

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

First-Class Mail and Periodicals  
Service Standard Changes, 2021

Docket No. N2021-1

REPLY BRIEF OF STEVE HUTKINS

(June 25, 2021)

Respectfully submitted,

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## I. INTRODUCTION

On June 21, 2021, seven initial briefs were filed in Docket No. 2021-1. Four of them discuss the issue of geographic disparities that will be caused by the proposed changes in service standards.<sup>1</sup> The issue is also discussed in the Statement of Position submitted by the Association for Postal Commerce and the Statement of Position by twenty-one attorneys general and two cities.<sup>2</sup> The topic is clearly of some significance as well as a matter of public interest.<sup>3</sup> Aside from the Postal Service's brief, all of the briefs and statements cited here agree that the proposed service standards will cause geographic disparities of a problematic nature. My reply brief will therefore focus on what the Postal Service has to say about the issue.

The Postal Service offers a defense against the allegation that its plan will unduly discriminate against some users of the mail by applying the three-prong test used in *GameFly*.<sup>4</sup> I used the same test in my Initial Brief. Not surprisingly, the test results were

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<sup>1</sup> See Douglas F. Carlson Initial Brief, Docket No. N2021-1 (June 21, 2021) at 22-23; APWU Initial Brief, Docket No. N2021-1 (June 21, 2021) at 8-16, 22-27; Initial Brief of the United States Postal Service, Docket No. N2021-1 (June 21, 2021) at 45-53; and Initial Brief of Steve Hutkins, Docket No. N2021-1 (June 21, 2021), in entirety.

<sup>2</sup> See Statement of Position of the Association for Postal Commerce, Docket No. N2021-1 (June 21, 2021) at 6-7; Statement of Position by Twenty-one Attorneys General and Two Cities, Docket No. N2021-1 (June 21, 2021) at 8-10

<sup>3</sup> See, for example, Jacob Bogage and Kevin Schaul, "DeJoy's USPS slowdown plan will delay the mail. What's it mean for your Zip code?" Washington Post, June 24, 2021, and Jacob Bogage, "Slow mail is no way for USPS to cut costs, bipartisan group of lawmakers tells The Post," Washington Post, June 24, 2021.

<sup>4</sup> See Order on Complaint, Order No. 718, Docket No. C2009-1 (April 20, 2011) at 28. The Postal Service also cites Order No. 5491, Order Granting the Postal Service's Motion to Dismiss Complaint with Prejudice, PRC Docket No. C2020-2 (Apr. 28, 2020), at 8, which references Order No. 718.

different. The Postal Service believes the claim of discrimination does not pass any of the three prongs. I believe it passes all three.<sup>5</sup>

## II. DISCUSSION

The Postal Service states that “whatever disparate effects may flow from the proposed service standards, those effects are not inconsistent with Section 403(c) for four reasons.” I will address these reasons one by one.

- A. Any disparities depend highly on circumstances; they do not map neatly onto a discrete class such as “senders and recipients living in western states and other geographic regions of the United States.” USPS Initial Brief at 46-47

The Postal Service states that “differences in impact do not map neatly according to geography.” This claim is something of a red herring and mischaracterization of the Commission’s precedents. The undue discrimination test does not require that discrimination be “neatly mapped” onto “discrete classes.” It only requires that similarly situated users of the mail be treated unfairly without a legitimate basis.

The Postal Service then mischaracterizes the evidence as well. It states: “The absolute number or percentage of ZIP Code pairs with changed service standards, see Tr. 1/220, is not meaningful, because different ZIP Code pairs carry differing volumes.” USPS Initial Brief at 46-47. This is the only evidence the Postal Service cites concerning geographic discrimination, thus suggesting that the testimony presented in this docket focused *only* on numbers or percentages of ZIP code pairs. My testimony and brief included data for the percentages of origin-destination pairs because the Postal Service

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<sup>5</sup> Mr. Carlson also concludes that the case satisfies the three-prong test. See Carlson Brief at 22-23.

uses this as a metric in its Request and testimonies, but it was not the only factor I used in identifying discriminatory patterns.<sup>6</sup> Rather, my testimony also considered daily volumes, average delivery times, and average increases in delivery times — the very same metrics that its witnesses used. These other metrics are more valuable than simply counting pairs or percentages of pairs, and they demonstrate persuasively that the proposed plan would have much greater impacts on certain regions of the country than on others. The maps that Anita Morrison and I presented in our testimonies show that the disparate impacts do “map neatly according to geography” and clearly show the greatest impacts will be on a discreet class of people, a class determined by where one lives.

- B. To the extent that any disparities exist, they are already features of the nationwide service standards framework; if anything, the proposal here would reduce, not create or heighten, existing disparities. USPS Initial Brief at 47.

In my testimony and brief I acknowledge that there are disparities in the current system because average delivery times vary SCF to SCF, but I go on to make the point that the disparities will become more pronounced under the proposal and the disparate effects, more exacerbated.<sup>7</sup> The Postal Service takes the opposite position and argues that rather than causing undue discrimination, its plan would reduce already existing geographic disparities: It won't make things worse, claims the Postal Service. It will make them better.

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<sup>6</sup> See Rebuttal Testimony of Steve Hutkins (SH-RT-1), PRC Docket. No. N2021-1 (Jun. 2, 2021) at 12-21. See also Rebuttal Testimony of Anita Morrison (APWU-RT-1), PRC Docket. No. N2021-1 (Jun 2, 2021), which involves an analysis that uses not only pair percentages but also volumes.

<sup>7</sup> See SH-RT-1 at 16-17 and Hutkins Initial Brief at 29.

Rather than focusing on existing disparities with respect to the range of average delivery times across the country, the Postal Service introduces a metric not previously discussed by any of its witnesses in this docket — price per mile for delivering a letter. The Postal Service explains that “[u]nder the non-distance-sensitive price structure for First-Class Mail, a letter to New York City costs the same price in Louisville, KY, and Los Angeles, CA, despite the fact that the letter from Los Angeles travels about 3.7 times as far as the one from Louisville.... On top of that, the Angeleno currently expects delivery in the same three days as the Louisvillian: this requires the Postal Service to move the Los Angeles–origin letter about 3.7 times as fast as the Louisville-origin letter.” USPS Initial Brief at 47.

Overall, then, according to the Postal Service, the Angelenos enjoy an “advantage in both price and speed relative to their Louisvillian counterparts.” Consequently, observes the Postal Service, “it is difficult to perceive the Angeleno as a victim here.” USPS Initial Brief at 48. The Postal Service thus suggests that that people who live in Western and Pacific states currently enjoy an “advantage” compared to those who live in the rest of the country because their mail tends to travel longer distances and to cost more to transport even though they pay the same price for a stamp. Under the proposal, “Far from harming longer-distance mailers, those mailers actually enjoy a preferential value proposition compared with shorter-distance mailers, and the proposed service standard changes would preserve that preference while reducing the size of the disparity.” USPS Initial Brief at 51.

It is difficult to square this statement with the Postal Service’s claim that the proposed changes, as witness Monteith put it, “may even improve customer satisfaction

by ensuring that the Postal Service remains reliable and consistently delivers within customers' and the general public's expectations."<sup>8</sup> The Postal Service has consistently argued that what mailers and recipients give up in speed will be more than compensated for in the increased reliability they will enjoy. Accordingly, nothing of value will be taken away from *any* users of the mail. But now we are told that something indeed may be taken from *some* users, but apparently that is fine because they "enjoy a preferential value proposition" right now.

The Postal Service thus concedes one of the main points of my brief. The means by which the proposal would "reduce the size of the disparity" between different regions of the country is by slowing down the mail in some places more than in others. That was a central theme of my testimony. The only difference is that I thought it was a problem whereas the Postal Service says this is actually a good thing. The Postal Service's sees these areas as enjoying an unfair advantage that the new service standards will help remediate.

Not to put too fine a point on it, the Postal Service is basically saying to mailers in the Western and Pacific states and other highly impacted regions, "You've been getting a really good deal because your mail costs us more to deliver even though you're paying the same as everyone else. Our plan will help fix that. We can't charge you more, so we're going to give you a lower quality of service. But don't complain about being a victim. We're just making things fairer."

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<sup>8</sup> See Direct Testimony of Witness Monteith on Behalf of the United States Postal Service, USPS-T-4 (April 21, 2021) at 20.

The Postal Service is right that raising the “quality-adjusted price” on the Pacific and Western states would be a way of leveling the field.<sup>9</sup> Unfortunately for the Postal Service’s argument, the fact that users of the mail near centers of population subsidize users more distant from these centers is a central feature of universal service. This is implicit in the uniform rate structure for First Class mail, which has been a cornerstone of postal service in the United States for about 150 years. As I discussed in my brief, the legislative history of section 404(c) shows that its intention is to guarantee uniform rates no matter how far the user is from centers of population. Hutkins Initial Brief at 26-28. Anything that works toward leveling the field in this respect undermines the uniform rate requirement.

C. The first two prongs of Section 403(c) are not triggered, because similarly situated mailers would be treated the same. USPS Initial Brief at 48

The Postal Service addresses the “similarly situated” prong of the *GameFly* test by stating that “similarly situated mailers would be treated the same.” It goes on to explain that “all mailers in a given origin locale are being offered the same terms of service.... The same distance-based service expectations are provided to all mailers, and so there is no differing treatment.” USPS Initial Brief at 49. In other words, mailers across the country are similarly situated and treated the same.

This, however, is not what this prong of the discrimination test is usually about. As I stated in my brief, in discrimination cases, “similarly situated” refers to the way plaintiffs must show that they have been “treated differently from others who are

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<sup>9</sup> The term “quality adjusted price” was introduced during the Commission’s proceedings on Docket No. N2012-1 by witness Kevin Neels in reference to the way the nominal price of a product may remain constant while the quality improves or declines. See Hutkins Initial Brief at 23-24.

similarly situated except for the alleged basis of discrimination.”<sup>10</sup> The defendant in the case then argues that the alleged victims do *not* share the same characteristics and are thus *not* similarly situated. Hence, as the Commission stated in its order on the GameFly complaint, “GameFly takes the position that it is similarly situated to both Netflix and Blockbuster based upon three factors discussed below. The Postal Service challenges the bases for GameFly’s position and cites numerous differences that lead it to the opposite conclusion.” Order No. 718 at 44.

In the current case, one would expect the Postal Service to explain why users in the areas most impacted by the new service standards are *not* similarly situated to other mailers across the country. Instead, the Postal Service says the Angelenos *are* similarly situated and treated similarly to mailers elsewhere. The Postal Service has either conceded the point it ought to be refuting or simply repeated its argument for the first prong and done nothing to address the second.

In any case, according to the Postal Service’s analysis, the case for discrimination passes the second prong of the test for the same reason it passed this test in my analysis: Users of the mail in the highly impacted regions are “similarly situated” to users everywhere else.

D. The effects of the service standard changes are reasonable under the totality of the circumstances, thereby passing muster under Section 403(c)’s third prong. USPS Initial Brief at 49

The Postal Service argues that the proposed changes are reasonable because “transportation changes applied in an objective and neutral fashion may unavoidably

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<sup>10</sup> See Legal Information Institute definition from Nolo’s Plain-English Law Dictionary, available at [https://www.law.cornell.edu/wex/similarly\\_situated](https://www.law.cornell.edu/wex/similarly_situated)



yield longer delivery times for pieces traveling longer distances.” USPS Initial Brief at 49. To support this statement, the Postal Service cites the Commission’s Order on the Carlson Complaint: “Geography, network design, and distances all play legitimate roles in determining service standards.” C2001-3 Report, app. B at 8, app. C at 12.

The Postal Service selectively quotes the Commission’s Order here, just as witness Hagenstein did in his responses to two of my interrogatories.<sup>11</sup> As I pointed out in my Initial Brief, this is only the first clause of the sentence, and it is immediately followed by another clause: “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....’”<sup>12</sup> The full context, in other words, reveals that when developing service standards much more needs to be considered than geography, network design, and distances. The Postal Service must also consider issues of fairness and the requirement to provide prompt service to patrons *in all areas*. Quoting the first clause without the second misrepresents what the Commission said.

To develop its argument that the proposed changes are reasonable, the Postal Service returns to the second of its four points: long-distance mail costs more to deliver

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<sup>11</sup> See Responses of Witness Hagenstein to Interrogatories SH/USPS-T3-1 (May 25, 2021) and SH/USPS-T3-7 (May 26, 2021).

<sup>12</sup> See SH-RT-1 at 22-23 and Commission Report: Complaint on First-Class Mail Standards, Docket No. C2001-3 (April 17, 2006), Appendix C at 12, section 38.

than local or intrastate mail, yet the price is same regardless of distance — “a feature of universal service.” This core element of the Service’s argument appears to be that under the current system some mailers enjoy an advantage over others (they pay less per mile), so there should be nothing wrong (or contrary to statute) with changing service standards in a way that disadvantages these mailers in a different way (their mail will go more slowly per mile). Or, as the Postal Service says twice in its brief, “the proposal here does not create disparate treatment; if anything, it reduces existing disparities.” USPS Initial Brief at 49.

The problem with this argument is that the disparities of the current system caused by distance-invariant rates on First Class letters have been approved and accepted for decades by Congress, the Commission and the Postal Service itself (even if it accepts distance-invariant rates “as a matter of discretion and tradition, not a statutory mandate”).<sup>13</sup> In contrast, the proposed changes in service standards will introduce an entirely new form of disparity based on speed and mode of delivery. The Postal Service can argue that the second form of disparity will help reduce the disparities of the first form, but this does not address the fact that the disparities caused by the proposed changes are unnecessary, are not part of a long tradition, and have not been previously approved by Congress, the Commission or the courts.

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<sup>13</sup> This is one reason why the Commission does *not*, for example, ask the Postal Service to separately identify cost coverage factors for First Class mail in different geographic regions. Yet the Commission *does* ask the Postal Service to provide service performance measurement for First Class mail in different geographic regions (areas and districts).

When Congress enacted the Postal Reorganization Act of 1971 and the PAEA in 2006, the maximum service standard for the contiguous 48 states was three days, achievable thanks to the use of air transportation when necessary to meet the standard. The Postal Service has downgraded standards on several occasions by shifting overnight mail to two-day and two-day mail to three-day, but it has never abandoned air transportation on a massive scale that requires shifting large volumes from a three-day standard to four- and five-days. Such a change would turn back the clock on using air transportation and degrade service standards in a way that Congress did not contemplate or envision in either 1971 or 2006. Indeed, Congress has taken a quite different position, as made clear by 39 U.S.C.101(f): “In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail.” In section 101(f), Congress has spoken clearly.

### III. CONCLUSION

The Postal Service has failed to show that the case alleging discrimination does not pass the three prongs of the *GameFly* test. Its argument that the new standards will “reduce the advantage” currently enjoyed by users of the mail in some places shows that the Postal Service acknowledges its plan will take something of value (speed of delivery) away from these users. It will thus discriminate against them. Its acknowledgment that these mailers are “similarly situated” to users in the rest of the country satisfies the second prong. And its argument that any discrimination that may occur is “reasonable” does not pass muster for the reasons explained in my Initial Brief and because “longer delivery times for pieces traveling longer distances” is not

consistent with the statutory mandate of section 101(f) that the Postal Service select a mode of transportation that is both economical *and* prompt.

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