

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

COMPLAINT OF STATES OF NEW YORK,
PENNSYLVANIA, CALIFORNIA, CONNECTICUT,
DELAWARE, DISTRICT OF COLUMBIA, ILLINOIS,
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN,
MINNESOTA, NEVADA, NEW JERSEY, NEW
MEXICO, NORTH CAROLINA, OREGON, VIRGINIA,
RHODE ISLAND, AND WASHINGTON

Docket No. C2022-1

UNITED STATES POSTAL SERVICE'S MOTION TO DISMISS

By its attorneys:

Anthony F. Alverno
Chief Counsel, Global Business &
Service Development

Andrew L. Pigott
Mikhail Raykher
C. Dennis Southard IV
Attorneys

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1135
(202) 268-2997
anthony.f.alverno@usps.gov
October 27, 2021

TABLE OF CONTENTS

| | |
|---|----|
| I. INTRODUCTION AND BACKGROUND | 2 |
| II. ARGUMENT | 4 |
| A. Legal Standard for Deciding to Hear a Section 3662 Complaint | 4 |
| B. The Plan Is Not a “Change” Within the Scope of 39 U.S.C. § 3661(b)..... | 5 |
| C. Section 3661(b) Does Not Require an Immediate Review of All Initiatives Anticipated in the Plan..... | 7 |
| 1. Section 3661(b) Requires That a Request for Advisory Opinion Be Presented Within a Reasonable Time Prior to the Effective Date of the Proposed Change..... | 8 |
| 2. Not Every Initiative Announced in the Plan Is a Change Within the Scope of Section 3661(b) | 10 |
| D. Dismissing the Complaint Effectuates the Policies Underlying Section 3661(b)..... | 16 |
| E. The Plan Is a “Strategic Plan” Subject to a Separate Statutory Framework | 18 |
| F. Various Aspects of the Plan Are Subject to Commission Review and Possible Public Participation Through Other Procedures..... | 23 |
| III. CONCLUSION | 28 |

The United States Postal Service (“Postal Service”) respectfully moves to dismiss the “Complaint Regarding United States Postal Service Violation of 39 U.S.C. § 3661(b)” (“Complaint”)¹ for failure to raise a material issue of fact or law within the scope of the Postal Regulatory Commission’s (“Commission” or “PRC”) jurisdiction under 39 U.S.C. § 3662. The Complaint alleges that the Postal Service should have sought an advisory opinion under 39 U.S.C. § 3661(b) before adopting the ten-year strategic plan, entitled *Delivering for America: Our Vision and Ten-Year Plan to Achieve Financial Sustainability and Service Excellence* (“Plan”).

The problem with the Complaint is that the Plan is only that: a plan. The Plan itself effects no changes, let alone any “change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis”² within the scope of Section 3661(b). Rather, the Plan is an announcement of anticipated strategies that the Postal Services expects to pursue over the next several years. These strategies include initiatives to grow revenue, encourage the enactment of legislative and administrative reforms to address the Postal Service’s retirement benefits funding obligations, and enhance operational precision and efficiency. Some of the strategies announced in the Plan to improve operational performance do indeed envision changes within the scope of Section 3661 or may constitute such changes once the Postal Service’s strategic deliberations crystallize into concrete operational proposals. For such initiatives, the Postal Service has either already sought the requisite advisory opinion or will commence that process, in accordance with the

¹ On October 22, 2021, Complainants moved to amend the Complaint to add the State of Vermont as an additional complainant. As of this filing, the Commission had not ruled on that Motion.

² This Motion will use the phrase “nationwide service changes” as shorthand hereafter.

requirements of Section 3661, “within a reasonable time prior to the effective date of that proposal.” See 39 U.S.C. § 3661(b). The remaining strategies announced in the Plan, however, do not implicate the Section 3661 advisory opinion process. Therefore, the Complaint is baseless and should be dismissed.

In asserting that the Postal Service had to seek an advisory opinion regarding the Plan, Complainants³ seek to inject themselves directly into the Postal Service’s strategic long-range planning, which would be completely contrary to the intended policies underlying Section 3661. Given the breadth of authority to lodge Commission complaints under Section 3662, allowing Complainants to broadly interfere in such planning would open the door to a landslide of complaints in response to all manner of Postal Service deliberations, asserting that any subject decision must first be presented to the Commission for an advisory opinion in accordance with Section 3661. This was clearly not the intent of either Section 3661 or 3662, and the Commission should dispel any such misguided notion by dismissing the Complaint.

I. INTRODUCTION AND BACKGROUND

On March 23, 2021, the Postal Service published a ten-year strategic plan, entitled *Delivering for America: Our Vision and Ten-Year Plan to Achieve Financial Sustainability and Service Excellence* (“Plan”). The Plan sets forth a comprehensive and balanced set of strategies to address the Postal Service’s long-standing financial, service, and operational challenges. Ultimately, the Plan is designed to achieve two

³ Complainants are nineteen States and Commonwealths (California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Virginia, and Washington) and the District of Columbia.

fundamental goals: service excellence, defined as meeting or exceeding 95 percent on time delivery across all product categories, and financial sustainability, by enabling the Postal Service to achieve break-even performance over the next ten years while making the necessary investments in people and infrastructure. (A copy of the Plan is attached as Exhibit 1 to the Complaint.)

Six months later, on September 27, 2021, Complainants requested to meet and confer with the Postal Service about the Plan. In that request, Complainants asserted that the Plan “reflects a host of substantial changes to the Postal Service’s operations” and that their residents and the Commission are entitled to “an opportunity to consider and weigh in on these proposals before they are implemented.” Complainants therefore requested “that the Postal Service immediately seek an advisory opinion from the PRC on its Plan, in accordance with 39 U.S.C. § 3661(b).”

On October 4, 2021, the parties met virtually and discussed Complainant’s position that Section 3661(b) requires the Postal Service to immediately request an advisory opinion from the Commission with respect to the “full Plan.”

On October 6, 2021, Complainants announced their intention to escalate their complaint to the Commission on the basis that “section 3661 requires that the Postal Service submit the full Plan for review now.”

The next day, Complainants filed a 44 page, 132 paragraph Complaint requesting “that the Commission order the Postal Service to request an advisory opinion on the entire Plan, which will ensure the Commission’s review of these significant changes and provide the [Complainants] and the broader public the opportunity to comment on them.” (Complaint ¶ 124; see also *id.* ¶¶ 125-129 (averring that the issue

in this Complaint—the Plan—is not pending in and has not been resolved by the Commission or any other forum).

II. ARGUMENT

The Complaint charges the Postal Service with failing to comply with Section 3661(b) when we issued our Plan without first requesting an advisory opinion from the Commission. *See, e.g.*, Complaint ¶¶ 8–13. Complainants assert that the Commission has jurisdiction to hear their Complaint pursuant to 39 U.S.C. § 3662, which permits any interested person who believes the Postal Service is not complying with the requirements of the provisions of Chapter 36 to lodge a complaint with the Commission. *See id.* ¶¶ 14, 35–37.

For the reasons stated below, the Complaint does not raise a material issue of fact or law within the scope of the Commission’s jurisdiction under Section 3662 and it should, therefore, be dismissed.

A. **Legal Standard for Deciding to Hear a Section 3662 Complaint**

The standards for whether the Commission will hear a complaint brought pursuant to 39 U.S.C. § 3662 is set forth in the statute itself:

(b) Prompt response required.—

(1) In general.—The Postal Regulatory Commission shall, within 90 days after receiving a complaint under subsection (a)—

(A) either—

(i) upon a finding that such complaint raises material issues of fact or law, begin proceedings on such complaint; or

(ii) issue an order dismissing the complaint; and

(B) with respect to any action taken under subparagraph (A)(i) or (ii), issue a written statement setting forth the bases of its determination.

39 U.S.C. § 3662(b)(1); *see also* 39 C.F.R. § 3022.30; Order No. 2512, Order Granting Motion for Reconsideration and Granting Motion to Dismiss, PRC Docket No. C2013-10 (May 27, 2015) at 8, *pet. for rev. denied*, *APWU v. PRC*, 842 F.3d 711 (D.C. Cir. 2016). As demonstrated below, the Complaint does not raise a material issue of fact or law that would require further proceedings in accordance with Section 3662, and for that reason it should be dismissed.

B. The Plan Is Not a “Change” Within the Scope of 39 U.S.C. § 3661(b)

The statute delegates “primary responsibility for both long-range planning and day-to-day operations” to the Postal Service. Order 1463, Order Dismissing Complaint, PRC Docket No. C2012-2 (Sept. 10, 2012), at 9; *see also Buchanan v. USPS*, 508 F.2d 259, 262 (5th Cir. 1975) (recognizing the Postal Service’s “freedom to manage without unnecessary limitations”); Order 2512, Order Granting Motion for Reconsideration and Granting Motion to Dismiss, PRC Docket No. C2013-10 (May 27, 2015), at 17 n.30. In furtherance of its long-term planning responsibility, the Postal Service developed the Plan, which announced comprehensive and balanced strategies to address the Postal Service’s long-standing financial, service, and operational challenges.

Complainants demand that the Commission order the Postal Service to request an advisory opinion pursuant to Section 3661(b) “on the entire Plan.” *See* Complaint ¶ 124. As demonstrated below, however, “the entire Plan” does not fall within the scope of Section 3661(b), and the Complaint is therefore baseless and should be dismissed.

Section 3661(b) provides as follows:

When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the

Postal Regulatory Commission requesting an advisory opinion on the change.

39 U.S.C. § 3661(b).

Contrary to Complainants' attempt to apply Section 3661(b) to the Plan, which constitutes a broad statement of strategy and potential initiatives anticipated to implement that strategy, it is well settled that Section 3661 is to be applied only to a specific class of actions identified therein. *Buchanan*, 508 F.2d at 262 (“The language of the statute, the legislative history, and the existence of alternative remedies indicate that Congress intended 3661 to apply to only a specified class of decisions.”). In that respect, three factors must coexist before Section 3661 applies: (1) there must be a “change” that has some meaningful impact on service; (2) the change must be “in the nature of postal services”—the proposed change must qualitatively alter the manner in which postal services are available to users; and (3) the change must affect service on “a broad geographical area.” *Id.* at 262-63.

Whether a proposed action constitutes a “change” within the meaning of Section 3661(b) is a quantitative question. *Buchanan*, 508 F.2d at 262. “There must be some meaningful impact on service. Minor alterations which have a minimal effect on the general class of postal users do not fall within 3661.” *Id.* In this context, it is beyond reasonable dispute that the Plan is not a “change” within the scope of Section 3661(b). Not only does the publication of the Plan have no meaningful impact on service, it has no impact on service whatsoever. The Plan itself makes no changes to postal services, but merely announces several anticipated initiatives that the Postal Service expects to undertake at various times after issuance of the Plan.

To further elaborate, the Plan plainly anticipates a series of initiatives to be implemented over its course, and it expressly indicates that the Postal Service will seek advisory opinions under Section 3661 when warranted.

- “Most importantly, we recognize that our success depends upon implementing the totality of the Plan—which will occur through deliberate, well communicated phases in the coming years.” Plan at 3 (Complaint, Ex. 1) (emphasis added).
- “The Postal Service will seek public comment through the formal rulemaking process and will request an advisory opinion from the [Commission] concerning this proposed [First-Class Mail service standard] change before it is implemented.” *Id.* at 26 (emphasis added).
- “The Postal Service will also request an advisory opinion from the [Commission] concerning this proposed [First-Class Package Service service standard] change before it is implemented.” *Id.* at 27 (emphasis added).
- “We will also adhere to legal, statutory, and regulatory requirements as we implement the initiatives within this Plan.” *Id.* at 41 (emphasis added).
- “[T]he Postal Service will . . . [f]ile a request for an advisory opinion from the [Commission] prior to implementing any initiative that constitutes a ‘change in the nature of postal services on a nationwide or substantially nationwide basis,’ as required by statute (39 U.S.C. 3661).” *Id.* (emphasis added).

Because the Plan is not itself a change within the meaning of Section 3661, it is not subject to the Section 3661 advisory opinion process. The Complaint, which demands that the entire Plan be reviewed for an advisory opinion pursuant to Section 3661(b) therefore warrants dismissal.

C. Section 3661(b) Does Not Require an Immediate Review of All Initiatives Anticipated in the Plan

Although not expressly stated, the Complaint seems to imply that Section 3661 compels an immediate review of all the strategies presented in the Plan. That argument, however, is clearly contrary to the plain language of Section 3661, which expressly requires only that a proposed nationwide service change be brought to the

Commission “within a reasonable time prior to the effective date of such proposal.”

39 U.S.C. § 3661(b).

1. Section 3661(b) Requires That a Request for Advisory Opinion Be Presented Within a Reasonable Time Prior to the Effective Date of the Proposed Change

For nationwide service changes within its scope, Section 3661 requires that the Postal Service request an advisory opinion within a reasonable time before the effective date of implementation. See, e.g., Order No. 1463, Order Dismissing Complaint, PRC Docket No. C2012-2 (Sept. 10, 2012), at 9 (“The Commission agrees that a plain reading of Section 3661 links implementation of a Postal Service proposal to make a [nationwide service change] to the filing by the Postal Service of a request for an advisory opinion.”); 39 C.F.R. § 3020.112 (“The request shall be filed not less than 90 days before the proposed effective date of the [nationwide service change].”). In this regard, the statute does not otherwise dictate when the Postal Service must request an advisory opinion from the Commission regarding a change that the Postal Service is considering: so long as the Postal Service requests an advisory opinion a reasonable time prior to actually implementing a proposal, the Postal Service has fulfilled the requirements of the statute. Properly construed, the statute does not support an order from the Commission under Section 3662 compelling the Postal Service to request an advisory opinion in circumstances in which the Postal Service is still developing a proposal that is not subject to imminent implementation. Complainants’ demand for such an order is, therefore, contrary to the plain meaning of Section 3661.

As the Complaint concedes and the Plan itself makes clear, the Plan is a description of a number of anticipated initiatives that are intended to be implemented

over a course of years. As discussed below, to the extent that the enumerated strategies may implicate Section 3661 review at all, two of those initiatives have already received Section 3661(b) advisory opinions, while other initiatives are still subject to various stages of deliberation, and hence are still undergoing preparation and revision. *See infra* at 11–16. The Postal Service will submit a nationwide service change to the Commission for any such initiative only once it has been explored, developed, and vetted by the Postal Service to the point that it constitutes a sufficiently concrete proposal that is ready for Commission review prior to actual implementation. It is clearly reasonable and consistent with the language of the statute for the Postal Service to take this approach, as it helps to ensure that the Postal Service can put forward an appropriately developed request, while also enabling the Commission to provide a meaningful advisory opinion concerning the proposal prior to implementation. On the other hand, construing Section 3661 to require that an advisory opinion request for a contemplated nationwide service change be submitted before the specifics of the change have been sufficiently explored, developed, and vetted would result in an inefficient and wasteful misuse of limited Commission and Postal Service resources.

Indeed, the Commission has expressed concerns about evaluating even what the Postal Service considers to have been well-developed proposed changes that, in the Commission’s view, do not have particular operational details. *See, e.g.,* Advisory Opinion on the Service Standard Changes Associated with First-Class Package Service, PRC Docket No. N2021-2 (Sept. 29, 2021), at 3 (noting that “[t]he Postal Service’s proposal is a directional rather than tactical presentation”). While the Postal Service does not agree that the prior Section 3661 requests were inadequate in that

regard, it is relevant to note that Complainants' position would result in advisory opinion requests that have even less operational detail, given that they would be filed at an even earlier stage of development.

Nothing in Section 3661(b) requires that Postal Service initiatives be vetted with the Commission in the early stages of the Postal Service's strategic or operational planning, or that the Postal Service vet initiatives regardless of whether they concern a *bona fide* nationwide service change. To the contrary, Section 3661(b) expressly requires that the Postal Service request an advisory opinion with respect to only those initiatives that if implemented would result in a nationwide service change, and then only "within a reasonable time prior to the effective date of such proposal." The Postal Service has complied and will continue to comply with that requirement.

2. Not Every Initiative Announced in the Plan Is a Change Within the Scope of Section 3661(b)

The Postal Service recognizes that some of the strategies in the Plan embody, or could embody, nationwide service changes within the meaning of Section 3661. For that reason, the Plan vows that the Postal Service will seek advisory opinions prior to implementing those strategies. *See, e.g., supra* at 7.

For example, regarding the change to First-Class Mail service standards, the Plan states that "[t]he Postal Service will seek public comment through the formal rulemaking process and will request an advisory opinion from the [Commission] concerning this proposed change before it is implemented." Plan at 26. As promised, on April 21, 2021, the Postal Service did indeed request such an opinion.⁴ *See United*

⁴ Likewise, on April 23, 2021, the Postal Service published proposed revisions to First-Class Mail and Periodicals service standards in the Federal Register and sought the required public comment. *Service*

States Postal Service Request for an Advisory Opinion on Changes in the Nature of Postal Services, PRC Docket No. N2021-1 (Apr. 21, 2021). And on July 20, 2021, following extensive public proceedings, including a submission by many of the current Complainants,⁵ the Commission issued a comprehensive advisory opinion on that proposed change. See Advisory Opinion on Service Changes Associated with First-Class Mail and Periodicals, PRC Docket No. N2021-1 (July 20, 2021); see also Complaint ¶ 79 (“In July 2021, the Commission issued a thorough advisory opinion on this proposed change.”). No Complainant intervened in the N2021-1 proceeding.⁶

Additionally, the Plan states that “[t]he Postal Service will also request an advisory opinion from the [Commission] concerning [the First-Class Package Service] proposed change before it is implemented.” Plan at 27. As promised, on June 17, 2021, the Postal Service did indeed request such an opinion. See United States Postal Service Request for an Advisory Opinion on Changes in the Nature of Postal Services, PRC Docket No. N2021-2 (Jun. 17, 2021). On September 29, 2021, following extensive public proceedings—including, again, a submission by several Complainants⁷—the

Standards for Market-Dominant Mail Products, 86 FR 21675 (Apr. 23, 2021). Having duly received and considered approximately 136,000 comments—including one from a group of states Attorneys General, many of whom joined in this Complaint—the Postal Service published its final rule in the Federal Register on August 11, 2021. Revised Service Standards for Market-Dominant Mail Products, 86 FR 43941 (Aug. 11, 2021).

⁵ See States’ and Cities’ Statement of Position, PRC Docket No. 2021-1 (June 21, 2021) (Complainants California, Connecticut, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, and Virginia sponsored this Statement of Position); see also *supra* note 3.

⁶ Had they wanted to, Complainants could have intervened in N2021-1 and/or N2021-2 to request discovery or introduce evidence or argument to the extent they were concerned that other strategies outlined in the Plan might affect the service standard changes proposed in those cases. Complainants, however, chose not to actively participate in those proceedings, but to wait until the cases had concluded before offering Statements of Position.

⁷ See States’ and Cities’ Statement of Position, PRC Docket No. 2021-2 (Aug. 20, 2021) (Complainants California, Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, Michigan,

Commission issued a comprehensive advisory opinion on that proposed change. See Advisory Opinion on the Service Standard Changes Associated with First-Class Package Service, PRC Docket No. N2021-2 (Sept. 29, 2021); see also Complaint ¶ 90 (“The Commission issued its advisory opinion on this proposed change in September 2021.”). No Complainant intervened in the N2021-2 proceeding.⁸

Where, as here, a complaint brought under Section 3662(a) alleges Postal Service noncompliance concerning a matter that the Commission has already addressed in another proceeding, those allegations do not raise material issues of fact or law and are properly dismissed:

Section 3662 allows any interested person who believes that the Postal Service is not operating in compliance with its service obligations to file a complaint. The [Commission], however, may dismiss any complaint that does not raise “material issues of fact or law.” While this phrase is not statutorily defined, it is not unreasonable to require the issue of fact or law to be one that the [Commission] has not already addressed.”

APWU v. PRC, 842 F.3d 711, 720 (D.C. Cir. 2016) (internal citations omitted) (upholding the Commission’s dismissal of a complaint challenging the Postal Service’s failure to comply with service standards because the Commission had already addressed the subject noncompliance in its Annual Compliance Determination).

In addition to the service standard changes to First-Class Mail and First-Class Package Service, and lesser included aspects of those requests (e.g., the operational

Minnesota, New Jersey, New York, North Carolina, Oregon, Virginia, and Washington sponsored this Statement of Position); see also *supra* note 3.

⁸ See *supra* Note 7. Notably, the City and States’ Statement of Position in N2021-2 did suggest that the proposed change needed to be considered in conjunction with the entire Plan. See Statement of Position, PRC Docket No. 2021-2 (Filing ID: 119603) (Aug. 20, 2021), at 14-15. Although the Commission noted the suggestion, it was not otherwise addressed in the Advisory Opinion. See Advisory Opinion on the Service Standard Changes Associated with First-Class Package Service, PRC Docket No. N2021-2 (Sept. 29, 2021), at 48.

changes enabled by those changes, such as shifting mail and package volume from air to surface transportation),⁹ the Plan also commits the Postal Service to requesting advisory opinions prior to realigning the retail network. See Plan at 34–35 (“The Postal Service will request advisory opinions from the [Commission] concerning our retail network realignment.”); see also Complaint ¶ 58. In accordance with Section 3661, the Postal Service will request advisory opinions with respect to any such proposed changes to the retail network that will impact service on a nationwide basis within a reasonable time prior to the effective date of such proposed changes.¹⁰

Likewise, as the Postal Service continues to develop our other proposed operational initiatives, and completes our assessment and analysis as to whether those initiatives implicate Section 3661, the Postal Service will request advisory opinions as to any relevant proposed changes within a reasonable time prior to implementation, as Section 3661 requires.¹¹

⁹ See Order No. 1463, Order Dismissing Complaint, PRC Docket No. C2012-1 (Sept. 10, 2012), at 12 (finding that “a new request was not required” because “in this instance the Phase One implementation can best be characterized as a lesser included aspect of the overall Request filed in Docket No. N2012-1”).

¹⁰ Assuming, of course, that the Postal Service determines to go forward with those initiatives.

¹¹ Complainants’ assertion that they need discovery “to obtain details about what parts of the Plan have already been implemented and when other parts of the Plan will be implemented in the future,” Complaint ¶ 116, does not create a material issue of fact sufficient to warrant further proceedings on this Complaint. Cf. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a claim supported only by conclusions will not suffice to unlock the doors of discovery). The Complaint does not challenge any specific strategies of the Plan, but “the entire Plan,” *id.* ¶ 124; accordingly, when any particular strategy began or may be implemented in the future is not material to the requested relief. Nor would it be an efficient or appropriate use of the Commission’s and Postal Service’s limited resources to engage in discovery where there is no legal basis to award the relief requested—the Plan is not itself a change within the meaning of Section 3661, nor does Section 3661 compel an immediate review of all the several initiatives anticipated in the Plan. In any case, when strategies enumerated in the Plan commenced is a matter of public record and identified in the Plan itself. See, e.g., Plan at 35 (reorganization completed in March 2021). And, as discussed below, when the Postal Service may commence strategies in the future is a matter squarely within the Postal Service’s discretion, subject only to applicable pre-implementation requirements, such as the requirement to seek an advisory opinion within a reasonable time before implementing a change that implicates Section 3661(b). See *infra* at 16-18.

In contrast, other initiatives announced in the Plan are undoubtedly beyond the scope of Section 3661, in that they do not propose nationwide service changes. The fact that those initiatives have been announced in a broader strategic plan that also includes initiatives that do implicate Section 3661 cannot serve to shoehorn them into the advisory opinion process.

As *Buchanan* instructs, the advisory opinion requirement in Section 3661 is targeted in scope: “[t]he language of the statute, the legislative history, and the existence of alternative remedies indicate that Congress intended 3661 to apply to only a specified class of decisions.” See *Buchanan*, 508 F.2d at 262. Although “[a]ll changes within the Service will probably affect postal services to some extent,” not all such changes require a pre-implementation advisory opinion request within the scope of Section 3661(b). See *Buchanan*, 508 F.2d at 262 (giving, as an example of a change that would not implicate Section 3661, combining two high management positions, even though that change might ultimately impact postal services on a nationwide or substantially nationwide basis). As discussed above, three factors must coexist before Section 3661 applies: (1) there must be a “change” that has some meaningful impact on service; (2) the change must be “in the nature of postal services”—the proposed change must qualitatively alter the manner in which postal services are available to users; and (3) the change must affect service on “a broad geographical area.” *Id.* at 262–63. In this regard, changes that do not “directly affect postal services available to a user of the mail” are not in the nature of postal services. See Order No. 2136, Order Dismissing Complaint, PRC Docket No. C2014-1 (July 28, 2014), at 6 (finding that a revision to the Postal Operations Manual eliminating the requirement to obtain customer feedback “did

not directly affect postal services available to a user of the mail” and was “not itself in the nature of postal services” but could “most fairly be described as relating to an opportunity to comment”).

The Plan identifies a number of proposed strategies that clearly do not implicate Section 3661(b). Like the management change identified in *Buchanan*, any impact of these changes on the nature of postal services enjoyed by users of the mail would be only indirect; as such, it does not implicate the Section 3661 advisory opinion process:

- A redesign of the Postal Service’s organizational structure from August 2020 to March 2021. See Plan at 35–37; Complaint ¶ 59.¹²
- Efforts to promote diversity, equity, career development, and employee retention, and to enhance employee safety and wellbeing. See Plan at 37–38; Complaint ¶ 60.
- Efforts to obtain legislative and administrative reforms concerning postal employee and retiree benefits. See Plan at 39; Complaint ¶ 63.
- Price and product changes to generate additional revenue, which would be implemented following compliance with the statutory and regulatory requirements that govern changes to market-dominant and competitive products. See Plan at 38-39; Complaint ¶¶ 61-62.

In accordance with the plain language of Section 3661, the Postal Service has and will continue to request advisory opinions for those initiatives within the Plan that

¹² Although this organizational change may ultimately affect postal services to some extent, like the management change identified in *Buchanan*, this organizational change does not directly affect postal services available to a user of the mail and, therefore, does not implicate the Section 3661 advisor opinion process.

constitute nationwide service changes that will impact service on a nationwide basis within a reasonable time prior to the effective date of such changes. The Postal Service will also follow other statutory and regulatory requirements that govern other aspects of the Plan. Complainants' criticism that the Postal Service must request an advisory opinion for the entire Plan, and hence, for the initiatives within the Plan that are not nationwide service changes or that are not proposed for imminent implementation is precisely contrary to the plain language of Section 3661(b) and their complaint should therefore be dismissed.

D. Dismissing the Complaint Effectuates the Policies Underlying Section 3661(b)

As discussed above, the statute delegates primary responsibility for long-range planning and day-to-day operations to the Postal Service. *See supra* at 5.

With respect to Postal Service decisions to implement nationwide service changes, Section 3661 grants to the Commission responsibility to evaluate whether those proposed changes comply with Title 39 and to provide advice to the Postal Service in that regard. *See* 39 U.S.C. 3661(b)–(c). And Section 3661(c) recognizes the public's interest in those decisions by permitting public participation and representation in the Commission's evaluation. 39 U.S.C. § 3661(c) (requiring an opportunity for "the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public" to be heard on the record).

The public's right to be heard, however, is not unlimited, and in the context of this Complaint applies only to those decisions that are actually within the scope of Section 3661(b). *See Buchanan*, 508 F.2d at 262 ("The language of the statute, the legislative history, and the existence of alternative remedies indicate that Congress intended 3661

to apply to only a specified class of decisions.”). And, as noted above, it is within the discretion of the Postal Service to determine precisely when to request an advisory opinion regarding any proposed service change that is within the scope of Section 3661(b), so long as the Postal Service makes such a request a reasonable time before actual implementation of the proposal.

In challenging “the entire Plan,” Complainants improperly seek to interpose themselves into the Postal Service’s long-range planning responsibility and interfere unduly with Postal Service’s management of operations and business. Indeed, Complainants’ broad interpretation of Section 3661 would expose virtually all Postal Service strategic decisions to public participation and scrutiny, eviscerating the managerial independence that was a core purpose of the Postal Reorganization Act. See *LeMay v. U.S. Postal Serv.*, 450 F.3d 797, 800 (8th Cir. 2006) (“The PRA’s legislative history shows that, in crafting the Act, Congress intended to minimize external intrusions on the Postal Service’s managerial independence. Congress intended to afford postal management the ‘unfettered authority and freedom that has been denied for years to maintain and operate an efficient service.’” (citing *Buchanan*, 508 F.2d at 262, and quoting S. Rep. No. 91–912, at 2 (1970))).¹³ In contrast, applying the Section 3661 advisory opinion requirements as contemplated by the provision to only the class of decisions embodied by its plain language—namely, nationwide service

¹³ This balance is reflected in other areas of the Postal Reorganization Act. For instance, while the Postal Service must comply with the public transparency requirements of the Freedom of Information Act and the Sunshine Act, see 39 U.S.C. § 410(b)(2), the public is not entitled to scrutinize predecisional deliberations or various types of sensitive management matters. See *id.* at (c); see also 5 U.S.C. §§ 552(b)(5), 552b(c).

changes—properly balances the Postal Service’s interest in managerial freedom with the public’s interest in being heard on those decisions. See *Buchanan*, 508 F.2d at 262.

Indeed, the public (including many of these Complainants¹⁴) has already exercised its right to be heard as to the First-Class Mail and First-Class Package Service initiatives announced in the Plan. See *supra* at 10–12. Likewise, the public will have an opportunity to participate in the advisory opinion hearings envisioned by the Plan for other initiatives that qualify as nationwide service changes if and when they are ready to move forward. See *supra* at 12-13. In addition, several of the other strategies announced in the Plan will also trigger public participation through other regulatory processes. See *infra* at 18–28.

Properly applying Section 3661 in accordance with its plain meaning promotes both the recognized policies of Postal Service managerial freedom and the public’s right to be heard about those specific types of changes, while the free-form interpretation urged by Complainants would effectively eliminate Postal Service managerial freedom with respect to all strategic decisions. These policies are effectuated by rejecting Complainants’ interpretation, applying the statutory provision as written, and dismissing the Complaint.

E. The Plan Is a “Strategic Plan” Subject to a Separate Statutory Framework

Section 2802 requires the Postal Service, every three years, to submit to the President and Congress “a strategic plan for its program activities” over at least the next five years. 39 U.S.C. § 2802(a). The Plan is explicitly the latest iteration of such a

¹⁴ See *supra* notes 4–8.

strategic plan. See Response 2 to Chairman’s Information Request No. 27, PRC Docket No. ACR2020 (Apr. 9, 2021), at 3. In conformity with Section 2802, the Postal Service has routinely formulated and issued such plans since 1997,¹⁵ yet the Postal Service is unaware of the Commission or any other party suggesting that the mere issuance of such a strategic plan, in and of itself, constitutes a nationwide service change requiring a Section 3661 advisory opinion. Had Congress intended for Section 2802 strategic plans to be subject to Commission advisory opinion review in accordance with Section 3661, it could have easily included such a requirement when enacting Section 2802 or, indeed, through the decade-long legislative process following such enactment that resulted in the PAEA. Yet no such requirement exists.

In lieu of the “holistic” mode of Commission review advocated by the Complainants, Section 3661(b) and longstanding Commission practice call for review of nationwide service changes a reasonable time prior to their implementation, not prior to their first mention in a strategic plan. To cite but one example, the 2002 Transformation Plan and the 2004–2008 Strategic Plan announced the Postal Service’s intention to optimize its retail network, employing a criteria-based methodology to identify redundant, low-value access points, and to replace them with alternative access methods. 2002 USPS Transformation Plan at 17; 2004-2008 USPS Strategic Plan at

¹⁵ See 1998-2002 USPS Five-Year Strategic Plan (<https://about.usps.com/strategic-planning/stratpln.pdf>); 2001-2005 USPS Five-Year Strategic Plan (<https://about.usps.com/strategic-planning/fiveyear.pdf>); 2004-2008 USPS Five-Year Strategic Plan (<https://about.usps.com/strategic-planning/fiveyearplan2004-2008.pdf>); Vision 2013 Five-Year Strategic Plan for 2009-2013 (<https://about.usps.com/transforming-business/vision2013/full-document.pdf>); FY 2013-FY 2017 Business Plan (<https://about.usps.com/strategic-planning/five-year-business-plan-2012-2017.pdf>); FY 2017-FY 2021 USPS Five-Year Strategic Plan (<https://about.usps.com/strategic-planning/five-year-strategic-plan-2017-2021.pdf>); 2002 Transformation Plan (<https://about.usps.com/strategic-planning/2002transformationplan.pdf>); and 2006-2010 Strategic Transformation Plan (<https://about.usps.com/strategic-planning/stp2006-2010.pdf>).

43. A “network optimization” initiative along these lines was ultimately the subject of later Section 3661 proceedings. See Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches, PRC Docket No. N2009-1 (Mar. 10, 2010); Advisory Opinion on Retail Access Optimization Initiative, PRC Docket No. N2011-1 (Dec. 23, 2011). Neither the Commission nor any other party suggested that those proceedings were overdue, or that the Postal Service should instead have sought an advisory opinion before issuing its strategic plans years earlier.

To deny the direct application of Section 3661 to a strategic plan is not, however, to claim that the Commission has no role in assessing its implementation. As discussed throughout this motion, the Postal Service must seek an advisory opinion before implementing any nationwide service changes that may be prefigured in a strategic plan, and, as discussed below in Section F, other initiatives within the Plan may implicate other Commission proceedings (e.g., rate cases, mail classification cases, and the Annual Compliance Determination). Moreover, the Commission reviews the Postal Service’s annual performance plans, which must “be consistent with the Postal Service’s strategic plan.” 39 U.S.C. § 2802(c); *see also id.* §§ 2803, 3653(d). Specifically, the Commission is obligated to “evaluate annually whether the Postal Service has met the goals established under Sections 2803 and 2804” and has the right to “provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in this title.” 39 U.S.C. § 3653(d).

Congress thereby crafted a deliberate scheme when it comes to strategic initiatives generally (i.e., that do not implicate a specific grant of Commission jurisdiction like Section 3661), the lineaments of which are as follows: (1) the Postal Service is at

liberty to develop strategic plans; (2) the Postal Service must publish an annual performance plan and report; (3) that plan and report must to a substantial degree reflect (or at least prove “consistent with”) the strategic plan in place at the time of its issuance; and (4) the Commission exercises a role in evaluating whether the Postal Service met the goals established by the annual plan and report, and it may further issue recommendations “related to the protection or promotion of public policy objectives” in Title 39 of the US Code. This scheme evinces a clear intention: not that the Commission subject the strategic plan to a “holistic” review upon its publication, and certainly not that it create an opportunity for a hearing on the record pursuant to 39 U.S.C. § 3661; but rather that the Commission assess the annual plan and report that both incorporates the strategic plan’s policy objectives and measures the Postal Service’s progress in meeting them.

And the Commission regularly follows this process. Yearly, the Commission not only observes the requirements of 39 U.S.C. § 3653(d); it also solicits comments from the general public on the annual performance plan and report, a process that commences in late December, typically runs through early spring, and culminates in the issuance of the Commission’s annual “Analysis” of the performance plan and performance report. *See, e.g.,* Analysis of the Postal Service’s FY 2019 Annual Performance Report and FY 2020 Performance Plan, PRC Docket No. ACR 2019 (June 1, 2020); Analysis of the Postal Service’s FY 2020 Annual Performance Report and FY 2021 Performance Plan, PRC Docket No. ACR2020 (June 2, 2021). Should Complainants wish to opine on the Plan’s implementation, Congress has given them numerous options for doing so. They can weigh in during Section 3661 proceedings on

specific initiatives, as several of Complainants have done thus far for initiatives covered by the Plan.¹⁶ They can weigh in during the other proceedings that may be implicated by the Plan, as discussed below. And they can participate in the Commission's annual proceedings to review annual performance plans based on the Plan. As for the overall design of the strategic plan itself, however, Congress vested that authority exclusively with the Postal Service, with oversight only by the President and Congress, not the Commission.

Finally, it is worth considering what the practical outcome of the Complainants' position would be. As mentioned, the Postal Service publishes a strategic plan approximately once every three years, pursuant to Section 2802(b). *See supra* at 18. According to Complainants' logic, a Commission advisory opinion review is required for each such strategic plan. Accepting that position would saddle both the Commission and the Postal Service with one of two unsatisfactory options. One, the Postal Service would submit each strategic plan to the Commission and the Commission would render an advisory opinion as to all the discrete initiatives that inform that plan's overarching vision—in which case, the Commission's review would be restricted to the broad and abstract sweep of strategic plans, while discrete initiatives would not receive Commission scrutiny at any level of detail. Or, two, the Postal Service would submit each strategic plan for Commission review and then also have to determine whether to resubmit each of the discrete initiatives that such strategic plan incorporates once those initiatives are ready to be implemented—in which case, the Commission and the Postal Service alike would find themselves bogged down with redundant, unnecessary, and

¹⁶ *See supra* at 10-12.

potentially contradictory proceedings. When taken to this inevitable conclusion, the Complainants' position not only is clearly contrary to the plain language of the statute, but would also undermine administrative economy, and unnecessarily complicate the process envisioned by and policies underlying Section 3661.

F. Various Aspects of the Plan Are Subject to Commission Review and Possible Public Participation Through Other Procedures

Contrary to the Complainants' claims that all of the strategies proposed in the Plan require the Postal Service to request an advisory opinion from the Commission under Section 3661(b), there are many aspects of the plan that are subject to other types of regulatory review by the Commission. By way of example, numerous aspects of the Plan implicate the pricing and product provisions of the statute, rather than Section 3661. For instance, the Plan announces the Postal Service's intention to "apply judicious and prudent strategies to optimize revenues and contribution within applicable regulatory constraints." Plan at 38. As Complainants observe, the Postal Service has already acted on this intention, filing with the Commission a request to adopt new market dominant published prices based on the new rules set forth following the 10-year Review. Notice of Market-Dominant Price Change, PRC Docket No. R2021-2 (May 28, 2021); Complaint ¶ 62. It did so, as Complainants acknowledge, "pursuant to a separate statutory obligation," i.e., a statutory obligation not embedded in Section 3661. Complaint ¶ 62.

The Postal Service has similarly acted on its intention to (per the Plan) "review our pricing strategy with regard to our package products," Plan at 39, proposing "time-limited changes in rates of general applicability for competitive products," including Priority Mail Express, Priority Mail, First-Class Package Service, Parcel Select, Retail

Ground, and Parcel Return Service. See Notice of Time-Limited Changes in Rates of General Applicability for Competitive Products, PRC Docket No. CP2021-127 (Aug. 10, 2021). The Commission favorably reviewed both initiatives. See Order 5937, Order on Price Adjustments for First-Class Mail, USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes, PRC Docket No. R2021-2 (July 19, 2021); Order 5973, Order Approving Price Adjustments for Domestic Competitive Products, PRC Docket No. CP2021-127 (Aug. 31, 2021). Section 3661 has never been applied to such pricing and product changes, which are governed by other statutory and regulatory provisions.

Further, there are several other methods pursuant to which the Postal Service may notify the Commission of actions that do not implicate Section 3661(b), but that nevertheless may impact postal services and related service performance. In that regard, in its Annual Compliance Determinations (“ACDs”), the Commission has routinely required the Postal Service to file updates and reports on various aspects of the Postal Service’s service performance including updates related to national and local initiatives that the Postal Service will implement to improve service performance. For instance, in several recent ACDs, the Commission instructed the Postal Service to provide, among other things, for each of the Postal Service’s Areas:

a detailed plan to improve First-Class Mail service performance that describes each planned action, identifies the problem that the planned action is expected to remediate, and provides an estimated timeframe for implementation and completion of each planned action.

Annual Compliance Determination Report, PRC Docket No. ACR2018, (Apr. 12, 2019), at 174; see *also* Annual Compliance Determination Report, PRC Docket No. ACR2019 (Mar. 25, 2020), at 120; Annual Compliance Determination Report, PRC Docket No.

ACR2020 (Mar. 29, 2021), at 181–82. The only purpose for such requests is to allow the Commission to review the initiatives that the Postal Service intends to implement to improve its service performance results in specific areas. Similarly, the Commission has directed the Postal Service to file other service performance improvement efforts and plans including those related to the performance of certain Market Dominant products, each of the Postal Service’s International Service Centers, and for certain national metrics related to First-Class Mail. Annual Compliance Determination Report, PRC Docket No. ACR2018 (Apr. 12, 2019), at 184, 189, 193; Annual Compliance Determination Report, PRC Docket No. ACR2019 (Mar. 25, 2020), at 119, 127, 133, 136; Annual Compliance Determination Report, PRC Docket No. ACR2020 (Mar. 29, 2021), at 180–81, 183–84, 193, 203, 208. The Postal Service provided numerous reports to the Commission in compliance with such directives. *See, e.g.*, United States Postal Service FY 2020 Annual Compliance Report, PRC Docket No. ACR2020 (Dec. 29, 2020), at USPS-FY20-29; Second Response of the United States Postal Service to Commission Requests for Additional Information in the FY 2019 Annual Compliance Determination, PRC Docket No. ACR2019 (June 23, 2020), at 12–18 & USPS-FY19-50. The Commission has been provided with abundant information on various initiatives over the years, but, to date, has not found that any of the improvement initiatives presented by the Postal Service in these reports warrant a request for an advisory opinion under 39 U.S.C. § 3661(b).

In a similar vein, in its most recent ACD, the Commission directed the Postal Service to “file . . . a service performance impact analysis for initiatives that are planned for implementation on or before the issuance of the next ACD (March 29, 2022) and are

reasonably foreseeable to impact service performance results.” Annual Compliance Determination Report, PRC Docket No. ACR2020 (Mar. 29, 2021), at 149–50. To ensure compliance with this directive, and in the interest of transparency, the Postal Service provided notice to the Commission of a new process for vendor selection intended to improve the selection of third-party Highway Contract Route suppliers for extra trips by prioritizing, in certain specific instances, the use of lower cost suppliers. See Response of the United States Postal Service to Commission Request for Additional Information in the FY 2020 Annual Compliance Determination, PRC Docket No. ACR2020 (June 4, 2021). The Commission did not criticize or reject this report or find that the adoption of the new process for vendor selection constituted a change sufficient to require a 3661 proceeding.

Hence, certain operational actions that do not constitute changes within the meaning of Section 3661, but that nonetheless may potentially affect postal service and related service performance, are, when necessary, reviewed by the Commission through methods other than proceedings before the Commission pursuant to 39 U.S.C. § 3661(b).

Additionally, under Rule 3055.5, the Postal Service is required to “file notice with the Commission describing all changes to measurement systems, service standards, service goals or reporting methodologies, including the use of proxies for reporting service performance, 30 days prior to planned implementation.” 39 C.F.R. § 3055.5.

After the Postal Service notifies the Commission of any such changes,

[t]he Commission may initiate a proceeding at any time to consider such changes if it appears that the changes might have a material impact on the accuracy, reliability, or utility of the reported measurement, or if the

changes might have a material impact on the characteristics of the underlying product.

Id.

The Commission initiates such proceedings denominated as Public Inquiry (“PI”) Dockets. For example, in 2018, the Postal Service proposed modifications to its Service Performance Measurement (“SPM”) Plan to incorporate procedures for “Non-Airlift Days.” The Postal Service proposed to modify its SPM Plan by changing the Start-the-Clock date of measurement from the acceptance day to the date following the applicable acceptance day for mailpieces that are dropped at a collection box, business mail chute, or Post Office location on Non-Airlift Days. The Commission favorably reviewed this proposed change on the grounds that it “more accurately describes the operational realities” and further noted that “this change increases the number of days, by one, that it takes for mail to reach its destination on up to four days per year. . . even though there is no change to the applicable service standard.” Order No. 4872, Order Conditionally Approving Modifications to Market Dominant Service Performance Measurement Systems, PRC Docket No. PI2018-2 (Nov. 5, 2018), at 1–2, 5–6.

Likewise, in 2021, the Postal Service notified the Commission of a material change to its SPM Plan. In order to align service performance reporting with the Postal Service’s changes to its First-Class Mail, the Postal Service notified the Commission that it would add reporting for 3-day, 4-day, and 5-day service standards for First-Class Mail in place of the current 3-5-day service standard. The Commission favorably reviewed this notification, finding that the changes adequately reflected the underlying service standard changes. Order No. 5989, Order Approving Modifications to Market

Dominant Service Performance Measurement Systems and Closing, PRC Docket No. PI2021-3 (Sept. 28, 2021), at 3.

Finally, other examples illustrate the point that not all changes that bear on service require the Commission to issue an advisory opinion, such as retail discontinuance actions under 39 C.F.R. § 241.3 and appeals of post office discontinuance actions under 39 U.S.C. § 404(b) and 39 C.F.R. Part 3021.

In sum, various aspects of the Plan are subject to varying forms of review by the Commission, though not necessarily in connection with Section 3661. Moreover, the public may participate in the review of a variety of service procedures that do not give rise to separate review under Section 3661. The Complaint should accordingly be dismissed.

III. CONCLUSION

For the reasons stated above, there are no material issues of fact or law that compel further proceeding on the Complaint. The Complaint should, therefore, be dismissed in accordance with 39 U.S.C. § 3662(b)(1)(A)(ii).

Respectfully submitted,

By its attorneys:

Anthony F. Alverno
Chief Counsel, Global Business &
Service Development

Andrew L. Pigott
Mikhail Raykher
C. Dennis Southard IV
Attorneys

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1135
(202) 268-2997
anthony.f.alverno@usps.gov
October 27, 2021