

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

First-Class Mail and Periodicals
Service Standard Changes, 2021

Docket No. N2021-1

INITIAL BRIEF OF STEVE HUTKINS

(June 21, 2021)

Respectfully submitted,

/s/ Steve Hutkins

P.O. Box 43
Rhinecliff, NY 12574
ssh1@nyu.edu

Table of Contents

Authorities Cited.....	i
I. STATEMENT OF THE CASE.....	1
II. STATEMENT OF POSITION.....	1
III. DISCUSSION.....	2
A. Users in some areas of the country will experience less favorable conditions	3
B. The less favorable conditions have material impacts	6
C. The highly impacted users are “similarly situated”	9
D. The impacts of previous changes in delivery times may not predict future impacts.....	10
E. The Postal Service has not provided persuasive evidence about customer preferences	14
F. The Commission’s order on the Carlson Complaint serves as precedent.....	21
G. Discriminating on the basis of distance from population centers is inconsistent with Title 39.....	24
IV. CONCLUSION.....	30

Authorities Cited

Judicial

GameFly, Inc. v. PRC, 704 F.3d 145 (D.C. Cir. 2013)

Statutory

39 U.S.C. §101(a)

39 U.S.C. §101(f)

39 U.S.C. §301

39 U.S.C. §301(b)(1)(C)

39 U.S.C. §403(c)

39 U.S.C. §404(d)

39 U.S.C. §3661

39 U.S.C. §3623

39 U.S.C. §3623(d)

39 U.S.C. §3683

Administrative (PRC)

Opinion and Recommended Decision on Docket No. R77-1 (May 12, 1978)

Advisory Opinion Concerning a Proposed Change in the Nature of Service Standards, Docket No. N89-1 (July 25, 1990)

Complaint on First Class Mail Service Standards, Docket No. C2001-3 (June 15, 2001).

Commission Report: Complaint on First Class Mail Service Standards, Docket No. C2001-3 (April 17, 2006)

Study on Universal Postal Service and the Postal Monopoly, Appendix F: Robert H. Cohen and Charles McBride, "Estimates of the Current Costs of the USO in the U.S." (2008)

Docket No. N2021-1

Order on Complaint, Order 718, Docket No. C2009-1 (April 20, 2011)

Advisory Opinion on Elimination of Saturday Delivery, Docket No. 2010-1 (May 24, 2011)

Direct Testimony of Dr. Michael A. Crew on Behalf of the National Association of Letters Carriers, AFL-CIO, Docket No. 2012-1 (April 20, 2012)

Direct Testimony of Kevin Neels on Behalf of the Public Representative, Docket No. 2012-1 (April 23, 2012)

Initial Brief of the Public Representative, Docket N2012-1 (July 10, 2012)

Advisory Opinion on Mail Processing Network Rationalization Service Changes, Docket No. N2012-1 (September 28, 2012)

Other

Federal Register, Vol. 76, No. 183, September 21, 2011

USPS Delivery Standards and Statistics Fact Sheet (March 2015), available at <https://about.usps.com/news/electronic-press-kits/our-future-network/assets/pdf/ofn-usps-dss-fact-sheet.pdf>

Government Accountability Office, "Post Office Changes Suggest Cost Savings, but Improved Guidance, Data, and Analysis Can Inform Future Savings Efforts," GAO-16-385 (April 2016)

Office of Inspector General, "Mail Processing and Operational Changes," NO-AR-16-009 (September 2, 2016)

USPS Press Release, With Commitment to Affordability and Financial Sustainability, U.S. Postal Service Proceeds with Request for Postal Rate Change, May 28, 2021, available at <https://about.usps.com/newsroom/national-releases/2021/0528-usps-proceeds-with-request-for-postal-rate-change.htm>

Legal Information Institute, Nolo's Plain-English Law Dictionary, available at https://www.law.cornell.edu/wex/similarly_situated

I. STATEMENT OF THE CASE

On April 21, 2021, the Postal Service filed a request for an Advisory Opinion under 39 U.S.C. §3661 regarding planned changes to the service standards for First-Class Mail and end-to-end Periodicals.¹ The Postal Service's plan is to add an extra day of delivery to a percentage of mail currently under a two-day standard and one or two extra days to a percentage of mail currently under a three-day standard. The Postal Service contends that such a relaxation of service standards would allow it to decrease dependence on air transportation and improve the overall reliability of delivery.

II. STATEMENT OF POSITION

I am opposed to the Postal Service's plan because the proposed service standards will cause undue discrimination of users of the mail who happen to live in places distant from the country's centers of population. The proposed standards will impact some areas of the country — particularly the Pacific states but also the Western states and portions of Florida, Texas and Maine — more than it will impact other areas. These highly impacted areas will see more of their origin-destination pairs and more of their volumes downgraded, as well as larger increases in average delivery time, than other parts of the country will experience. Consequently, the proposed changes in service standards will result in unreasonable and undue discrimination among users of the mail, in violation of 39 U.S. Code § 403(c).

¹ United States Postal Service Request for an Advisory Opinion on Changes in the Nature of Postal Service (April 21, 2021).

III. DISCUSSION

As stated in 39 U.S.C. 403(c), “In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.”

Discrimination lawsuits typically involve a framework in which plaintiffs first demonstrate that they have been treated unfairly compared to others who are in a similar situation and then the defendants must show that there was a legitimate reason for their actions. In Order 718 on the GameFly Complaint, the Commission thus used a three-pronged test to evaluate whether undue discrimination had taken place.² First, it must be established that a mailer or group of mailers “has been offered less favorable rates or terms and conditions than one or more other mailers.” Second, the mailer “must demonstrate that it similarly situated to the other mailer or mailers who have been offered more favorable rates or terms and conditions of service.” And third, “it must demonstrate that there is no rational or legitimate basis for the Postal Service to deny it the more favorable rates or terms and conditions offered to others.” The following discussion will show that the undue discrimination at issue in Docket N2021-1 passes all three of these tests.

This brief will proceed as follows: It will first review the evidence showing that some users of the mail will be subjected to unfavorable conditions and undue discrimination in ways encompassed by 39 U.S.C. 403(c). It will then address the matter of “similarly

² See Order on Complaint, Order No. 718, Docket No. C2009-1 (April 20, 2011) at 28.

situated.” It will then argue that the Postal Service’s two main rationales for the plan — an improvement to net income and improved “reliability” of delivery — are highly questionable and, in any case, insufficient justification for the undue discrimination the plan will cause. The brief proceeds then to a discussion of why the Commission’s Order on the Carlson Complaint should serve as a precedent that established that geographical discrimination is encompassed by section 403(c).³ The brief concludes with a discussion of the relationship between postal prices and the quality of service as it relates to sections 403(c) and 404(c) of Title 39.

A. Users in some areas of the country will experience less favorable conditions

The Postal Service has not challenged the fundamental observation that the proposed service standards will result in “unintentional discrepancies.”⁴ In responses to two interrogatories, USPS witness Hagenstein acknowledged that the impacts would vary region to region and the West will be impacted the most. Due to factors like population density, the nature of the country’s geography, and the plan’s transitioning of air transportation to surface, the Western regions, particularly the Pacific region, as well as parts of Florida and Texas, will see a higher proportion of downgraded pairs and downgraded volumes and a larger increase in average delivery time than other parts of the country.

³ Commission Report: Complaint on First Class Mail Service Standards, Docket No. C2001-3 (April 17, 2006)

⁴ See Responses of the United States Postal Service Witness Hagenstein to Interrogatories and Request for Production of Documents of Steve Hutkins, SH/USPS-T3-1 (May 25, 2021) and SH/USPS-T3-6 (May 26, 2021)

First, with respect to origin-destination pairs, the Postal Service states that under the proposed service standards, approximately 60 percent of the pairs would be downgraded nationwide.⁵ These downgrades will, however, not be uniform across the country. As noted in my testimony, for Sectional Center Facilities (SCFs) in most of the central and eastern parts of the country, fewer than 50 percent of the pairs would be four- or five-day. By contrast, for SCFs in the western states, as well as southern Florida and parts of Texas, over 75 percent of the origin-destination pairs would fall within a four- or five-day standard. In the Pacific states, many SCFs would have over 90 percent of their pairs under a four- or five-day standard.⁶ In the Midwest, fewer than 8 percent of the origin-destination pairs would shift from three-day to five-day; in the western states, over 30 percent of the pairs would be downgraded to five-day. The discrepancies are stark: for SCF Lincoln NE 683, only one origin-destination pair would shift to a five-day standard, 0.06 percent of the total, while for SCF Eureka CA 955, over 75 percent of the pairs would shift to a five-day standard.⁷

Second, with respect to mail volumes, the proposal would downgrade approximately 39 percent of volumes nationwide.⁸ Again, though, some areas will see much more of their mail volumes shifted from a three-day to a four- or five-day standard than others. For SCF Springfield IL 627, 7.7 percent of destinating volume would fall under a four- or five-day standard; for SCF Las Vegas NV 890, 68.4 percent of volumes

⁵ See Direct Testimony of Witness Hagenstein on Behalf of the United States Postal Service, USPS-T-3 (April 21, 2021) at 21.

⁶ See Rebuttal Testimony of Steve Hutkins (SH-RT-1), PRC Docket. No. N2021-1 (Jun. 2, 2021) at 12 (Figure 6) and associated Library Reference SH-LR-N2021-1/1, tab “Fig 6 % Pairs SSD 4 or 5.”

⁷ See SH-RT-1 at 13 (Figure 7) and SH-LR-N2021-1/1, tab “Fig 7 % Pairs SSD 5.”

⁸ See USPS-T-3 at 24.

would be four- or five-day. SCF Las Vegas will thus see almost nine times more of its destinating volumes downgraded to a four- or five-day standard than SCF Springfield would see.⁹ For Zip Code zones with a 1-digit prefix of 0 to 8, about 6.4 percent of volumes would be shifted to a five-day standard. For zone 9, the Pacific region, almost 31 percent of mail volumes would be downgraded to a five-day standard.¹⁰

Third, with respect to average delivery time, the current average nationwide is 2.569 days, and under the proposal it will increase to 3.008 days — an increase of 18.74 percent.¹¹ The increases, however, will not be uniform. Under the proposal, average delivery time for SCF Quincy IL 623 would rise from 2.46 to 2.59 days, an increase of 5.24 percent, while for SCF Sacramento CA 956 average delivery time would rise from 2.85 days to 3.99, an increase of 40 percent — more than seven times the increase in Quincy. For Zip Codes with a 1-digit prefix of 6, average delivery time will increase 12.7 percent, while for the Zip codes with a prefix of 9, the increase will be 27.7 percent — more than twice as much.¹²

As these examples indicate, the structure of the proposed changes in service standards will, however inadvertently and unintentionally, cause mail to and from the Western and Pacific states, as well as portions of Texas, Florida, and Maine, to suffer greater impacts than the rest of the country.

⁹ See SH-RT-1 at 15 and SH-LR-N2021-1/1, tab “Fig 8 % vol SSD 4 or 5.”

¹⁰ See SH-RT-1 at 15 and SH-LR-N2021-1/1, “Fig 9 % vol SSD & 1-digit.”

¹¹ See USPS-LR-N2021-1-9, tab “LR-N2021-1-9.xlsx.”

¹² See SH-RT-1 at 18-19 and SH-LR-N2021-1-1, tab “Fig 12 ADT % Increase.”

B. The less favorable conditions have material impacts

As explained by witness Thress, a 19 percent (or 18.74) increase in average delivery time will cause a loss of 523.1 million pieces of First Class mail, \$253.6 million in gross revenue and \$110.9 million in contribution.¹³ The losses in volume, revenue and contribution, however, will not be uniform across the country. In the Pacific region, where the increase in average delivery time will be almost 28 percent, the losses in volume and revenue can also be expected to be proportionally greater.

People living in regions where the impacts of the proposed standards have more impact and where mail volumes decline more will thus suffer greater harms than those living elsewhere. Businesses and institutions in these places will be pushed to shift more of their communications to digital platforms, and the retooling will add to their operational costs. Bill payments will be late more frequently, and customers will have to pay more in late fees, risk being reported to third-party debt collectors, and experience lower credit scores. Mailers in these places will sometimes find it necessary to use more expensive forms of mail, like Priority Mail and Express Mail.¹⁴ These are zoned products, so mail to and from regions like the Pacific will have to pay even higher than average rates for these already expensive classes.

If all such costs were spread evenly across the country, it would be undesirable, but in terms of geography, it would at least be fair. Imposing greater costs on some people just because of where they live is a perfect example of unfair discrimination. The

¹³ Notice of the United States Postal Service of Filing Errata to the Direct Testimony of Postal Service Witness Thress (USPS-T-5) (June 2, 2021) at 37.

¹⁴ Advisory Opinion on Elimination of Saturday Delivery, Docket No. 2010-1 (May 24, 2011), at 106: “Priority Mail volume may increase due to increased consumer use of Priority Mail to ensure the timely delivery of materials. USPS-T-9 at 12.”

unfairness is particularly egregious when one considers that the populations of the highly impacted regions include, as does everywhere else in the country, those typically subjected to discriminatory practices — rural communities, minorities, seniors, low income families, and those with disabilities — as well as millions of Americans who lack access to high-speed Internet and have no choice but to use the Postal Service to receive Social Security and other payments. Many of these vulnerable populations live in the highly impacted areas, so they too will experience greater harms than those living in the rest of the country.

The Postal Service did not conduct any studies to determine how such groups might be impacted by their plan.¹⁵ Its only nod in this direction was to provide some calculations showing that rural residents will not be more impacted by the proposal than urban in terms of downgraded volumes.¹⁶ In his testimony, witness Cintron stated, “Moreover, these changes will not cause any undue or unreasonable discrimination against any users of the mail. First, they do not treat different groups of users in different ways. The changes are based on time and distance, which is not only more efficient, but also more equitable.”¹⁷ In the hearing on June 9, Commissioner Fisher asked witness Cintron if he had any thoughts about how the Postal Service might assess how groups like the elderly, veterans, low-income, or rural consumers could be

¹⁵ See USPS responses to APWU/USPS-1/2, APWU/USPS-1/3, and APWU/USPS-1/4 (May 26, 2021).

¹⁶ See Direct Testimony of Witness Hagenstein on Behalf of the United States Postal Service, USPS-T-3 (April 21, 2021) at 24.

¹⁷ See Direct Testimony of Witness Cintron on Behalf of the United States Postal Service, USPS-T-1 (April 21, 2021) at 36.

impacted by the proposed changes. Witness Cintron replied, “Yeah, I’m not sure how we would capture the data for all of those categories you mentioned.”¹⁸

While it may be a challenge to capture such data, it should be clear that rural communities, minorities, seniors, and the poor will be seriously impacted by the proposed changes. As APWU witness Anita Morrison observed in her testimony, in the most highly impacted Zip Code areas, more than a quarter of households have individuals 65 years of age or older, and 10 to 30 percent of their populations are minority populations.¹⁹ The Postal Service’s plan does not intentionally discriminate against these people, but that will be an outcome.

It is also likely that average citizens and small businesses will be more impacted because they send more single-piece mail. Large business mailers who pre-sort their mail are more able to adjust to new standards than individuals and small businesses that use single-piece mail. As witness Thress observed in his testimony, households are more sensitive than non-households to changes in delivery times, and there is a somewhat stronger impact of average days to delivery on First-Class single-piece volume than for pre-sort mail.²⁰ This phenomenon will be nationwide, but households in the highly impacted regions will be more impacted.

Contrary to witness Cintron’s assertion that the proposed changes “do not treat different groups of users in different ways,” the changes do exactly that. They treat people who live in particular regions of the country differently and in a fundamental way:

¹⁸ See Volume 1 - Official Transcript of Hearing Held on June 9, 2021, in Docket No. N2021-1 (June 16, 2021) at 444, lines 10 – 25, and 445, lines 1- 8

¹⁹ See Rebuttal Testimony of Anita Morrison (APWU-RT-1), PRC Docket. No. N2021-1 (Jun 2, 2021) at 6.

²⁰ See USPS-T-5 at 25; see also USPS-T-4 at 15.

these people are given a lower quality of service. While the design of the plan may be “equitable” in terms of the geometry of drive times and distance, the impacts of the changes will not be spread evenly across the country. The changes will consequently result in a form of geographic discrimination.

C. The highly impacted users are “similarly situated”

The second element of the three-pronged test in *Gamefly* states that the mailer or group of mailers “must demonstrate that it is similarly situated to the other mailer or mailers who have been offered more favorable rates or terms and conditions of service.” In applying this test, the Commission acknowledged that “identifying the circumstances and conditions that would make an applicant ‘similarly situated’ ... will, in all likelihood, have to be determined on a case-by-case basis....” The Commission explained that the term “[s]imilarly situated’ refers to a comparison of the *relevant* characteristics of different mailers as the characteristics apply to a particular Negotiated Service Agreement.” (Emphasis added in original text.)²¹ In *Gamefly*, “similarly situated” was thus interpreted to mean how Gamefly was situated in the marketplace compared to other businesses, like Netflix, that also sent small, lightweight disks through the postal system.

In discrimination cases, “similarly situated” refers to the way plaintiffs must show that they have been “treated differently from others who are similarly situated except for the alleged basis of discrimination.”²² This consideration ensures that the plaintiffs are

²¹ Order 718 on GameFly Complaint at 45.

²² See Legal Information Institute definition from Nolo’s Plain-English Law Dictionary, available at https://www.law.cornell.edu/wex/similarly_situated

comparing themselves to others who are just like them in all relevant respects except for the factor on which the discrimination is based, such as race, gender, and age. The purpose of this consideration is basically to ensure that it is an apples-to-apple comparison on relevant criteria, such as qualifications for the job; other considerations, like what neighborhood one lives in, would not be relevant.

In the context of the issues in this case, “similarly situated” is fairly straightforward. The users of the mail in the regions that will be more impacted by the new standards are similarly situated to mailers in other regions in all relevant respects: they send and receive the same kind of mail, they use postal services in exactly the same way, and they pay the same rates for First Class mail. In all relevant respects besides location there is no difference between one group of users and another.

One could argue, of course, that users in the Western and Pacific region are not “similarly situated” to mailers in the rest of the country just as a matter of geography — they live in a different places. But that would not make sense since location is the factor on which the discrimination is based. Such an interpretation would mean that the case had failed the second of the three-prong test in *GameFly* and there would be no reason to proceed to the third. The Postal Service could discriminate against some users of the mail based simply on where they live, and it would not even need to provide a legitimate basis for doing so. This cannot be the intention of section 403(c).

D. The impacts of previous changes in delivery times may not predict future impacts

Let’s turn now to the third element on the three-prong test in *GameFly*, the question of where or not there is a “rational or legitimate basis” for the Postal Service to

deny some users the more favorable rates or terms and conditions offered to others. The Postal Service presents two main justifications. The changes will increase net income and improve “reliability” of delivery.

The Postal Service’s cost-saving analysis is based on the proposition that transportation costs will decrease by putting lower mail volumes on air carriers, and even though some volume will be lost due to slower delivery times, the losses in revenue and contribution will be exceeded by the cost savings. It is entirely possible, however, that the cost savings will be less than projected and the loss in volume and contribution will be greater.

The Postal Service has certainly miscalculated cost savings in the past. As Chairman Kubayanda noted at the end of the hearing on June 9, in prior N cases the Postal Service made assertions about slowing the mail and achieving cost savings that were not fully realized: “[T]he lower service standards are currently in place, but the savings have not materialized, and that’s according to the analysis of the Office of Inspector General.”²³

Other intervenors in this case may find problems with the Postal Service’s estimates of the cost savings of shifting away from air transportation. As for projections on loss revenues, the Postal Service depends primarily on the testimony of witness Thress, which includes an econometric analysis of “sources of change” that considers

²³ See Transcript at 451. See also OIG report on “Mail Processing and Operational Changes,” NO-AR-16-009 (September 2, 2016), available at <https://www.uspsoidg.gov/sites/default/files/document-library-files/2016/NO-AR-16-009.pdf>, and GAO report on “Post Office Changes Suggest Cost Savings, but Improved Guidance, Data, and Analysis Can Inform Future Savings Efforts,” GAO-16-385 (April 2016), available at <https://www.gao.gov/assets/gao-16-385.pdf>.

the period 2011 to 2020. While the Postal Service changed service standards during this period, the proposed changes are unprecedented in their magnitude and scope.

Since 1990, the Postal Service has changed service standards on First Class mail four times. The percentage of total mail volume that was downgraded by each of these changes can be estimated based on several postal documents.²⁴ The plan reviewed in N89-1 was designed to shift 5 to 15 percent of First Class mail from overnight to a two-day standard and 5 to 10 percent from two-day to three-day. Most of these changes apparently took place in 1990, with some additional downgrades taking place in 2000-2001. The proposal reviewed in N2012-1 appears to have caused downgrades of about 36 percent of volumes in 2012 during the first (“interim”) phase of implementation, and then an additional 16 percent in 2015, during the second phase.

Under the current proposal, the new service standards would downgrade about 39 percent of First Class mail. The average delivery time would increase almost 19 percent — much more than the 14.6 percent increase that occurred in 2015, the largest increase during the timeframe examined by witness Thress (2005-2020).²⁵ The proposal may thus represent the biggest single change in service standards in the Postal Service’s history, in terms of both the volumes that will be downgraded and the increase in average delivery times. Plus, unlike the two previous plans for changing service standards reviewed by the Commission, in this case there will not be a phased implementation. In the hearing, Commissioner Taub asked witness Cintron, “[D]oes the

²⁴ These numbers can be found or derived from Advisory Opinion, Docket No. N89-1 at 1; Federal Register, Vol. 76, No. 183, September 21, 2011, p. 58434; USPS Delivery Standards and Statistics Fact Sheet (March 2015), available at <https://about.usps.com/news/electronic-press-kits/our-future-network/assets/pdf/ofn-usps-dss-fact-sheet.pdf>

²⁵ See table in USPS-T-5 at 24.

Postal Service have a detailed implementation plan for the lane changes? So just what I'm getting at is, will the Postal Service roll out implementation all at once or stagger it over time geographically?" Witness Cintron's response: "All at once."²⁶

Perhaps most importantly, this would be first time the Postal Service extended standards to more than three days for the contiguous 48 states. It would also be the first time it downgraded standards for some origin-destination pairs by not one but two days. Mr. Thress's analysis considers this fact indirectly — the two-day downgrades are factored into the 18.74 percent increase in delivery times he used in his revised calculations — but because the Postal Service has never made such a change, it may be difficult to predict the results.

Making predictions is particularly problematic when one considers the context. Over the past year, attention to mail delays in the media has been unusually high, as has been the number of complaints from patrons and politicians. Vast numbers of people are asking, "Where's my mail?" The public reaction to mail delays under two- and three-day standards over the past year may turn out to be nothing compared to what happens when the Postal Service *intentionally* slows mail to four and five days and tells customers that service is actually "improving" because the mail will be "on time" more often.

For the past year, the Postal Service has had to apologize for poor service performance many times, but it had a good explanation. The pandemic was causing an unprecedented surge in package volume, and the Postal Service was experiencing worker availability problems. The poor performance was not its fault, and it could

²⁶ Transcript at 429, lines 6 – 10.

promise that performance would improve. But now the Postal Service wants to make slower mail *permanent*.

It is also important to consider that the changes in service standards may be coupled with an unusually large rate increase.²⁷ The synergy between a rate increase and slowing down the mail at a time when customers are especially concerned about speed of delivery is likely to have an unprecedented impact on volumes and revenues. The past may not be indicative of the future. Or, as investment wisdom likes to say, “Past performance is no guarantee of future results.”

E. The Postal Service has not provided persuasive evidence about customer preferences

While the cost savings associated with reducing air transportation appear to be the primary reason for changing service standards,²⁸ the Postal Service says that it will have a second benefit: It will increase the “reliability,” “predictability,” and “consistency” of mail delivery because service performance scores will improve to 95 percent.²⁹ In other words, there’s a tradeoff: The mail will move more slowly, but delivery will be more “reliable,” and customer satisfaction may actually *improve*. As witness Monteith stated in his testimony, “In sum, I do not anticipate that the proposed changes will materially impact customer satisfaction. Indeed, the proposed changes may even improve

²⁷ USPS Press Release, With Commitment to Affordability and Financial Sustainability, U.S. Postal Service Proceeds with Request for Postal Rate Change, May 28, 2021, available at <https://about.usps.com/newsroom/national-releases/2021/0528-usps-proceeds-with-request-for-postal-rate-change.htm>

²⁸ See Postal Service’s response to MH/USPS-T2-1: “The Postal Service’s decision to transport more mail by surface transportation initiated the service standard change modeling and analysis.”

²⁹ See USPS-T-1 at 35.

customer satisfaction by ensuring that the Postal Service remains reliable and consistently delivers within customers' and the general public's expectations."³⁰

The Postal Service is concerned about customer satisfaction not simply because it makes good business sense. Section 301 of the Postal Accountability and Enhancement Act contains eight factors that the Postal Service must consider in establishing or revising service standards for market-dominant products. The second factor is "the degree of customer satisfaction with Postal Service performance in the acceptance, processing and delivery of mail." To satisfy this consideration, the Postal Service must show that the proposed changes in service standards will not hamper its ability to fulfil the objective stated in section 301(b)(1)(C) of PAEA, "To reasonably assure Postal Service customers delivery reliability, speed and frequency consistent with reasonable rates and best business practices." The Postal Service thus makes the case that while customer satisfaction may be negatively impacted by slowing down the speed of delivery, the negative impact will be outweighed by the positive impact of greater reliability.

This is not the first time the Postal Service has presented the Commission with the claim that mailers value reliability and consistency over speed. The Postal Service made this same argument in the N89-1 proceedings and supported it by pointing to market research surveys. In its Advisory Opinion, the Commission found "important flaws" in the surveys and stated this: "Most important conceptually was their failure to present interviewees with more meaningful alternatives than an abstract choice between 'consistency' and 'speed.'" As a result of this problem and others in the

³⁰ See USPS-T-4 at 20.

surveys, “The commission found that the market research could not be construed as showing customer support for the downgrading of service.”³¹

When the Postal Service submitted its proposal to change service standards in 2012, it conducted not one but two rounds of market research to determine, among other things, how the slower delivery standards might impact volumes and revenue. The Postal Service claimed that customers place little value on speed of delivery and are more concerned with reliability. The Commission did not find the claim persuasive: “The Postal Service’s assertions that customers value reliability and consistency in service over speed of delivery are not documented by studies on this record. The quantitative market research undertaken by the Postal Service did not include the concept of reliability.... Comments directly received by the Postal Service in its Federal Register notice and rulemaking process appear to contradict Postal Service assertions as a majority of commentators oppose MPNR, with some commenting on the burden created by lengthening service standards.”³²

The Commission may have had issues with the surveys done for Dockets N89-1 and N2012-1, but at least the Postal Service conducted market research to support its case. For Docket N2021-1, the Postal Service conducted no market research specifically designed to evaluate how customers might respond to the proposed changes. In one of his interrogatories, Mr. Carlson asked USPS witness Monteith to provide the basis for his contention that customer satisfaction may improve after the

³¹ Advisory Opinion Concerning a Proposed Change in the Nature of Service Standards, Docket No. N89-1 (July 25, 1990) at 2.

³² Advisory Opinion on Mail Processing Network Rationalization Service Changes, Docket No. N2012-1 (September 28, 2012) at 153.

Postal Service slows delivery times, “including any studies, surveys, market research, focus groups, or other documents.” In response, Mr. Monteith pointed to the studies cited in his testimony (presumably a reference to the econometric analysis of witness Thress and a survey discussed in a report by the Office of Inspector General) and the Consumer and Commercial Brand Health Tracker survey results for the first quarter of fiscal year 2021.³³

In this quarterly survey, respondents are asked about their level of agreement with a series of attributes such as “is reliable” and “provides fast mail delivery.” The responses are analyzed to determine which attributes are more predictive of customer satisfaction and then ranked in terms of top drivers of satisfaction. An attachment to witness Monteith’s testimony contains a table from the survey report showing the top five drivers of customer satisfaction.

The driver “is reliable” comes out on top. But the survey does not explain to respondents what “is reliable” means. The Postal Service may use the term as shorthand to refer to service performance scores, but the respondents in the survey were not told that. In the mind of many respondents, “reliable” may have meant something totally unrelated to average delivery time or service performance scores. Perhaps they thought of “reliable” in terms of related words, like trustworthy, dependable, safe and secure. Or they may have thought “reliable” referred to the Postal Service’s tradition of delivering the mail under any conditions, as summed up by its motto: “Neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds.” They may have thought that “reliable”

³³ See Responses to DFC/USPS-T4-13 and USPS-LR-N2021-1_10

included “swiftness,” rather than seeing it as opposed to speed, the way the Postal Service would have it.

A similar ambiguity applies to the driver “consistently delivers the mail when expected,” which comes out second in the list of top drivers. While some respondents may have interpreted the phrase the way the Postal Service does — consistently delivers on the expected day according to the service standard — it is entirely possible that some respondents took this phrase to mean that the mail is delivered *at the same time* every day. Many people wait for their mail each day and look forward to the “mail moment.” Some people get frustrated when the mail is “late” — and by that they mean late by hours, not by days. There’s no way to know how many people were thinking what the Postal Service interprets the question to mean and how many interpreted it differently. In any case, it is safe to say that some respondents were not thinking about service standards and performance targets when they selected “consistently delivers the mail when expected” as a key driver of satisfaction.

When the Postal Service discusses “reliability” and “consistency,” it is usually referring to what percent of the mail arrives on the expected day according to the service standards and how much arrives one day later, two days later, and three days later. A primary reason the Commission requires the Postal Service to provide the Commission and mailers with variance data about the tail-of-the-mail is to help measure consistency of delivery.

In one of my interrogatories to witness Cintron, I presented the following table comparing service performance and variance scores from the five quarters before the

pandemic began (the four quarters of FY 2019 and the first quarter of FY 2020) and the hypothetical scores the Postal Service is hoping to achieve.³⁴

Service performance scores in FY19-FY20 Q1-2 and projected targets under proposed standards								
FY19-FY20 Q1-2		2-Day		3-5-Day				
		Percent on time	Percent Within +1-Day	Percent on time	Percent Within +1-Day	Percent on time	Percent Within +1-Day	Percent Within +2-Days
Days Since Entered		Day 2	Day 3	Day 3	Day 4	Day 3	Day 4	Day 5
FY19	Pre-Sort	94.3	98	92.1	97.4	92.1	97.4	98.8
FY19	Single Piece	92.5	97.3	81.4	93.9	81.4	93.9	97.2
FY20 Q1-2	Pre-Sort	94.2	98	92.1	97.5	92.1	97.5	98.8
FY20 Q1-2	Single Piece	92.9	97.4	81.1	94.1	81.1	94.1	97.3
Under Proposed Standards		2-Day Shifting to 3-Day		3-Day Shifting to 4-Day		3-Day Shifting to 5-Day		
		Percent Within -1-Day	Percent on time	Percent Within -1-Day	Percent on time	Percent Within -2-Day	Percent Within -1-Day	Percent on time
Days Since Entered		Day 2	Day 3	Day 3	Day 4	Day 3	Day 4	Day 5
Projected (Composite, Pre-sort and Single Piece)		N/A	95	N/A	95	N/A	N/A	95

My interrogatory asked witness Cintron to discuss “why mailers and recipients should prefer a longer average delivery time and the performance targets for the proposed service standards over these actual scores, which show, in almost each case, a larger percentage of the mail being delivered by the same day since entered.” Mr. Cintron responded as follows:

The service standards are designed to set customer expectations. Based on the scores in the table referenced in SH/USPS-T1-2, it is clear the Postal Service is not meeting the current service standards at a 95% on-time performance, with the exception of Overnight Pre-Sort. This table would allow mailers to assess

³⁴ See SH/USPS-T-1-4.

expected performance outcomes against the service standards; however, service performance tables are not expected to be used in place of service standards.³⁵

This response does not go the heart of the matter. The table was not intended to show that the Postal Service hasn't been meeting its standards or to help mailers assess expected performance against the standards. Its purpose was to show two scenarios, current and proposed, and to ask why anyone would prefer the second scenario. The question remains unanswered.

As shown in the table, in fiscal year 2019, for single-piece mail with a three-to-five-day standard, 81.4 percent was delivered in three days, 93.9 percent in four days, and 97.2 percent in five days. For pre-sort mail with a three-to-five day standard, 92.1 percent was delivered in three days, 97.4 percent in four days, and 98.8 percent in five days. Under the proposal, for both pre-sort and single-piece mail with a five-day standard, none of this mail (or virtually none) will be delivered in three days, none will be delivered in four days, and 95 percent will be delivered in five days. On what legitimate basis can one say that the proposed scenario is preferable? If the Postal Service had presented survey participants with these two scenarios or a table like this one and asked them their preferences, it would have produced more useful results than a brand health questionnaire with vague terms like "reliable" and "fast."

For at least thirty years now, the Postal Service has been making the claim that customers prefer "reliability" and "consistency" to "speed." It has yet to provide convincing evidence for this claim, and the evidence it has produced in this current proceeding is even less persuasive than the materials provided for N89-1 and N2012-1.

³⁵ See USPS responses to SH/USPS-T-1-4.

If the Postal Service wants to show that customers care more about on-time delivery scores than average delivery times, it should ask them questions about that, rather than interpreting vague terms in ways that suit its case. In any case, the Postal Service has not presented persuasive evidence that the new service standards fulfill the requirements of section 301 of PAEA, and the “improvements” to customer satisfaction that the plan is projected to make do not provide a legitimate basis for the discrimination the plan will cause.

F. The Commission’s order on the Carlson Complaint serves as precedent

The Postal Service has certainly presented a rationale for its plan. Relaxing service standards will allow it to shift mail volumes from air to surface and thereby cut costs and improve net income, and it may help improve customer satisfaction — at least for those customers who value “reliability” and “consistency” of delivery over speed. The plan may or may not accomplish these goals, but either way, a rationale for the plan is not the same as a “legitimate basis” for the discrimination the plan will cause.

In 2001, Mr. Carlson filed a Complaint with the Commission because of changes to service standards that took place in 2000 that, he argued, unfairly impacted the Pacific states.³⁶ The changes involved 76,000 origin-destination pairs. More pairs were upgraded than downgraded, but the downgrades were not evenly distributed across the country. As the Commission observed in its final order, “In addition, the realignment had a disparate regional impact, with postal patrons in several western states, including

³⁶ Complaint on First Class Mail Service Standards, Docket No. C2001-3 (June 15, 2001).

California, experiencing far more service downgrades than those in other parts of the country.”³⁷

The Postal Service certainly had a rationale for this realignment and change in service standards in 2000, and in its Order, the Commission acknowledged as much: “Geography, network design, and distances all play legitimate roles in determining service standards.” But there was an important “but” there.

In responses to two of my interrogatories, witness Hagenstein quoted this passage from the Order on the Carlson Complaint, and in both instances, he cut off the quotation without completing the Commission’s sentence.³⁸ The full passage reads as follows:

The Commission finds that the Complainant’s assertions of undue discrimination, to the extent they involve delivery in California and other locales in the Pacific and Western areas, have merit. The Service’s approach and application of the new model, given its underlying assumptions, resulted in a degree of unfairness that was clearly unintended, but nevertheless real. Geography, network design, and distances all play legitimate roles in determining service standards, but the Service’s starting point — which, among other things, proceeded without public involvement and eliminated air transportation from initial determinations — exhibits an inappropriate degree of arbitrariness with respect to delivery in the areas Mr. Carlson highlights. The results, in turn, also impede the Service’s ability to meet the mandate of section 101(a), which exhorts the Service “... to provide prompt, reliable, and efficient services to patrons in all areas....”³⁹

³⁷ Commission Report: Complaint on First-Class Mail Standards, Docket No. C2001-3 (April 17, 2006), Appendix A at 2, section 5.

³⁸ See Responses of Witness Hagenstein to Interrogatories SH/USPS-T3-1 and SH/USPS-T3-7.

³⁹ Commission Report: Complaint on First-Class Mail Standards, Docket No. C2001-3 (April 17, 2006), Appendix C at 12, section 38.

In this passage, the Commission acknowledges that geography, distance and network design play a legitimate role in determining service standards, but the Commission goes on to say that “undue discrimination” and “a degree of unfairness” may nevertheless sometimes be the result. In response to my interrogatory about this passage, witness Hagenstein stated the following:

Indeed, transportation changes applied in an objective and neutral fashion may unavoidably yield longer delivery times for pieces traveling longer distances. Any objective operational criteria applied equally throughout the Nation can have differing impacts in different areas of the country, given the size and geographic diversity of the Nation, but it cannot be the case that the Postal Service is foreclosed from adopting such uniform criteria. The Postal Service therefore submits that such unintentional discrepancies in no way constitute undue or unreasonable discrimination.

No one is claiming that the Postal Service developed a plan that intentionally created discrepancies in how postal services are provided to the country. The unfairness caused by the changes in 2000 were also “unintended,” yet the Commission found that “undue discrimination” had nonetheless taken place.

The Commission took several years to work through the issues in the Carlson Complaint. In the end, it concluded as follows:

Conclusions are also mixed because the record indicates that service under the adjusted standards appears to have improved for some postal patrons. However, many postal patrons in the western part of the Nation experienced a disproportionate number of service downgrades. Thus, the delivery service under the realignment resulted in a degree of unfairness and undue discrimination under section 403(c) for these patrons.⁴⁰

⁴⁰ Commission Report on Complaint on First Class Mail Standards Service, Docket No. C2001-3 (April 17, 2006) at 2

The Commission stopped short of calling for a complete rollback of the downgrades, but it did recommend that the Governors direct management to reinstate some of the downgrades, where feasible, and to initiate procedures to identify areas “where more expeditious First-Class Mail service is consistent with efficient and economic practices. Particular attention should be given to areas where disproportionate effects have been experienced as a result of the realignment.”⁴¹

While there may be differences between the current proposal and the changes at issue in the Carlson Complaint (as discussed in some detail by witness Hagenstein), the similarities are such that the Commission should view the Carlson Complaint as a precedent.⁴²

G. Discriminating on the basis of distance from population centers is inconsistent with Title 39

The proposal to change service standards is obviously not about postal rates per se, but in many ways it is. The link between prices and quality of services is a basic principle of economics, and it is common sense as well. If a business reduces the quality of its product (e.g., by making the candy bar smaller), it is in effect raising its prices.

This linkage of price and quality of services has come up in many of the Commission’s proceedings, including Docket No. N2012-1. The issue at the time was the relationship between the quality of service, as reflected in service standards, and a rate cap regime. In his testimony, economist Kevin Neels developed the concept of

⁴¹ Commission Report on Docket No. C2001-3 at 3

⁴² See Responses of witness Hagenstein to SH/USPS-T3-1.

“quality-adjusted price,” i.e., the way the nominal price of a product may remain constant while the quality improves or declines. “[W]hen the quality of a product gets worse, such as a longer delivery time standard, the quality-adjusted price rises,” Neels observed. “The price is the same, but the buyer gets less for the money. A reduction in quality is an increase in the quality-adjusted price.”⁴³

Another witness in the N2012-1 proceedings, economist Michael A. Crew, also testified about the relationship of price and quality. Crew noted how the Postal Service was downplaying the fact that customers care about speed of delivery and care more about other factors, such as “easy to use, dependable, safe and secure, and not costly.” Crew responded that “speed of delivery is an important attribute of product quality. It is evident to me that if first-class mail becomes slower, *ceteris paribus*, its quality has declined.”⁴⁴

In his brief on N2012-1, the Public Representative pointed to the comments of witnesses Neels and Crew and observed that “when the Postal Service reduces the quality of service, mailers of the classes of mail affected by the change are paying the same amount for less service. In economics, this is equivalent to an increase in price – paying the same for less service is equivalent to paying more for the same amount of service. This increase in real price has been recognized by numerous economists testifying before the Commission, and has not been rebutted by the Postal Service.

⁴³ Direct Testimony of Kevin Neels on Behalf of the Public Representative, Docket No. 2012-1 (April 23, 2012) at 12-13.

⁴⁴ Direct Testimony of Dr. Michael A. Crew on Behalf of the National Association of Letters Carriers, AFL-CIO, Docket No. 2012-1 (April 20, 2012) at 4.

Regardless of whether the law separates quality of service from price paid for that service, in an economic sense the two are inextricably interlinked.”⁴⁵

In its Advisory Opinion on N2012-1, the Commission reviewed the price-quality issue and observed, “The Postal Service is aware of customer concerns that reductions in quality are analogous to price increases. In its Federal Register notice announcing final rules for service standards, the Postal Service states: ‘Commenters also pointed out that increased costs to customers and decreased service levels are analogous to price increases.’”⁴⁶

Relaxing service standards can thus be seen as form of raising prices. Imagine, then, if the Postal Service were to propose raising rates on First Class mail by 6 percent nationwide — 3 percent in the East and Midwest, 5 percent in the West, and 8 percent in the Pacific states. It is difficult to imagine that the Postal Service would ever make such a proposal or that Commission would ever approve it. But in key respects that is just what the Postal Service is proposing in this case. It is lowering the quality of service across the country, but not to the same degree in each part of the country. It isn’t raising rates in a non-uniform way, but it is lowering services in a non-uniform way.

Under 39 U.S.C.404(d), Congress has required the Postal Service “to maintain one or more classes of mail for the transmission of letters sealed against inspection,” and “the rate for each such class shall be uniform throughout the United States, its territories, and possessions.” The meaning of the uniform rate requirement is explained

⁴⁵ Initial Brief of the Public Representative, Docket N2012-1 (July 10, 2012) at 11 (citations omitted).

⁴⁶ Advisory Opinion on Mail Processing Network Rationalization Service Changes, Docket No. N2012-1 (September 28, 2012) at 153.

by Robert H. Cohen and Charles McBride in “Estimates of the Current Costs of the USO in the U.S.” (Emphasis added.)

There is statutory language stating there must be at least one class of mail for letters that is sealed against inspection and whose rate is uniform throughout the U.S. First-Class mail fulfills this requirement. Further, the Commission has issued a ruling that that this statutory provision does not require distance-invariant rates. It ruled that the statute required that *First-Class rates be uniform in the sense that they be invariant with respect to where the sender is located in the US. The First-Class rate structure for a mailer in New York must be the same as for a mailer in San Juan or Seattle.*⁴⁷

In other words, the uniform rate requirement does not prohibit the Postal Service from using distance-based zone pricing, but it does prohibit the Postal Service from implementing a system in which rates on First Class letters vary based on “where the sender is located.”

The ruling to which Cohen and McBride are referring in the quoted passage is a case discussed in a section in the Commission’s order in 1978 on Docket No. R77-1. The case involved Percolator’s argument that the Postal Service was violating section 3623 of the PRA because Express Mail rates were not uniform — prices were zoned and the product was not available everywhere in the country.⁴⁸ The Commission examined the legislative history of section 3623 and found little that would address the issue.⁴⁹ “Indeed,” stated the Commission, “the only helpful discussion took place during the House debate on the conference bill.” Mr. Udall (one of the House Managers for the bill) was explaining the difference between the two uniform rate provisions in the Senate

⁴⁷ Study on Universal Postal Service and the Postal Monopoly, Appendix F: Estimates of the Current Costs of the USO in the U.S at 32.

⁴⁸ Opinion and Recommended Decision on Docket No. R77-1 (1978) at 411-19, available at <https://www.prc.gov/prcarchive/viewpdf.aspx?docid=508>

⁴⁹ 39 U.S.C. § 404(c) was originally 39 U.S.C. § 3623(d).

bill. Section 3623(d) was about letter mail, while section 3683 was for books and media.

In explaining the difference, he made the following comment (emphasis added):

The legislation provides, in section 3623(d), that the rate for classes of letter mail sealed against inspection should be "uniform throughout the United States, its territories, and possessions." The principal purpose here is to insure the nondiscriminatory injunction of section 403(c), so that *no city or place in the United States or in its territories or possessions, should be required to pay more for the delivery of its mail to other citizens in the United States just because of its remoteness or distance from the continental United States or its centers of population.*⁵⁰

The legislative history thus indicates that the "principal purpose" of the uniform rate provision of 404(d) is to prevent the kinds of discrimination prohibited by section 403(c), and the uniformity in 404(d) refers to "remoteness or distance" from centers of population. It is not a great leap, then, to suggest that section 403(c) should be read to encompass discrimination based on geographic considerations as well, and not only with respect to classifications, rates, and fees but also to services. The prohibition against geographic discrimination is critical. Just as the Postal Service cannot offer different rates to "distant" areas of the country, it should not offer a lower quality of service to those areas.

The Postal Service's plan was not designed to offer one area of the country better service than another area, but that is exactly what will happen. The farther the mail needs to travel, the more days it will take for delivery. If you happen to live in a place where longer distances are more likely, you will experience the diminished quality

⁵⁰ Opinion and Recommended Decision on Docket No. R77-1 at 414.

of service — and a de facto rate increase — to a greater degree than those who live closer to the centers of population.

The existing structure of service standards does not result in perfect equality among all areas of the country. Average delivery times for each SCF region are not the same.⁵¹ But under the current system, the Postal Service makes every effort, within reason, to deliver the mail as fast as possible, and everywhere in the contiguous 48 states enjoys a two- or three-day service standard. As required by 39 U.S.C.101(f), when the Postal Service selects what mode of transportation to use, it gives “highest consideration to the prompt and economical delivery of all mail.”

Under the system being proposed, however, the Postal Service will use a mode of transportation that is *not* as prompt as the one it is using now. As a result, the slight geographical inequalities of the current system will become much more pronounced, and the impacts of these inequalities will be exacerbated. Users of the mail are not complaining about the inequities of the service standards under the status quo, but they will have good reason to complain about unequal service if the Postal Service implements its plan. There may be a logic to craft service standards that provide an extra day or two to truck mail long distances across the country, but the benefits must be weighed against the costs. Whatever these benefits, the Postal Service should not implement a plan that discriminates against citizens in the United States just because of their distance from the country’s centers of population.

⁵¹ See SH-RT-1 at 16.

IV. CONCLUSION

The Postal Service's proposed service standards may apply the same rules of time and distance "uniformly," but the outcomes will be anything but. People in some part of the country should not feel they are being provided with second-class postal services. Under the proposal, they will not only feel that way. It will be a fact. Some regions will receive significantly lower service, and people living in these places will suffer in materially harmful ways. Their mail will be worth less and their costs for doing business and running households will be greater. This is not a general impression of what might happen under the new standards. Rather, it is a phenomenon that can be measured in a granular way — before the changes are implemented — by looking at factors such as volume shifting to a downgraded standard, average delivery times and the demographics and customer needs of the highly impacted regions.

The Postal Service failed to ask for an Advisory Opinion when it changed service standards in 2000, so the Commission could address the problem of undue discrimination only after the fact. In the current case, the Commission has an opportunity to focus on the issue before the changes are implemented.

In 2011 the Commission found that GameFly's complaint that it was the victim of undue discrimination was justified. The Postal Service had "failed to establish reasonable and legitimate reasons for providing GameFly less favorable treatment than Netflix, a similarly situated customer of the Postal Service."⁵² GameFly appealed the order in federal court, alleging that the remedy provided by the Commission left much of the discrimination in place. The Court of Appeals agreed and vacated the Commission's

⁵² Order on GameFly Complaint at 108.

order and remanded further proceedings. From the Court's point of view, the burden of proof had shifted from the Postal Service to the Commission. As Chief Judge Sentelle stated in his ruling, Subsection 403(c) only prohibits "undue" or "unreasonable" discrimination. "Where the Commission allows discrimination to exist in the postal rate structure, it must explain why that discrimination is due or reasonable under § 403(c)."⁵³

If the Commission determines that the proposed service standards do in fact cause discrimination, it will be up to the Commission to explain why the discrimination is due or reasonable.

I respectfully urge the Commission to advise the Postal Service not to proceed with implementation of its plan to change service standards.

⁵³ GameFly, Inc. v. PRC, 704 F.3d 145 (D.C. Cir. 2013), Opinion available at casetext.com/case/gamefly-inc-v-postal-regulatory-commn