities for oversight of mail processing operations on a national basis and her vast wealth of first-hand experience in managing mail processing and delivery operations in the field. Her expert judgment is further buttressed by her first-hand familiarity with the operations of the South Jersey

plant, her supervision of the South Jersey Operations Test, her extensive first-hand observations of the affected mail processing delivery operations during the test, and her consultations with witness Anderson and the current South Jersey plant management team.

3. The Public Representative mischaracterizes the scope and nature of the additional testing underway.

Notwithstanding record evidence to the contrary, the Public Representative's characterization of the additional testing as "nationwide" at page 8 of its Initial Brief misses the mark. The service areas of the mail processing plants involved in the additional testing do not, in the aggregate, cover the entire postal system. Nor is the list of sites in the response to interrogatory PR/USPS-T1-19 designed to be a representative, scientific cross-section of all mail processing plants. Tr. Vol. 1 at 35-36. The ongoing testing is intended to include a variety of mail processing plant environments (small, medium and large) from which to observe the multitude of issues that could arise from implementation of a common operational change at plants responsible for processing DSCF Standard Mail. While the results of the South Jersey Operations Test are sufficient to validate that the service standard change will allow for load leveling, the Postal Service will use this broader range of operational experiences to further inform the development of nationwide implementation procedures for the service change. See Tr. Vol. 1 at 36.

4. The Commission need not be concerned with the Public Representative's other allegations.

a. Concerns about staggered implementation are unfounded.

At page 14 of its Initial Brief, the Public Representative expresses concern that the Postal Service has not determined whether the service change will be implemented

“on a rolling or nationwide basis.” The Public Representative might have taken a cue from the Phase I service standard changes in Docket No. N2012-1, which were implemented on a universal, simultaneous basis. It is not clear what sparked the Public Representative’s belated concern. In any event, the underlying Load Leveling operational changes are fundamentally different from and less complex than the inter-plant Area Mail Processing operational consolidations reviewed in Docket No. N2012-1. In the absence of any consideration of staggered, plant-by-plant implementation of the operational adjustments underlying the service change, it has not occurred to the Postal Service that there was any need to affirmatively declare in the instant docket that any such extraordinary form of implementation would occur. And there was no follow-up discovery on the issue.

b. An implementation timetable and communications plan are in place.

The Public Representative complains at page 14 of its Initial Brief that “the Postal Service has also not yet set an implementation timetable for the Load Leveling Plan and plans to establish it after it has an opportunity to review and consider the comments received in response to” its notice of proposed rulemaking. The Postal Service invites the Public Representative’s attention to the various references to March 27, 2014 at page 2 of the Request filed on December 27, 2013, and at pages 1 and 4 of the testimony of witness Malone, USPS-T-1.⁸

The Public Representative claims that the Postal Service “has not yet determined . . . what specific outreach will be made to affected mailers, and how facilities will be

⁸ Notwithstanding the criticism at page 14 of the Public Representative’s brief, the Postal Service considers it appropriate to review the comments submitted in the rulemaking before making a final decision regarding the implementation date for the proposed changes to the DSCF Standard Mail service standard regulations in 39 C.F.R. § 121.3(b).

prepared for implementation.” PR Initial Brief at 14. The Postal Service concedes that it has not presented for review in this docket any mock-ups of Business Mail Entry Unit signage and other notices to mailers, drafts of any of the communications it will disseminate to its employees on the workroom floor, or copies of press release templates, and it has not shared the content of customer-oriented materials being prepared for posting online via its Rapid Information Bulletin Board System. However, the Public Representative has presented no basis for implying that responsible departments that routinely produce such communications relative to similar operational and service initiatives will somehow fail to utilize the various communications channels and tools discussed at pages 18-20 of USPS-T-1 to fulfill their responsibilities. The Commission is able to be “fully informed” about the DSCF Standard Mail service change and the Load Leveling Plan without also insisting on serving as advisory editor of every draft of each communication from postal management being prepared for dissemination to employees and customers in conjunction with implementation of the service change.

5. The Public Representative’s prescription is unsatisfactory.

At page 14 of its Initial Brief, the Public Representative argues that the “Postal Service is rushing implementation of the Load Leveling Plan without consideration of other changes being made to the Postal Service’s network.” At pages 14-15, the Public Representative discusses the relationship between the Load Leveling Plan and the 2014 national roll-out of the Lean Mail Processing initiative designed to improve and standardize mail processing plant operational practices, which is discussed by both Postal Service witnesses Malone and Anderson (USPS-T-1 at 11; and Tr. Vol. 1 at 18; see *also* Tr. Vol. 1 at 74. The Public Representative characterizes Lean Mail Processing as “vital” to achieving success with Load Leveling. The Postal Service’s

witnesses explain the general operational benefits expected from implementation of Lean Mail Processing practices at plants throughout the nation. It is not clear what the Public Representative implies by use of the term “vital.” However, there is no basis in the record for any inference that the Load Leveling initiative is entirely dependent on implementation of Lean Mail Processing for positive results.

At page 16 of its Initial Brief, the Public Representative expresses alarm that the Postal Service has implemented various mail processing and delivery unit operational consolidations, and retail service changes, but has failed “to consider how . . . the Load Leveling Plan will impact the cost savings of other network changes.” In the Public Representative’s view, measuring the impact of each change may be a difficult task, but:

The magnitude of these simultaneous changes and the way in which they may impact one another and service overall should be studied to ensure that are all implemented in such a way that minimizes negative impacts and maximizes cost savings.

PR Initial Brief at 16. After all:

Such study also ensures that the most cost-beneficial changes are made and the cross-impacts of the changes are understood and analyzed prior to implementation The Commission should hold the Request in abeyance until the interactions between the . . . ongoing initiatives are studied and understood and benchmarks for measuring success are formed.

Id. at 16-17. Reduced to its essence, the Public Representative’s argument stands for two propositions: (1) the Postal Service should never make any decision without first generating all conceivable data which might have some bearing on any aspect or consequence of that decision, or any matter that might be related to that decision, no matter how long or what resources that may require; and (2) the Commission should defer acting upon any request for advice under section 3661 until all such data are

provided. With respect to the DSCF Standard Mail service change, the Public Representative's prescription provides no practical guidance to the Postal Service or the Commission, since both agencies must fulfill of their respective responsibilities under title 39 subject to limitations of data and resources imposed by the real world.⁹

B. Detailed Cost Savings And Volume Impact Estimates Are Not Required.

As discussed above in section II, the Public Representative's argument is based on the flawed premise that the Commission lacks the necessary information with which to formulate an advisory opinion. Specifically, the Public Representative argues that "[t]he Commission should require the Postal Service . . . to conduct a formal cost savings and network impact analysis." PR Initial Brief at 19. This suggestion does not seem to be based on any legal requirement, but rather the Public Representative's desire to have more information to analyze.

The ability to gather such desired information can be constrained by a number of factors, including the complexity and feasibility of the undertaking, the time required, and the cost incurred to conduct such studies. The specific and detailed studies suggested by the Public Representative are not required by section 3661, as was already discussed in section II.A of this brief, and the Commission should not, in this docket, declare them to be *de facto* requirements for the submission of Postal Service requests or the issuance of advisory opinions. Instead, until such time as the results of the Docket No. RM2012-4 rulemaking can be implemented, the Commission should continue to rely on Rule 74 of the Commission's Rules of Practice and Procedure, which

⁹ Likewise, the Public Representative's suggestions for how the Postal Service should evaluate the costs and savings related to some unspecified "plan to reduce market-dominant delivery by a day" are of no value to the task at hand. PR Initial Brief at 17.

establishes that the Commission follows a flexible process for requesting an advisory opinion, with only a few firmly defined necessities.

The Postal Service submitted a complete request for an advisory opinion with detailed testimony and supporting documents. The South Jersey Operations Test validated the hypothesis that implementation of the service change concept would result in load leveling. The Postal Service contends that the test data provided by in USPS-T-1 and USPS Library References N2014-1/2, N2014-1/NP8, and N2014-1/NP9 are sufficient to fully inform the Commission within the meaning of Rule 74. This rule allows for flexibility in what information the Postal Service is required to submit in support a request, and what may be required in order for the Commission to fully understand the nature, scope and significance of the change in service at issue, when it is likely to be implemented, why it is being pursued, how it is likely to affect postal customers, and the basis for the Postal Service's assertion that the change is in accordance with title 39. And during the course of Commission review of an advisory opinion request, the Postal Service is obliged to respond to discovery and information requests that seek additional information that will enhance the Commission's ability to offer the advice that has been requested.

Based on interrogatory PR/USPS-T1-21, it appears that the filing of the highly detailed cost analyses supporting the requests in Docket Nos. N2010-1 and N2012-1 created an expectation on the part of the Public Representative that review of all future nationwide service changes, by definition, implies in-depth analysis of potential cost savings.¹⁰ It should be noted that both of those earlier service changes were driven by

¹⁰ The Postal Service notes that subsequent to these dockets, the Commission was able to issue an advisory opinion in Docket No. N2012-2. In that docket, the Postal Service calculated cost savings

postal management determinations that each could generate cost savings of such magnitude as to play a substantial role in addressing the chronic misalignment between operating costs and revenues that has plagued the Postal Service and contributes significantly to its financial situation. Thus, these service changes were the product of operational changes expected to help improve the postal bottom line, notwithstanding the potential for adverse volume impact. Accordingly, postal management exercised its discretion to aid the Commission by providing information far in excess of the requirements of Rule 74, consisting of extremely well documented estimates of the expected cost savings and revenue consequences that formed the basis for the decision to pursue those service changes.

In contrast, the DSCF Standard Mail service change is sought primarily for the purpose of authorizing operational changes that will alleviate challenges resulting from a collision between current mail entry patterns and service standards that generate a disproportionate Monday delivery workload. The record in this proceeding shows that the Postal Service has fully informed the Commission about the service change at issue and its underlying purpose. It is undisputed that, if properly implemented, the instant service change is expected to generate some operational efficiency and cost reduction. However, the magnitude of such benefits has never been a driving force behind the DSCF Standard Mail service change. Accordingly, the instant request differs from those submitted in Docket Nos. N2010-1 and N2012-1. The absence of “N2010-1/N2012-1-type” analysis in support of the instant request, however, does not render it or the record in this docket deficient by any applicable standard.

The Public Representative’s recommendations also overstate the necessary

without conducting a detailed study.

extent of the information required. Rule 74 of the Commission's Rules of Practice and Procedure requires that the information be sufficient to inform the Commission of the nature, scope, significance and impact of the proposed change. The Postal Service has submitted an appropriate level of information that fully informs the Commission of the impact of this change,¹¹ including the testimonies of witnesses Malone (USPS-T-1) and Anderson (USPS-T-2), the results of the load leveling testing from the original South Jersey test, as well a report on the ongoing Capital District test. The Postal Service's request for an advisory opinion complies with the requirements of Rule 74 without the Public Representative's desired cost studies and volume impact studies, which would create an undue burden on the Postal Service. The section 3661 review process should remain grounded in the requirements imposed by Rule 74.

IV. THERE IS NO RECORD EVIDENCE TO SUPPORT THE CONCERNS EXPRESSED BY THE PUBLIC REPRESENTATIVE AND THE INTERVENORS

A. The Commission Is Prohibited From According Testimonial Status To Comments Filed Pursuant To Rule 20b And Comments Received By The Postal Service In Response To Its Proposed Rulemaking.

To ensure the integrity of its advisory opinion, the Commission must ensure that the foundation for that opinion is limited to evidence that not only meets specific substantive criteria, but that also was subject to examination by the parties under the Commission's current rules.

1. The Commission's Rules of Practice and Procedure do not provide evidentiary status to Rule 20b comments.

The Commission's Rules of Practice and Procedure are clear in distinguishing the status of parties, limited participators, and commenters as well as any information

¹¹ Witness Malone's observation regarding the range of potential mailer reactions to the service change highlights the difficulty in determining the magnitude of any potential adverse volume impact. USPS-T-1 at 9-10, 15.

they provide to the Commission relevant to issues in pending dockets. See 39 C.F.R. §§ 3001.20, 20a and 20b. Information presented to the Commission relevant to issues in a docketed proceeding subject to 5 U.S.C. § 556(d) can have evidentiary status on par with testimony submitted by participants and limited participators only if such information is “subject to cross-examination *on the same terms applicable to that of formal participants*” as required by Rule 20a(c) (emphasis added). Otherwise, the Commission is required to maintain such material in such a manner that it is “segregated from the evidentiary record” 39 C.F.R. § 3001.20b(c).

Rule 20b of the Commission’s Rules of Practice and Procedure invites the public to participate in an informal manner in Commission hearings as commenters. This rule states that any person may file with the Commission, in any case that it noticed for a hearing pursuant to Rule 17(a), an informal statement of views in writing. 39 C.F.R. § 3001.20b. Comments submitted under Rule 20b are shielded from cross-examination by the Postal Service, the intervenors and the Public Representative. Accordingly, inclusion of, reference to or appending of Comments received under Rule 20b to a legal brief in a section 3661 proceeding does not elevate those comments to a status above “the informal expression of views” within the meaning of Rule 20b.

2. The comments received by the Postal Service in response to its Notice of Proposed Rulemaking are not evidence on par with the status of witness testimony.

In interrogatory PR/USPS-T1-11, the Public Representative requested that witness Malone provide all “copies of comments received in response to the [Postal Service’s Notice of Proposed Rulemaking published in the Federal Register on January 3, 2014].” PR/USPS-T1-11. In response to the Public Representative’s request, under

witness Malone's direction, comments received in response to the rulemaking were dutifully compiled and submitted to the Commission as library reference N2014-1/12. United States Postal Service Notice of Filing Revised Library Reference USPS-LR-N2014-1/12, PRC Docket No. N2014-1 (Feb. 5, 2014). Whether as a witness presenting her own direct testimony on behalf of the Postal Service or as the agency representative sponsoring the admission of institutional discovery responses, witness Malone has not attested to the truth of the statements contained in the rulemaking comments. Neither she, nor the Postal Service, has sponsored those comments as evidence of the truth of the matters asserted therein. Rather, witness Malone has merely confirmed that the comments provided in the library reference were those received by the Postal Service in response to its Notice of Proposed Rulemaking. Tr. Vol. 1 at 26. Furthermore, at no time has *any* party or commenter attested to the truth of the statements contained in the comments or moved for their admission into evidence on any such basis. At no point during this docket has the Postal Service, any intervenor, or the Public Representative had an opportunity to cross-examine the authors of the comments or rebut the statements contained therein.

Accordingly, the comments received by the Postal Service in response to the proposed rule published in the Federal Register should be accorded the same status as comments received by the Commission under Rule 20b. Like the non-participant comments provided for by Rule 20b, the rulemaking comments received by the Postal Service are merely informal statements of "any view, opinions, or suggestions." 39 C.F.R. § 3001.20b(b). Such a conclusion is reinforced by that fact that one Docket No. N2014-1 non-participant, Publishers Clearing House, submitted nearly identical

comments to the Commission under Rule 20b and to the Postal Service in response to its Notice of Proposed Rulemaking. See Publishers Clearing House Comments, PRC Docket No. N2014-1 (Jan. 27, 2014); see *a/so* USPS-LR-N2014-1/12 at 5-6.

Consequently, this and the other rulemaking comments should be treated similarly to Rule 20b comments from non-participants, and should not receive evidentiary status on par with sworn witness testimony which parties have had an opportunity to cross-examine and rebut.

3. Inclusion of, reference to, or appending of comments to an initial brief does not elevate these comments to a status above an informal statement of views.

The Public Representative, the American Postal Workers Union (APWU), and the Association for Postal Commerce (PostCom) inappropriately cite the rulemaking comments in their initial briefs as testimonial evidence.¹² Perhaps most egregiously, the Public Representative cites comments from Quad/Graphics and the International Digital Enterprise Alliance as evidence of the “mailing industry’s prevailing best practices” and uses the comments to describe the practices of the “industry as a whole.” PR Initial Brief at 25. The Public Representative also cites comments submitted by Publishers Clearing House as testimony regarding the flexibility of the Postal Service’s labor pool.

Id.

The Public Representative inappropriately cites to the rulemaking comments received by the Postal Service and extends undue weight to commenters’ statements of view regarding the likely effects of the Load Leveling Plan. First, the Public Representative argues that the comments support a conclusion that the Load Leveling

¹² In their Initial Brief, the American Catalog Mailers Association appended the comments that it submitted as part of the rulemaking. Appending such comments to the Initial Brief does not grant them status on par with testimonial evidence.

Plan will result in increased costs to the mailers. *Id.* at 20. Whatever conclusion may be proper to draw on that issue, the rulemaking comments do not constitute record evidence. Second, the Public Representative argues that “comments from mailers clearly indicate some volume loss is likely.” *Id.* Again, whatever conclusion may be proper to draw on that issue, the rulemaking comments do not constitute record evidence. Third, the Public Representative concludes that the comments confirm “that many mailers will change their entry days in response to implementations of the Load Leveling Plan.” *Id.* at 22. Although it would be inappropriate for the Commission to rely on the comments as evidence in support of that proposition, witness Malone testifies based on her Mailers Technical Advisory Committee (MTAC) Workgroup 157 interactions with mailers that it is reasonable to expect that some mailers will shift their mail entry patterns. See USPS-T-1 at 9.

Similar to the Public Representative, the APWU also improperly cites to the comments received by the Postal Service in response to its Notice of Proposed Rulemaking. For example, the APWU cites to comments submitted by PostCom and Association for Mail Electronic Enhancement (AMEE) as proof that “it is amply clear that substantial service cuts and cost increases will be imposed on mailers.” Brief of the American Postal Workers Union, AFL-CIO (APWU Initial Brief), PRC Docket No. N2014-1 (Feb. 21, 2014) at 1-2. The APWU also cites comments from Publishers Clearing House and ECHO Communications, Inc. as indication that the “possibility of significant volume loss is real.” APWU Initial Brief at 2. Lastly, the APWU cites to comments submitted by the Saturation Mailers Coalition and Quad/Graphics Inc. as confirmation that “mailers will change their mailing habits to reserve their original

delivery days.” *Id.* at 3.¹³

Additionally, at page 1 of its Initial Brief, PostCom acknowledges that much of the brief’s substance was submitted to the Postal Service in the form of comments in the DSCF Standard Mail service standard rulemaking. See Initial Brief of the Association for Postal Commerce, PRC Docket No. N2014-1 (Feb. 20, 2014) at 1 (PostCom Initial Brief). Insofar as its brief departs from reliance upon the testimony and additional record evidence provided by the Postal Service in this docket and repeats the substance of those comments, PostCom has provided no basis upon which the Commission should give weight to its arguments. This shortcoming applies the PostCom’s argument regarding the magnitude of any increased unpredictability in DSCF Standard Mail delivery and complications arising from diminished predictability. See PostCom Initial Brief at 3. Likewise, PostCom’s argument about mailflow disruptions “to an extent that the Postal Service cannot imagine” that will have a “serious impact on meeting the delivery expectations of mailers” suffers from this same deficiency. *Id.* PostCom also provides no information quantifying any additional costs to mailers or to the Postal Service resulting from the possibility of disruption of existing commingling and copalletization arrangements, which are discussed at pages 3-4 of its brief.

PostCom argues at page 4 of its Initial Brief that “there were many questions still outstanding on the Load Leveling test that were never answered or addressed prior to the filing” of the Docket No. N2014-1 request. However, there is no PostCom testimony or any other record evidence of what those questions may have been. And the docket

¹³ However, for record evidence in support of the APWU’s proposition on which the Commission can rely, see USPS-T-1 at 9.

is devoid of any effort by PostCom during discovery to seek answers to any such questions. At page 5 of its Initial Brief, PostCom references the South Jersey Operations Test and alludes to a mysterious “subsequent test that was initiated by mailers.” This is followed by vague insinuations of statements by the Postal Service regarding the potential impact of the Load Leveling Plan on specific mailers. However, PostCom does not reveal either the nature or the results of this “subsequent test” or clarify the nature of any alleged misrepresentations for the benefit of the Docket No. N2014-1 evidentiary record. Accordingly, PostCom fails to provide the Commission with any basis for accepting its arguments.

If it was the goal of the Public Representative, APWU, or PostCom to elevate any of these comments to formal evidentiary status on par with testimony submitted by the Postal Service, the Commission’s current rules make clear that such a result is permitted only if those comments are “subject to cross-examination *on the same terms applicable to that of formal participants.*” See 39 C.F.R. § 3001.20a(c) (emphasis added). Accordingly, under its current rules, the Commission is required to maintain the comments in such a manner that they are “segregated from the evidentiary record” 39 C.F.R. § 3001.20b(c).

The Postal Service and the parties have had no opportunity to conduct cross-examination of comments submitted to the Commission under Rule 20b or to the Postal Service as part of its rulemaking. No party has offered to sponsor the comments as evidence of the truth of the matters asserted therein. Nor have these comments been “subject to cross-examination on the same terms applicable to that of formal participants” within the meaning of Rule 20a(c). To preserve consistency with the

Commission's current rules, it is bound to segregate these comments from the evidentiary record on which it may rely in developing its Docket No. N2014-1 advisory opinion.

Otherwise, if the rulemaking comments provided in response to and under the conditions of the Public Representative's discovery request received evidentiary status on par with sworn witness testimony, it would be possible for unfounded allegations, characterizations, assertions and conclusions to be entered into the record as truthful statements of fact without parties having an opportunity for cross-examination or rebuttal. Given the nature of the rulemaking process, any member of public can submit comments. By citing to these comments, the Public Representative and the APWU improperly ask the Commission to give equal consideration to all statements in any comment submitted by any person without other parties having an opportunity to verify, confirm, or assess their truthfulness.

B. Judicial Precedent Makes Clear That Reliance On The Comments Would Be Inconsistent With Commission Rules.

The comments received by the Commission in Docket No. N2014-1 under Rule 20b and by the Postal Service in response to its January 3, 2014 Notice of Proposed Rulemaking (79 Fed. Reg. 376) are full of allegations, characterizations, assertions and conclusions that the Postal Service and other parties have not been permitted to examine. Without an opportunity to do so, it is virtually impossible for parties to determine the nature of any underlying limitations or flaws in those comments, or any disagreement they might have, and the grounds on which any rebuttal testimony might be based. Because of deficiencies in the development of the evidentiary record in earlier dockets, the courts have previously invalidated Commission decisions on several

occasions.¹⁴ At the conclusion of the current docket, the Postal Service would prefer to receive an advisory opinion not flawed by reliance on information obtained without a full and true disclosure of the facts. Accordingly, the Postal Service urges the Commission to adhere to its rules of practice by basing its Docket No. N2014-1 advisory opinion only on record evidence.

The Postal Service's goal has been to ensure that the Commission has a reasonable understanding of the context and merits of the proposed service changes, and a well-founded basis for offering an informed and useful advisory opinion. Should the Commission err by relying on any of the comments as the basis for that opinion, such a material procedural defect would call into question the validity of the Commission's advisory opinion. As a result, postal management would be deprived of the nature and quality of advice that section 3661 was intended by Congress to foster.

C. The Rule 20b Comments And Rulemaking Comments Are Not Without Value.

The Postal Service has various existing channels through which it receives customer comment generally. Postal management regards customer expressions of preferences, needs and concerns to be important considerations in balancing the conflicting service and efficiency objectives of title 39 United States Code. The direct testimony of witness Malone (USPS-T-1) reflects the customer outreach conducted by the Postal Service and the consideration given to customer concerns in development of the operational testing and the service change plan submitted for review in this docket, not to mention the comprehensive plans the Postal Service has for communicating any service changes that it implements.

¹⁴ See *Mail Order Association of America v. United States Postal Service*, 2 F.3d 408, 429-30 (D.C. Cir. 1993). See also, *Newsweek v. United States Postal Service*, 663 F.2d 1186, 1205 (2d Cir. 1981).

Since filing the December 27, 2013 Request for an Advisory Opinion, postal management has compared (a) customers views and concerns received through its routine channels of customer communication, (b) comments received through the DSCF Standard Mail service standard rulemaking, and (c) the statements and expressions of customer concern compiled by the Commission in its public comment files. The comments submitted to the Commission pursuant to Rule 20b and received by the Postal Service in its rulemaking echo some of the concerns expressed to the Postal Service during its customer outreach efforts and in its consultations with the mailing industry. See USPS-T-1 at 9-10, 15. Although the Commission cannot give consideration or weight to these comments as a basis for its advisory opinion, the rulemaking comments will inform postal management's decision regarding the proposed rule and these submissions will be considered by postal management as it shapes its DSCF Standard Mail service standard change implementation plans.

V. CONCLUSION

For the foregoing reasons, the Postal Service submits that the Commission should opine that it has received from the Postal Service a substantial evidentiary record explaining the factual and policy bases for the planned service changes and why those changes reflect a reasonable balancing of the various service and efficiency objectives of title 39, United States Code. The Commission should find that the parties opposed to the service changes have offered insufficient evidentiary, policy and legal arguments to justify a different conclusion. Accordingly, the Postal Service respectfully requests that the Commission issue an opinion that advises that the service changes under review are ones that the policies of title 39 permit the Postal Service to

implement, supplemented by such other advice as is appropriate to the Commission's role under section 3661.

Respectfully submitted,

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