

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

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Public Inquiry on Changes Associated )  
With the Delivering for America Plan )  
Docket No. PI2023-4 )

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**RESPONSE OF THE ASSOCIATION FOR POSTAL COMMERCE AND ALLIANCE  
OF NONPROFIT MAILERS TO MOTION FOR RECONSIDERATION OF THE  
UNITED STATES POSTAL SERVICE**

**May 12, 2023**

Pursuant to Rule 3010.160(b) of the Commission’s Rules of Practice and Procedure, 39 C.F.R. § 3010.160(b), the Association for Postal Commerce (“PostCom”) and the Alliance of Nonprofit Mailers (“ANM”) hereby oppose the Postal Service’s Motion for Reconsideration of Order No. 6488 (“USPS Motion”), filed in this docket on May 5, 2023. The USPS Motion prematurely seeks relief against actions the Commission has yet to take, relies on outdated precedent, and fails to recognize that the Postal Accountability and Enhancement Act fundamentally strengthened the Commission’s oversight of the Postal Service. The Commission acted well within its statutory authority when opening this docket, which is “necessary and proper to carry out [its] functions and obligations to the Government of the United States and the people as prescribed under” Title 39.<sup>1</sup>

**I. THE COMMISSION HAS THE AUTHORITY TO ESTABLISH THIS DOCKET**

Before we discuss the Commission’s authority to open this docket, it is important to focus on what the Commission has actually done—or more importantly, what it has not done. The Commission has not proposed to take any action with respect to the *Delivering for America* (“DFA”) plan as a whole. It has not proposed to take any action with respect to any initiative

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<sup>1</sup> 39 U.S.C. § 503.

within the DFA plan. It has not claimed the authority to direct the Postal Service to expedite or abandon any initiative. It has not proposed to overrule or modify any Postal Service management decision. It has not claimed that the Postal Service must seek an advisory opinion regarding the DFA plan or any initiative contained therein. Nor has it suggested it intends to issue an advisory opinion *sua sponte*.<sup>2</sup> It has not proposed a rule that would limit the Postal Service's ability to implement DFA initiatives in any way. It has not proposed new reporting requirements to which the Postal Service must adhere. It has not yet even requested any information from the Postal Service.

Rather, the Commission has simply opened a docket in which it intends to gather information about initiatives the Postal Service—the entity the Commission was created to regulate—is currently undertaking to fulfill its statutory obligations; the same obligations the Commission is tasked with ensuring the Postal Service fulfills.<sup>3</sup> The Postal Service's objection, therefore, is solely to providing the Commission and the public with *any* information regarding the implementation of the Delivering for America plan. Even though it will have ample opportunity to object to any specific data request and to argue any action the Commission might eventually decide to take is beyond its statutory authority, the Postal Service objects to even engaging with its regulator.

Whatever the limits of the Commission's authority under 39 U.S.C. § 503, it is certainly empowered to open a public inquiry docket and ask questions regarding Postal Service initiatives that are ostensibly intended to improve service and efficiency;<sup>4</sup> that will determine the Postal

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<sup>2</sup> See Order No. 6488 at 4 (“The instant docket is not intended as an advisory opinion process on the Postal Service Strategic Plan.”)

<sup>3</sup> See, e.g., 39 U.S.C. § 3653 (directing Commission to determine Postal Service compliance with statutory provisions).

<sup>4</sup> See, e.g., DFA at 6, 26, 29, 31, 42; cf. 39 U.S.C. §§ 3622(b)(1), 3622(c)(12).

Service's costs and impact the rates it must charge to obtain adequate revenues;<sup>5</sup> and that will directly impact the Postal Service's ability to maintain high quality, affordable postal services.<sup>6</sup> Not only does the Commission have the authority to open this docket, it has an obligation to do so.

**A. 39 U.S.C. § 503 Provides the Commission Broad Authority to Gather Information in Support of Its Role as the Postal Service's Regulator**

Section 503 of title 39 authorizes the Commission to “promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5, and take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people as prescribed under this title.”<sup>7</sup> To carry out its “functions and obligations,” the Commission must have sufficient information about the entity it is charged with regulating. To assist in this information gathering, the Commission occasionally establishes public inquiry dockets. These dockets might or might not lead to further regulatory action.

The establishment of a public inquiry docket is generally uncontroversial, likely because an inquiry is not always tied to a specific planned regulatory action. The Commission does not always cite to specific statutory authority in its orders establishing these dockets.<sup>8</sup> In fact, no statutory provision specifically authorizes the Commission to open public inquiry dockets, and the only regulatory reference to such dockets appears in 39 C.F.R. § 3010.102(d)(1), which lists the various designations by which the Commission's Secretary may label a docket. It is thus

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<sup>5</sup> See, e.g., DFA at 43; cf. 39 U.S.C. § 3622(b)(5).

<sup>6</sup> See, e.g., DFA at 4.

<sup>7</sup> 39 U.S.C. § 503.

<sup>8</sup> See, e.g., Order No. 2791, Notice Establishing Docket Concerning Service Performance Measurement Data, PRC Docket No. PI2016-1 (Oct. 29, 2015); *contrast* USPS Motion at A-2 (claiming that statutory authority for this docket was cited in a Government Accountability Office report that was in turn discussed in Order No. 2791).

unsurprising that “the Commission’s Order does not identify a specific statutory provision authorizing a wholesale public inquiry into the” strategic plan.<sup>9</sup>

That does not mean, however, that no statutory authority authorizes the Commission to gather information regarding the DFA and the Postal Service’s implementation thereof. This authority should be obvious because the Commission has in fact promulgated regulations that directly impact significant aspects of the DFA. Most directly, the Commission established a system of ratemaking that constrains, to some degree, postal management’s discretion regarding the rates it can charge.

In that same docket, the Commission promulgated rules that require the Postal Service to provide to the Commission, within 95 days of the end of every fiscal year, detailed information about the Postal Service’s active and planned cost reduction initiatives.<sup>10</sup> These regulations require the Postal Service to provide information associated with actions that are inextricable from activities within postal management’s discretion, such as the identification of “each cost reduction initiative planned for future fiscal years, including the status, the expected total expenditure, start date, end date, and any intermediate deadlines.”<sup>11</sup> The Postal Service must even provide “[a] description of any mid-implementation adjustments the Postal Service has taken or will take to align the impacts with the schedule” of when the cost reduction impacts are expected to occur.<sup>12</sup> In Docket No. RM2017-3, neither the Postal Service nor any other party objected to the Commission’s authority to issue these regulations.<sup>13</sup> The Commission cited as

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<sup>9</sup> USPS Motion at 6.

<sup>10</sup> See 39 C.F.R. §§ 3050.55(c) and 3050.55(d); 85 Fed. Reg. 81,124, 81,140 (Dec. 15, 2020); see also Docket No. RM2017-3, Order No. 5763.

<sup>11</sup> 39 C.F.R. § 3050.55(c)(1).

<sup>12</sup> 39 C.F.R. § 3050.55(d)(3).

<sup>13</sup> See, e.g., Comments of the United States Postal Service, Docket No. RM2017-3 (Mar. 20, 2017).

the basis for its authority to issue those regulations 39 U.S.C. §§ 503, 3651, 3652, and 3653;<sup>14</sup> the same authority authorizes it to seek similar information in this docket.

Of course, because the Commission has not yet issued any information requests, one can only speculate at this time whether it will seek information similar to what it already requires by regulation. And because the Commission has not proposed any concrete actions in this docket, it is not clear what aspects of the DFA the Postal Service believes are entirely outside of the Commission's authority to investigate or regulate. But to the extent the Commission seeks information regarding the initiatives the Postal Service is implementing or plans to implement as part of its strategic plan and the impact those initiatives have had or are expected to have on Postal Service costs, such inquiries are plainly within the Commission's regulatory ambit. Title 39 does not insulate Postal Service management actions from oversight by the Commission, even if it limits the Commission's authority to direct those actions in some instances.

Section 3651 also supports the Commission's exercise of section 503 authority in this docket. Section 3651 requires the Commission to annually report to Congress and the President "concerning the operations of the Commission under this title, including the extent to which regulations are achieving the objectives under sections 3622 and 3633, respectively."<sup>15</sup> Several of the objectives of § 3622 are implicated by the DFA, including the directive to "maximize incentives to reduce costs and increase efficiency," to "create predictability and stability in rates," and to "assure adequate revenues, including retained earnings, to maintain financial stability."<sup>16</sup> If the Commission is to report on whether its regulations are achieving these objectives, it must understand how the Postal Service is responding to the incentives created by

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<sup>14</sup> See System for Regulating Market Dominant Rates and Classes, 85 Fed. Reg. 81,124, 81,139 (Dec. 15, 2020).

<sup>15</sup> 39 U.S.C. § 3651(a).

<sup>16</sup> 39 U.S.C. § 3622(b).

its regulations and, for example, what actions the Service is taking to reduce costs and increase efficiency. Section 3651(c) codifies this principle by requiring the Postal Service to “provide the Postal Regulatory Commission with such information as may, in the judgment of the Commission, be necessary in order for the Commission to prepare its reports under this section.” Far from insulating Postal Service management actions from Commission oversight, the statute provides the Commission with substantial discretion to inquire into Postal Service activities and directs the Postal Service to comply with those inquiries.

Moreover, even if the Commission refrains from directing postal management to take specific actions to reduce costs, it is still responsible for developing a regulatory structure that encourages these management actions, as sections 3651 and 3622 recognize. The Postal Service’s strategic plan, in turn, sets out how management intends to respond to these incentives. There is no statutory or logical basis on which to conclude that management actions that would be legitimate subjects of inquiry in the annual compliance docket pursuant to 39 U.S.C. §§ 3652 and 3653, or investigation pursuant to § 3651, or in a rulemaking docket such as RM2017-3, are somehow insulated from Commission inquiry solely by virtue of being associated with a strategic plan created pursuant to 39 U.S.C. § 2802. Even if the DFA is “just . . . a plan,”<sup>17</sup> the Commission has the authority to inquire into the actions the Postal Service is taking or plans to take to implement that plan.

Regardless of the specific level of oversight the Commission can exercise over Postal Service management actions, it is not required to regulate in the dark. Instead, it is authorized to take “*any . . . action . . . necessary and proper to carry out [its] functions and obligations to the Government of the United States and the people.*” One such authorized action is collecting

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<sup>17</sup> USPS Motion at 15. *See* section I.D., *infra*, for discussion of concrete actions USPS has already taken to implement the plan.

information from the Postal Service to inform the exercise of its regulatory responsibilities. Even if the Postal Service were conceptually correct that “the Commission’s general authority in 39 U.S.C. § 503 cannot overcome the absence of an underlying statutory function to which the rulemaking pertains,”<sup>18</sup> the instant docket (notably, not a rulemaking) *does* pertain to numerous statutory functions of the Commission. In sum, Congress did not prevent the Commission from inquiring into Postal Service management actions. The Commission has regularly exercised such oversight authority, and this docket is an appropriate exercise of its power.

**B. The Commission Has Not Disclaimed Oversight Authority Regarding the DFA**

The Postal Service claims that “[t]he Commission . . . has recognized that its authority under 39 U.S.C. §§ 2803 and 3653(d) is limited,” citing to statements the Commission made in Order No. 6067 when dismissing a complaint asking the Commission to issue an advisory opinion on the DFA as a whole.<sup>19</sup> Contrary to the Postal Service’s suggestion, however, the Commission has never recognized that its oversight authority is limited to ensuring consistency between a strategic plan and “the annual performance plan and performance report within the course of the Commission’s annual compliance review.”<sup>20</sup> In fact, the Commission stated in the footnote cited by the Postal Service that the “fact that performance plans must be consistent with strategic plans in accordance with 39 U.S.C. § 2802(c) does not in any way limit the Commission’s review of issues related to strategic plans under other statutory provisions including 39 U.S.C. § 3661 when appropriate.”<sup>21</sup> Not only was Order No. 6067 narrowly focused on whether the DFA constituted a change in the nature of postal services requiring an advisory opinion under 39 U.S.C. § 3661, but it directly rebutted the Postal Service’s argument that section 2802(c) limits Commission authority to

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<sup>18</sup> USPS Motion at 14.

<sup>19</sup> USPS Motion at 9 (citing Order No. 6067 at 19 n.24).

<sup>20</sup> USPS Motion at 9.

<sup>21</sup> Order No. 6067 at 19 n.24.

review strategic plans. Order No. 6067 certainly did not disclaim any authority to open a public inquiry docket to further inform the Commission and the public about the DFA and its implementation.

**C. Precedent Cited by USPS Does Not Limit Agency Authority to Open Public Inquiry-Style Dockets**

Notably, the Postal Service cites no precedent suggesting that a regulatory agency exceeds its lawful authority when it opens a docket to gather information about the activities of the entities it regulates. Instead, it relies on cases that address when an agency regulation exceeds the authority delegated to the agency by statute. The Postal Service’s assertion that “[n]ecessary and proper’ provisions, like the one found in Section 503, do not supply an agency ‘carte blanche authority’ to justify action on any matter relating to its enabling statute”<sup>22</sup> is correct, but a red herring. No one, including the Commission, has suggested that the Commission has “carte blanche authority” to take any action in this docket. The Commission has simply requested information from the Postal Service of the kind it regularly collects through various avenues.

Every case cited by the Postal Service in support of this argument involves a final rule issued by the agency or a remedial action taken in an investigation.<sup>23</sup> The Commission has

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<sup>22</sup> USPS Motion at 11.

<sup>23</sup> See, e.g., *Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844 (D.C. Cir. 1979) (upholding EPA regulations issued to reconcile statutory provisions); *Nat’l Mining Ass’n v. U.S. Dep’t of Interior*, 105 F.3d 691 (D.C. Cir. 1997) (ruling that expanding ineligibility for permits is beyond the Department of the Interior’s statutory limits); *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113 (D.C. Cir. 1995) (EPA imposing rule for oxygenate requirements); *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454 (5th Cir. 2020), *as revised* (Aug. 4, 2020) (finding there was no statutory authority for the agency to promulgate a rule authorizing aquaculture development); *Merck & Co. v. U.S. Dep’t of Health & Human Servs.*, 385 F. Supp. 3d 81 (D.D.C. 2019), *aff’d*, 962 F.3d 531 (D.C. Cir. 2020) (finding the Department of Health lacked authority under the relevant statute to require disclosures); *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) (finding that the National Mediation Board lacked authority to issue contrary regulations with the relevant statute dictates who can initiate investigation of labor practices); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (finding that the EPA impermissibly denied a waiver request on public health grounds, because the subject statute states waivers can only be granted on emissions grounds); *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (finding the FCC issued video description rules without the statutory authority to do so); *Am. Bus Ass’n v. Slater*, 231 F.3d 1 (D.C.

proposed no rule in this docket. There is no action to judge against the authority delegated to the Commission, unless the Postal Service’s position is that the Commission lacks any authority to inquire into matters in any way related to its strategic plan. In none of the cited cases did the parties challenge the mere opening of a docket to collect information. If the Commission eventually takes an action in this docket that exceeds its statutory authority, the Postal Service will have the opportunity to object.

**D. The Postal Service Fails to Recognize the Fundamental Change in the Commission’s Authority Wrought by PAEA**

The Commission has exercised regulatory oversight over the Postal Service since its creation in 1970, when Congress passed the Postal Reorganization Act (“PRA”). “Congress passed the PRA to ‘insulate’ Postal Service management ‘from partisan politics . . . by having the Postmaster General responsible to the [Postal Rate] Commission, which represents the public interest only, for his conduct of the affairs of the Postal Service.’”<sup>24</sup> Until the passage of the Postal Accountability and Enhancement Act (“PAEA”) in 2006, though, the Commission’s regulatory authority was more limited. With PAEA’s enactment, Congress replaced the Postal Rate Commission with today’s Postal Regulatory Commission and “strengthened its role.”<sup>25</sup>

The Postal Service’s key statutory argument largely ignores this pre-PAEA/post-PAEA dichotomy. The Postal Service acknowledges that the Commission has “broad” authority under 39 U.S.C. § 503.<sup>26</sup> But, claims the Postal Service, that broad authority somehow excludes this docket, which seeks transparency into the Postal Service’s widely touted (and partially implemented) strategic plan. As discussed above, DFA objectives directly relate to the Postal

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Cir. 2000) (finding the Department of Transportation could not impose new monetary penalties on violations when the subject statute did not authorize monetary penalties).

<sup>24</sup> *New York v. Trump*, 490 F. Supp. 3d 225, 231 (D.D.C. 2020) (quoting H.R. Rep. No. 91-1104, 3660-61 (1970)).

<sup>25</sup> *Id.* (quoting *Carlson v. PRC*, 938 F. 3d 337, 340 (D.C. Cir. 2019)).

<sup>26</sup> USPS Motion at 11.

Service’s financial stability and service performance, including recently announced plans to consolidate delivery units to “reduce transportation and mail handling costs.”<sup>27</sup> Issues pertaining to the Postal Service’s costs, revenues, rates, and quality of service fall squarely within the Commission’s regulatory purview.

The Postal Service asserts that this docket is improper because it is not “rooted in one of [the Commission’s] functions or obligations enumerated by Title 39.”<sup>28</sup> To support its argument, the Postal Service cites *Governors of USPS v. U.S. Postal Rate Comm’n* (“*Governors*”) <sup>29</sup> as case law “analyzing the scope of the Postal Rate Commission’s authority under 39 U.S.C. § 3603, which was later recodified as 39 U.S.C. § 503.”<sup>30</sup>

*Governors* is inapposite, and the Postal Service should know better. Decided a quarter-century before PAEA’s passage, the *Governors* ruling refers to the then-Postal Rate Commission’s “limited statutory responsibilities.”<sup>31</sup> It also quotes approvingly a 1978 district court decision that explained “[t]he responsibilities of the Postal Rate Commission are strictly confined to relatively passive review of rate, classification, and major service changes, unadorned by ... wide discretion in choosing the appropriate manner and means of pursuing its statutory mandate.”<sup>32</sup>

The Commission’s regulatory role today is not “limited” or “passive” as it was more than forty years ago when the authority on which the Postal Service relies was decided. Buried in a

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<sup>27</sup> See United States Postal Service, Letter to Edmund A. Carley, National President, United Postmasters and Managers of America from James Lloyd, Director, Labor Relations Policies and Programs, July 29, 2022, available at [https://www.unitedpma.org/docs/default-source/defaultdocument-library/resources/notification-0729202246b67af2-353b-48a5-9ca8-87cf43e95d81.pdf?sfvrsn=6055688d\\_3](https://www.unitedpma.org/docs/default-source/defaultdocument-library/resources/notification-0729202246b67af2-353b-48a5-9ca8-87cf43e95d81.pdf?sfvrsn=6055688d_3).

<sup>28</sup> USPS Motion at 11.

<sup>29</sup> 654 F.2d 108 (D.C. Cir. 1981).

<sup>30</sup> USPS Motion at 11, n. 38.

<sup>31</sup> See *Governors*, 654 F.2d at 117.

<sup>32</sup> See *id.* (quoting *United Parcel Service, Inc. v. USPS*, 455 F. Supp. 857, 873 (E.D. Pa. 1978), aff’d 604 F.2d 1370 (3d Cir. 1979), cert. denied, 446 U.S. 957 (1980)).

footnote, the Postal Service concedes that “the scope of the Commission’s role was expanded in the PAEA,” but it insists that “the reasoning in the *Governors* decision is still illuminating” and that PAEA “did not expand the Commission’s jurisdiction or change the statutory scheme so meaningfully” as to authorize this docket.<sup>33</sup>

But that is precisely what Congress did. Congress intended to create an “enhanced regulatory Commission” when it enacted PAEA. In the Committee Report on S. 2468, the Governmental Affairs Committee lamented that the PRA-era Commission was “given limited authority to exercise oversight over the Postal Service.”<sup>34</sup> It noted, and agreed with, the President’s Commission’s conclusion that “The Postal Service’s need for oversight today is as broad as the Postal Rate Commission’s authority is narrow.”<sup>35</sup> Both the President’s Commission and the Senate Committee recommended “that a Postal Regulatory Board be vested with *substantially expanded regulatory authority*.”<sup>36</sup> Congress thus armed the PRC with oversight into large swaths of Postal Service operations, including rate setting, costing, service performance, product offerings, and – crucially – “the role of ensuring the financial transparency of the Postal Service, obtaining information from the Service - - if need be - - through the use of subpoena power.”<sup>37</sup>

Lead sponsor Senator Susan Collins explained that under PAEA, “[t]he existing Postal Rate Commission would be transformed into the Postal Regulatory Commission with greatly enhanced authority. Under current law, the Rate Commission has very narrow authority. We wanted to ensure that the Postal Service management has both greater latitude and stronger

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<sup>33</sup> USPS Motion at 17, n. 52.

<sup>34</sup> S. Rept. 108-318 (July 22, 2004), at 6.

<sup>35</sup> *Id.* at 17.

<sup>36</sup> *Id.* at 32 (emphasis ours).

<sup>37</sup> *Id.* at 32-33.

oversight.”<sup>38</sup> On the day PAEA was signed into law, Senator Collins again noted the Postal Rate Commission’s “transformation” into the Postal Regulatory Commission and described the latter as having “enhanced authority to ensure that there is greater oversight of the Postal Service as its management assumes greater responsibility.”<sup>39</sup> Post-PAEA court decisions note that the “Act was meant to strengthen the PRC’s power.”<sup>40</sup>

The Postal Service’s claim that the Commission cannot rely on its broad, general oversight authority under Section 503 is therefore specious. Even if the statutory text of 39 U.S.C. § 3603 did not change when it was recodified as Section 503, the scope of the Commission’s authority unambiguously did. Congress clearly instilled in the Commission significantly expanded regulatory powers within Title 39 when it enacted PAEA. Those powers include oversight and review authority over rate regulation, product lists, service standards, performance measures, changes to postal services, and financial transparency into the Postal Service. The Commission’s initiation of this public inquiry into a Postal Service strategic plan that touches on many of those issues is “necessary and proper” to carry out the Commission’s obligations to the public.

## **II. THE POSTAL SERVICE CANNOT INVOKE A “DELIBERATIVE PROCESS” PRIVILEGE IN AN EFFORT TO SHIELD ITSELF FROM SCRUTINY**

The Postal Service mischaracterizes the DFA as an embryonic idea. It is “just ... a plan.”<sup>41</sup> It allegedly “effects no changes” and is “merely a broad statement of strategy and potential initiatives.”<sup>42</sup> It contains only “pre-decisional deliberations” and is in its “early

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<sup>38</sup> See 151 Cong. Rec. 3013 (2005).

<sup>39</sup> See 152 Cong. Rec. S00000-15 (Dec. 8, 2006).

<sup>40</sup> *Foster v. Pitney Bowes Inc.*, No. CIV.A. 11-7303, 2012 WL 2997810, at \*5 (E.D. Pa. July 23, 2012), *aff’d sub nom. Foster v. Pitney Bowes Corp.*, 549 F. App’x 982 (Fed. Cir. 2013).

<sup>41</sup> USPS Motion at 15.

<sup>42</sup> *Id.*

stages.”<sup>43</sup> The Postal Service labels the Commission’s and mailers’ efforts at transparency as “invasive,” “unjustifiable,” and “intrusive.”<sup>44</sup>

To avoid disclosing any information about the DFA, the Postal Service attempts to cloak itself in a version of the deliberative process privilege,<sup>45</sup> “an apparently judicially-created qualified privilege, the underlying purpose of which is to promote candor in agency policy formation and decisionmaking by preventing public disclosure of documents falling within its scope.”<sup>46</sup> The Postal Service “bears the burden of establishing the applicability of the privilege” and “must show that the document is both ‘predecisional’ and ‘deliberative.’”<sup>47</sup>

The Postal Service cannot meet its burden here. Contrary to its claims, *DFA* is not “just a plan” that “effects no changes.” To be sure, because DFA is a ten-year strategic plan, many aspects of it remain forward-looking. But “forward-looking” is not “predecisional.”

*Delivering For America* was launched more than two years ago. Outside the confines of its Motion in this docket, the Postal Service characterizes the DFA as anything but “just a plan” in its “early stages.” Rather, the plan is “comprehensive.”<sup>48</sup> It “established clear and precise strategies,” and “[m]any of these strategies were implemented in the plan’s first two years.”<sup>49</sup> With respect to the plan’s initiatives that have not yet been effectuated, those “must be implemented timely and in full to meet our financial targets.”<sup>50</sup> The Postal Service’s own words

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<sup>43</sup> *Id.* at 16, 19.

<sup>44</sup> *Id.* at 16, 20.

<sup>45</sup> See USPS Motion at 18 (“If Order No. 6488 is not withdrawn, this premature review has the potential to interfere with the deliberative process of the Postal Service and intrude upon the prerogatives of the Postal Service, and our Governors.”)

<sup>46</sup> *Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 44 (N.D.N.Y. 1991).

<sup>47</sup> *Id.* (citing *Access Reports v. Department of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991)).

<sup>48</sup> See USPS Form 10-Q (May 9, 2023) at 22.

<sup>49</sup> See “Delivering For America: Second-Year Progress Report” at 9 (April 2023).

<sup>50</sup> See USPS Form 10-Q (May 9, 2023) at 22.

make clear that the DFA is not predecisional: Postal Service leadership has decided on a strategic path forward and is in the process of implementing that strategy.

Nor is it true that the plan “effects no changes.” Numerous strategic objectives have already been implemented and have already effected change for postal stakeholders. For example, the objective to implement pricing strategies that are designed to maximize USPS revenues has resulted in three massive and above-CPI price increases since October 2021, with yet another large rate increase scheduled to take effect on July 9, 2023.<sup>51</sup> As another example, the objective to modernize the Postal Service’s processing network through the creation of large sorting and delivery centers (“S&DC”) is well underway. Indeed, the Commission established this inquiry in reaction to stakeholder concerns about the impact of such centers on flats operations and costs.<sup>52</sup> This initiative is not predecisional: the Postal Service opened its first S&DC in Athens, Georgia in November 2022. It scheduled other locations for conversion into S&DCs in February 2023, with another phase of conversions scheduled for June 2023.<sup>53</sup> These conversions effect changes encompassing 15 S&DCs and about 65 post offices and 600 routes.

Under these circumstances, the Postal Service may not claim a deliberative process protection against regulatory oversight and information gathering. If an agency reform plan “merely explains actions or reforms that an agency has already implemented or adopted, such information is not predecisional for purposes of the deliberative process privilege.”<sup>54</sup> Likewise, documents discussing actions or reforms that have since been “adopted formally or informally,

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<sup>51</sup> See Docket No. R2023-2, United States Postal Service Notice of Market-Dominant Price Change (Apr. 10, 2023).

<sup>52</sup> See Order No. 6488 at 2-4.

<sup>53</sup> See Letter to I. Butts, President of the National Association of Postal Supervisors (Dec. 2, 2022), available at [https://naps.org/files/galleries/Updated\\_Schedule\\_for\\_Implementation\\_of\\_S\\_DC\\_Sites\\_and\\_Spoke\\_Offices\\_Lloyd\\_12\\_2\\_2022.pdf](https://naps.org/files/galleries/Updated_Schedule_for_Implementation_of_S_DC_Sites_and_Spoke_Offices_Lloyd_12_2_2022.pdf)

<sup>54</sup> *Southern Environmental Law Center v. Mulvaney*, 2019 WL 4674497, No. 3:18cv00037, at \*10 (W.D. Va. Sept. 25, 2019).

as the agency position on an issue,” or “used by the agency in its dealings with the public” have lost their predecisional status.<sup>55</sup>

### **III. THE COMMISSION CAN REMEDY ANY PROCEDURAL ERRORS IN ORDER NO. 6488**

To the extent the Commission agrees with the Postal Service that Order No. 6488 failed to comply with the Commission’s rules,<sup>56</sup> the Commission can easily remedy those technical violations. For instance, 39 C.F.R. § 3010.151(b)(3) requires the Commission to identify the legal authority under which it is establishing a docket; the Commission can clarify that it is authorized to open the docket by 39 U.S.C. § 503 to explore how the DFA and related initiatives affect its obligations under 39 U.S.C. §§ 3622, 3651, 3652, and 3653, among others. To the extent 39 C.F.R. § 3010.200(a) requires this docket to conform to notice and comment procedures, the Commission can either establish a comment date or indicate that it will do so to the extent necessary after it has received responses to information requests. These objections do not go to the Commission’s statutory authority to open this docket; they are procedural objections that can be remedied in an order on rehearing.

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<sup>55</sup> *Id.*

<sup>56</sup> *See* USPS Motion at 6-8.

#### IV. CONCLUSION

This docket is a legitimate exercise of the Commission’s oversight authority—authority granted to it by Congress with the enactment of PAEA, and that benefits all stakeholders in the mail. The Postal Service’s Motion is a misplaced overreaction to healthy regulatory scrutiny. If anything, the Postal Service’s reaction and its claim of broad immunity from the oversight of its regulator (relying on pre-PAEA authority to do so) validates the Commission’s decision to open this docket in the first place. The Commission should deny the Postal Service’s Motion.

Respectfully submitted,

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