

**BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001**

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY**

**Complaint on First-Class Mail
Service Standards**

Docket No. C2001-3

**DOUGLAS F. CARLSON
ANSWER IN OPPOSITION
TO POSTAL SERVICE MOTION TO DISMISS**

August 11, 2001

I. INTRODUCTION

On June 19, 2001, I filed a complaint on First-Class Mail service standards.¹ On July 12, 2001, the Postal Service answered the complaint.² On July 30, 2001, the Postal Service filed a motion to dismiss my complaint.³ Accompanying the motion to dismiss was a declaration from Charles M. Gannon, the national program manager for "USPS Service Standards."⁴

Section 3662 grants the Commission jurisdiction to hear a complaint that an interested party files if the interested party alleges that he/she is "not receiving postal service in accordance with the policies of this title." 39 U.S.C. § 3662.

The Commission should deny the Postal Service's motion and exercise its discretion to hear this complaint. My complaint concerns a matter of national significance that also is critically important to postal customers residing in the

¹ Douglas F. Carlson Complaint on First-Class Mail Service Standards ("Complaint"), filed June 19, 2001.

² Answer of the United States Postal Service ("Answer"), filed July 12, 2001.

³ Motion of the United States Postal Service to Dismiss Complaint ("Motion to Dismiss"), filed July 30, 2001.

⁴ Declaration of Charles M. Gannon ("Declaration"), filed July 30, 2001.

western states. Postal customers are not receiving postal service in accordance with the policies of title 39.

Four separate grounds exist on which the Commission should find jurisdiction and decide to hear this complaint:

1. The **changes in First-Class Mail service standards** that the Postal Service implemented in 2000 and 2001 represent a change in the nature of postal services that generally affected service on a nationwide or substantially nationwide basis. Section 3661(b) of the Postal Reorganization Act required the Postal Service to seek an advisory opinion before the effective dates of the changes in First-Class Mail service standards implemented in 2000 and 2001. The Postal Service failed to seek an advisory opinion under section 3661(b) before implementing changes in First-Class Mail service standards in 2000 and 2001. Therefore, the Commission has jurisdiction to hear this complaint.
2. The changes in First-Class Mail service standards that the Postal Service implemented in 2000 and 2001 represent a **change in, departure from, or abandonment of the criteria** that the Postal Service announced in Docket No. N89-1 for two-day First-Class Mail service standards. In his declaration, Mr. Gannon admits to a new definition. This change in, departure from, or abandonment of previously announced criteria represents a change in the nature of postal services that generally affected service on a nationwide or substantially nationwide basis. Section 3661(b) required the Postal Service to seek an advisory opinion from the Commission before changing, departing from, or abandoning the previously announced criteria. The Postal Service failed to obtain an advisory opinion. Therefore, the Commission has jurisdiction to hear this complaint.

3. The Postal Service has implemented changes in First-Class Mail service standards that have caused First-Class Mail service *not to be adequate* within the meaning of section 3661(a) for some customers.
4. The Postal Service has created First-Class Mail service standards that *unduly and unreasonably discriminate among users of the mail*, in violation of 39 U.S.C. § 403(c).

I will discuss each of the four bases for Commission jurisdiction individually and respond to arguments that the Postal Service raised in its motion to dismiss. Next, I will briefly discuss the significance of my motion to amend my complaint to allege additional violations of 39 U.S.C. § 101(e) and (f).⁵ Following these discussions, I will review the elimination of airmail service in 1976 and demonstrate from a historical perspective the significance of the recent changes in service standards. I will conclude with a discussion of the importance for the Commission to exercise its discretion to hear this complaint.

II. BASES FOR COMMISSION JURISDICTION

A. RECENTLY IMPLEMENTED CHANGES IN FIRST-CLASS MAIL SERVICE STANDARDS ARE NATIONWIDE IN SCOPE.

The Postal Reorganization Act requires the Postal Service to submit a proposal to the Commission requesting an advisory opinion on any change in the nature of postal services that will generally affect service on a nationwide or substantially nationwide basis. 39 U.S.C. § 3661(b). The Postal Service must request this advisory opinion within a reasonable time *before* the effective date of such a proposal. *Id.* The Commission has jurisdiction to hear a complaint that an interested party files if the complaint alleges that the Postal Service implemented, with first seeking an advisory opinion from the Commission, a change in the nature of postal services that generally affected service on a nationwide or substantially nationwide basis. Order No. 1307 at 8. This

⁵ Douglas F. Carlson Motion for Leave to Amend Complaint, dated August 11, 2001.

jurisdiction exists because the Postal Service has changed the nature of postal services without seeking the required advisory opinion and receiving the public input that a hearing on a request for an advisory opinion would produce. Therefore, the postal services are not consistent with the policies of title 39.

The threshold question here is whether the Postal Service changed the nature of postal services in a way that generally affected service on a nationwide or substantially nationwide basis. The answer clearly is yes.

First, the Postal Service admits that the changes in service standards affected 48 states. Complaint at 11, ¶ 50; Answer at 15, ¶ 50. The only states that were not affected by the changes implemented in 2000 and 2001 are Alaska and Hawaii. *Id.* The scope was nationwide.

Second, the Postal Service changed the service standards for over 76,440 origin-destination three-digit ZIP Code pairs affecting all 11 postal areas nationwide. Complaint at 11, ¶ 49; Answer at 15, ¶ 49. Again, the scope was nationwide — and large. The delivery speed of a significant volume of two-day and three-day First-Class Mail changed, thus changing the nature of First-Class Mail service. For example, for customers living in California, First-Class Mail now means three-day delivery service, not two-day delivery service, for bill payments destined to neighboring states. See Complaint at 5, ¶ 24, and Answer at 6, ¶ 24.

Third, the changes in First-Class Mail service standards affect approximately nine percent of three-digit ZIP Code pairs nationwide. Complaint at 12, ¶ 57; Answer at 16, ¶ 57. Although the changes in First-Class Mail service standards affect approximately nine percent of three-digit ZIP Code pairs nationwide, the changes affect substantially more than nine percent of the three-digit ZIP Code pairs that could reasonably have been considered for changes in two-day or three-day service standards. First, the ZIP Code pairs in an origin SCF's overnight delivery area were not candidates for switching between two days and three days. Second, certain three-digit ZIP Codes in the nearby two-

day delivery area did not reasonably constitute candidates for a change to a three-day standard. Third, and most importantly, a large number of three-digit ZIP Codes represented a distance too far to be considered for inclusion in the two-day delivery area. For example, for origin SCF's in the New York Metro Area, SCF's in the Pacific Area and Western Area — as well as other areas — would not reasonably have been candidates for conversion to two-day delivery. Therefore, the changes in First-Class Mail service standards represent changes to significantly greater than nine percent of the origin-destination pairs that could reasonably have been considered possible candidates for switching between a two-day service standard and a three-day service standard.

Fourth, except for Alaska, Hawaii, and the Caribbean, the changes affect 100 percent of the ZIP Codes listed in the 2001 *National Five-Digit ZIP Code and Post Office Directory*. See DFC-LR-1. That is, 100 percent of the ZIP Codes were affected one way or the other by at least one change in service standards.

Fifth, the changes in First-Class Mail service standards have shifted over 3.4 billion pieces of mail per year from a two-day delivery standard to a three-day delivery standard. Complaint at 11, ¶ 53; Answer at 15, ¶ 53. The changes in service standards resulted in a net increase of approximately 22,250 origin-destination three-digit ZIP Code pairs for which the service standard is two days. *Id.* However, the net *volume* of First-Class Mail subject to a two-day delivery standard instead of a three-day delivery standard has decreased by approximately 1.5 billion pieces per year. *Id.*

The fact that the changes in service standards resulted in a net increase in origin-destination three-digit ZIP Code pairs for which the service standard is two days is irrelevant to determining Commission jurisdiction. Section 3661(b) requires the Postal Service to seek an advisory opinion regardless of whether changes in the nature of postal services that generally affect service on a nationwide or substantially nationwide basis will improve or reduce services. The net effect of the changes may influence the Commission on whether to exercise

its discretion under section 3662 to hear a service complaint. In this instance, the net *volume* of First-Class Mail subject to a two-day delivery standard instead of a three-day delivery standard decreased by approximately 1.5 billion pieces per year. Complaint at 11, ¶ 53; Answer at 15, ¶ 53. Volume is a better measure of the effect of these changes on the public than the number of ZIP Code pairs. Thus, the effect on postal customers of the recent changes is decidedly negative.

Moreover, the effect on postal customers residing in the western states (excluding Texas), which are home to 22 percent of our country's population, was devastating. As the Postal Service admits, over 99 percent of the changes in the Pacific Area were downgrades from two days to three days. Complaint at 11–12, ¶ 54 and Answer at 16, ¶ 54. Over 79 percent of the changes in the Western Area were downgrades from two days to three days. Complaint at 12, ¶ 55; Answer at 16, ¶ 55. Appendix 1 of the complaint provides maps detailing the sweeping effect of some of these changes. See *also* Complaint at 5, ¶ 23.

The catastrophic effect of these nationwide changes in service standards on residents living in the western states combined with the general nationwide decline in the volume of First-Class Mail receiving two-day service counsel the Commission to exercise its discretion and hear this complaint.

The Postal Service does not appear to dispute the conclusion that the recently implemented changes in service standards are at least substantially nationwide in scope. See Motion to Dismiss at 26–27.

In sum, the Postal Service implemented widespread changes in First-Class Mail service standards. For many customers, if not most customers, these changes in service standards changed the nature of postal services by changing the delivery speed of a significant portion of their two-day and three-day First-Class Mail volume. The Postal Service knew before implementing these changes that the changes would alter the nature of postal services and generally affect customers on a nationwide or substantially nationwide basis. The Postal

Service implemented these changes without requesting an advisory opinion from the Commission within a reasonable time before the effective date of the proposal. Therefore, the Commission has jurisdiction to hear this complaint.

B. THE RECENTLY IMPLEMENTED CHANGES IN FIRST-CLASS MAIL SERVICE STANDARDS REPRESENT A CHANGE IN, DEPARTURE FROM, OR ABANDONMENT OF PREVIOUSLY ANNOUNCED CRITERIA.

A substantial portion of the Postal Service's strategy to dismiss this complaint relies on the Postal Service's erroneous conclusion that the nationwide changes in service standards merely implement changes for which the Postal Service sought an advisory opinion in Docket No. N89-1. This discussion will explain why the recent "realignment" of service standards represents a change in, departure from, or abandonment of criteria previously announced and litigated in Docket No. N89-1. Thus, in no sense is the recent realignment merely an implementation of a plan submitted for the Commission's review in 1989.⁶

Moreover, even if the recent changes in service standards were simply a belated implementation of a plan duly reviewed in 1989 and 1990, far too much time passed between the review and the implementation to eliminate the need to seek an advisory opinion from the Commission.

1. The Postal Service has changed the nature of postal services.

The Postal Reorganization Act requires the Postal Service to seek an advisory opinion from the Commission prior to implementing changes in the nature of postal services that will generally affect service on a nationwide or substantially nationwide basis. 39 U.S.C. § 3661(b). The Postal Service triggers this statute when it satisfies two conditions. First, the Postal Service must be seeking to *change the nature of postal services*. Once the change constitutes a

⁶ Some changes in service standards, particularly outside the western states, may, by coincidence, be consistent with the objectives of the realignment plan reviewed in Docket No. N89-1. A review of the totality of the circumstances, however, compels the conclusion that, on the whole, the new definition of the two-day delivery standard is not the definition contemplated and reviewed in Docket No. N89-1.

change in the nature of postal services, the changes must affect service on a nationwide or substantially nationwide basis.

The discussion in section II.A., *supra*, demonstrates that the changes in First-Class Mail service standards affected service on a nationwide basis. This conclusion apparently is not in dispute. See Motion to Dismiss at 26–27. The previous discussion also demonstrates that the Postal Service changed the nature of postal services by changing the delivery speed of a significant volume of two-day and three-day First-Class Mail.

However, the Postal Service changed the nature of postal services in another very significant way. The recently implemented changes in First-Class Mail service standards change the *criteria* for two-day delivery areas. The following discussion is critically important to recognizing the fallacy underlying the Postal Service's motion to dismiss.

2. In Docket No. N89-1, the Postal Service articulated, participants litigated, and the Commission evaluated a specific service standard for two-day First-Class Mail delivery.

According to the Postal Service in Docket No. N89-1, “[p]erhaps the most important aspect” of determining the two-day delivery area would be “to identify the major business centers where business customers need two-day delivery.”⁷ Docket No. N89-1, Direct Testimony of Seymour A. Lazerowitz on Behalf of the United States Postal Service (“Lazerowitz Testimony”) at 22–23; *see also* Complaint at 7, ¶ 33, and Answer at 8–9, ¶ 33. The testimony suggests that two-day delivery should be provided when reliable air transportation exists and business customers need two-day delivery.⁸ Lazerowitz Testimony at 22–23.

⁷ Every mailing relationship involves two customers (unless a mailer is sending mail to himself). Therefore, as long as either the mailer or recipient is a business, and as long as the business customer needs two-day service, this criterion is satisfied. Thus, a remittance processor who needs and benefits from two-day delivery of remittance payments from non-business mailers causes all the mail sent to this remittance processor to satisfy this criterion.

⁸ The two-day delivery area also includes nearby delivery areas that lie outside the origin SCF's overnight delivery area. These two-day areas did not change. This discussion focuses on the two-day delivery areas that may require air transportation to achieve two-day delivery.

The testimony further suggests that customer input also may be considered. *Id.* The essence of witness Lazerowitz's testimony appeared in the *National Five-Digit ZIP Code and Post Office Directory* ("ZIP Code Directory") as recently as 2001. The ZIP Code directory states, "Second-day delivery is scheduled for locally designated areas nationwide to which 2-day delivery is needed and to which transportation is available for consistent achievement of 2-day delivery."⁹ ZIP Code Directory at 9-3.

The Commission's advisory opinion, issued at the conclusion of the proceeding, confirmed witness Lazerowitz's description of the two-day service standard. The advisory opinion stated that the Postal Service would continue to provide two-day delivery "where 'significant business/mail volume relationships exist[.]'" PRC Op. N89-1 at 7 (quoting USPS-T-1 at 11). Later, the advisory opinion confirmed Postal Service "guidelines" stating that two-day delivery is to be provided to (1) "'all (or part, where justified) of the home state and nearby states' if within reasonable reach of surface transportation" and (2) "locally identified, major business centers." *Id.* at 8. Elaborating on guideline (2), the Commission further explained that "two-day delivery may be provided to other areas outside the reach of surface transportation 'if significant business/mail volume relationships exist' and dependable and timely air transportation is available." *Id.* Finally, the Commission recited another significant guideline: "[A]ny destination Area Distribution Center which receives 0.5 percent of a facility's originating volume should be considered for two-day service." *Id.* at 8-9.

I emphasize that the guidelines that I quoted from the Commission's advisory opinion are not the Commission's recommendation or opinion. Rather,

⁹ The motion to dismiss at 16-17 rebuts an argument that the complaint does not state. Nowhere does the complaint state or suggest that the Commission should find jurisdiction to hear this complaint on the basis of the Postal Service's failure to comply with the criterion stated in the ZIP Code Directory. Rather, the ZIP Code Directory provides evidence of a change in an underlying service standard. A simple comparison of the definition of two-day First-Class Mail in the ZIP Code Directory with Mr. Gannon's declaration at paragraph 18 confirms the change. The change in the underlying service standard constitutes a change in the nature of postal services. This change leads to Commission jurisdiction as described in this pleading.

these guidelines are the guidelines that *the Postal Service submitted* for review in Docket No. N89-1. Consequently, participants in Docket No. N89-1 litigated proposed changes in service standards to implement the criteria for two-day mail service described above. Mailers who intervened in Docket No. N89-1 exercised their statutory right to provide input on the criteria specifically proposed in Docket No. N89-1. Moreover, the Commission issued an advisory opinion concerning changes in service standards that would implement the criteria described above. The reverse also is true: neither the public nor the Commission provided advice or input concerning any service standards for two-day mail that the Postal Service did *not* propose.

The changes in First-Class Mail service standards that the Postal Service implemented in 2000 and 2001 represent a substantial change in, departure from, or abandonment of the criteria that the Postal Service submitted, mailers litigated, and the Commission evaluated in Docket No. N89-1. No other conclusion is plausible. The criteria announced in Docket No. N89-1 did not guide most, if not all, of the recent changes. Thus, at no point in Docket No. N89-1 did the public have an opportunity to provide input on the definition of two-day First-Class Mail that the Postal Service used to implement nationwide changes in service standards in 2000 and 2001. The next section describes the new two-day delivery standard for First-Class Mail.

3. The Postal Service secretly crafted and implemented a new service standard for two-day First-Class Mail.

A review of the Service Commitment and Service Standards programs filed in DFC-LR-2 confirms an obvious conclusion: in nearly all instances, the Postal Service has shrunk the two-day delivery area to include only those destinations that the Postal Service can reach by *surface transportation* for two-day delivery. Even this definition is a bit generous. The Postal Service must be able to achieve two-day delivery between the area distribution centers, not the origin city and destination city or even the origin SCF and destination SCF. Mr.

Gannon dutifully explains why a letter travelling from Ashland, Oregon, to Yreka, California, cities located 33 miles apart, properly should travel 1,313 miles; to Mr. Gannon, the latter distance justifies the new three-day delivery standard for this mail. See Declaration at ¶¶ 34 and 35.

Although a review of the maps contained in the Service Commitment and Service Standards computer programs is instructive, the Commission does not need to spend hours in front of the computer to confirm that the new two-day delivery areas include only distances that the Postal Service can reach via surface transportation. Mr. Gannon's declaration confirms the new definition. The importance of paragraph 18 justifies a full quotation, with emphasis added:

Throughout the process [of determining which adjustments between 2-day and 3-day service standards would be most appropriate after operational changes in clearance times and critical-entry times were completed], we focused on two objectives. The first was the Postal Service's primary realignment goal during Docket No. N89-1 — improved consistency. The second was the 2-Day service standard *definition*. For each Processing Plant of origin, we looked beyond the overnight service areas that resulted from the completion of Phase 1. *We then examined the remaining SCFs and ADCs to determine which ones were (a) within the home State and nearby States and (b) within reasonable reach of surface transportation.* Having established minimum transportation windows available with which to transport mail, *we decided upon a maximum 12-hour highway drive-time range by which to determine those destinations that would become [sic] part of the 2-Day service area for any Processing Plant of origin. The remaining 3-digit ZIP Code areas beyond 12 hours became part of the 3-Day service standard network.* To ensure the Baldrige ideals of Alignment and Standardization, we built a computer model which used a customized transportation software package to determine reasonable and safe drive-times between postal facilities by which to even-handedly determine which pairs qualified for 2-Day service *by using a formula that could be applied nationwide.*

Declaration at ¶ 18 (emphasis added).

The significance of Mr. Gannon's admission cannot be overstated. In paragraph 18, and confirmed in paragraph 22, Mr. Gannon provided the new definition of two-day First-Class Mail: a destination must be within the reasonable reach of surface transportation. If highway drive time by truck is more than 12 hours, the destination becomes three-day. This definition is plain and simple.

Witness Lazerowitz's articulation of a concern for customer need is gone. See Lazerowitz Testimony at 22–23. The Postal Service's previous concern for "significant business/mail volume relationships" is gone as well. PRC Op. N89-1 at 7 (quoting USPS-T-1 at 11). In fact, mail volume is not a concern at all. Finally, the previous standard for two-day mail — any destination Area Distribution Center that receives 0.5 percent of a facility's originating volume should be considered for two-day service — is history. PRC Op. N89-1 at 8–9.

The conclusion is clear and obvious: the changes in service standards implemented in 2000 and 2001 reflect a significant and substantial change in the definition — Mr. Gannon's own words — of two-day First-Class Mail delivery. The public and Commission had no opportunity whatsoever in Docket No. N89-1 to evaluate and provide input on this new definition of two-day First-Class Mail delivery. Even a skeptical interpretation of the standards proposed in Docket No. N89-1 would not have led anyone to fear a change in the two-day delivery standard that would be as sweeping as the one that occurred in 2000 and 2001. For example, a pessimist in Docket No. N89-1 might have feared, at worst, that residents of the San Francisco Bay Area would lose two-day delivery to rural areas in the western states. However, under the definitions proposed in Docket No. N89-1, *no one would have feared that two-day delivery to the Seattle, Portland, Phoenix, and Las Vegas metropolitan areas would be eliminated.* Moreover, no customer would have feared that the service standard for mail from San Francisco to San Diego would change to three days. Mr. Gannon's revised definition, however, allowed precisely these changes to occur, since the Postal Service has eliminated customer need and the availability of reliable air transportation from the definition of two-day First-Class Mail. In fact, Mr. Gannon simply applied a *formula* nationwide with no regard for the needs of customers.

The Postal Service notes that participants in Docket No. N89-1 were on notice that the realignment plan would result in reduced reliance on air transportation. See Motion to Dismiss at 13–14. Consequently, according to the

Postal Service, the recent changes are consistent with the Docket No. N89-1 plan, and any changes to the nature of postal services occurred more than 10 years ago. *Id.*

The Postal Service is incorrect. While participants in Docket No. N89-1 were on notice that the realignment plan would result in reduced reliance on air transportation, participants also understood, consistent with witness Lazerowitz's assurances, that the Postal Service would continue to use air transportation when significant business relationships and mail volume existed. This complaint arose because Mr. Gannon decided to eliminate witness Lazerowitz's criterion, and now customer need and availability of air transportation are not criteria for two-day mail delivery. Travel time by truck is the only criterion for determining the two-day delivery area. The most-recent change in the nature of postal services occurred in 2000 and 2001. The fact that one could describe both the realignment plan reviewed in Docket No. N89-1 and the changes implemented in 2000 and 2001 as "reduced reliance on air transportation" misses the point. The recent changes virtually *eliminate* the use of air transportation for two-day mail. This result was not a possibility in Docket No. N89-1, thanks to witness Lazerowitz's important criterion focusing on customer need.

4. Reliable air transportation exists, but the Postal Service has chosen not to use it.

For obvious reasons, the Postal Service's motion to dismiss does not address the key criterion from witness Lazerowitz's testimony for two-day First-Class Mail that I discussed in section II.B.2., *supra*. That is, the Postal Service has failed to explain how the new definition of two-day First-Class Mail is somehow consistent with the definition reviewed in Docket No. N89-1. The old definition required an assessment of customer need and mail volume and the availability of reliable and timely air transportation before a two-day delivery area could be converted to three-day delivery. Under the new definition, these factors are irrelevant.

Implicit in the motion to dismiss, however, is the suggestion that commercial air transportation is so unreliable in transporting two-day First-Class Mail that customers will be served better with three-day surface transportation. Consequently, as the Postal Service might have argued explicitly, the criterion from Docket No. N89-1 discussed in section II.B.2., *supra*, was rendered moot because no reliable air transportation exists. Regardless of customer need, the argument would go, no reliable air transportation exists, so the two-day delivery area from now on will consist only of destinations within the reach of ground transportation in two days.

At best, Postal Service suggestions are dubious that commercial airlines are providing service that is so unreliable for transporting two-day First-Class Mail as to justify shifting all two-day mail nationwide to ground transportation and changing the delivery standard to three days. The changes in service standards hit the western states particularly hard, yet the airlines offer large numbers of nonstop flights between the major population centers in the West. One of many examples is the route between Oakland, California, and Seattle, Washington. Alaska Airlines offers nine daily nonstop flights from Oakland to Seattle. Southwest Airlines chips in another seven nonstop flights. Both airlines offer robust schedules in the opposite direction as well. These short-haul flights probably tend to carry relatively small amounts of passenger luggage, thus reducing problems with airplanes reaching weight limits. A recent newspaper article in Las Vegas quoted one airline spokesman as unaware about complaints from the Postal Service about airline service.¹⁰ Even if problems exist on some routes, the problems probably are not universally bad on all routes to an extent that justifies a universal, formula-applied "solution" — to eliminate air transportation for two-day First-Class Mail and shift this mail to a three-day delivery standard.

¹⁰ See http://www.lvrj.com/cgi-bin/printable.cgi?lvvj_home/2001/Jul-28-Sat-2001/business/16625337.html.

At a minimum, the Commission should require the Postal Service to document problems with commercial airline transportation on the record. Fundamentally, the public has a right to provide input on whether commercial airline transportation has been causing two-day mail delivery to be so unreliable that the public felt that it would be better served by a change to consistent three-day service. This issue is a major issue affecting the nature of First-Class Mail. I submit that the public would reject this proposal decisively if the Postal Service had bothered to give the public an opportunity to provide input.

To this point, this discussion has assumed the validity of the line of argument implicit in the Postal Service's motion to dismiss that the only type of air transportation available to the Postal Service for transporting two-day First-Class Mail is erratic commercial airline service. In fact, Mr. Gannon's declaration reveals an alternate source of air transportation when the airlines do not provide a sufficient level of service. Mr. Gannon stated that "the Postal Service also experienced problems with commercial air performance that necessitated that we purchase more costly 'dedicated' air transportation to move mail between certain Pacific, Western, and Southwestern cities." Declaration at ¶ 12. Dedicated air transportation presumably is cargo transportation that the Postal Service purchases that is not subject to the many competing demands for aircraft space, weight, and scheduling that airline transportation is. In fact, the recent pact with FedEx to transport mail probably is a form of "dedicated" air transportation. Surely *some* type of air transportation is available between cities that would provide the Postal Service with reliable delivery of two-day First-Class Mail on those routes where commercial airlines may not be fulfilling this need.

Mr. Gannon notes that dedicated air transportation may be "more costly" than airline transportation. *Id.* This comment does not, however, classify dedicated air transportation as a cost-prohibitive solution beyond the realm of permissible discussion. Rather, the cost consideration raises precisely the type of cost-versus-benefit issue for which the statute envisions public input to inform

postal management. Moreover, the Commission has the expertise to perform cost-benefit analyses of postal issues. The tradeoff between “more costly” dedicated air transportation and slower truck transportation is precisely the type of question for which section 3661 mandates a public hearing.

This distinction between “commercial airline transportation” and “air transportation” is critical because the service standard reviewed in Docket No. N89-1 referred to the availability of “air transportation,” not “commercial airline transportation.” Lazerowitz Testimony at 22–23. Nowhere in Mr. Gannon’s declaration or the Postal Service’s motion to dismiss does any discussion appear that could lead one to believe that reliable air transportation of any kind does not exist between any of the cities nationwide for which the service standard changed from two days to three days.

Absent proof that reliable air transportation is not available, two conclusions are inescapable. First, Mr. Gannon’s new two-day service standard described in his declaration represents a change in the definition of two-day service. See Declaration at ¶ 18. The Postal Service removed the criterion that two-day service should be considered when a significant business and volume relationship exists and dependable and timely air transportation is available. Air transportation is now irrelevant, even though reliable air transportation of some sort most likely is available. Two-day First-Class Mail now moves by surface transportation only. Second, the use of the term “air transportation” in Docket No. N89-1, rather than “commercial airline transportation,” did not put the public on notice that the Postal Service might eliminate the use of air transportation to transport two-day First-Class Mail. In 1989 and 1990, let alone 2001, no one, while reading witness Lazerowitz’s testimony, could seriously have imagined that the nation’s fleet of airplanes could not be deployed in a way that would allow for reliable air transportation of two-day First-Class Mail. If the public had had any clue that the changes being proposed in Docket No. N89-1 might lead to the destruction of two-day delivery areas, the outcry would have been substantial. In

reality, Docket No. N89-1 did not litigate the change in the definition of two-day First-Class Mail delivery that is at issue in this complaint because the Postal Service secretly crafted this definition nearly 10 years later.

Moreover, the Postal Service quietly implemented these changes, providing no warning, notice, or other communication to customers except for sending updated Service Standard CD-ROM's to customers on its mailing list. The CD-ROM's contained no cover letters alerting recipients to significant changes on the CD-ROM's. The Commission ruled in Order No. 1312 that "section 403(a) requires that the Postal Service 'plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees.'" Order No. 1312 at 4. The Commission added that "[s]ection 3661(b) is an essential step that Congress decided was necessary under certain circumstances, to carry out the policy requirements suggested by § 403(a)." *Id.* Arguably, the Postal Service has completely failed to promote adequate postal services by failing to inform its customers — in particular, the general public — about the widespread changes in First-Class Mail service standards or to give them an opportunity in a section 3661 proceeding to provide input.

5. The Postal Service no longer considers the needs of customers in determining two-day First-Class Mail delivery areas.

The definition of two-day First-Class Mail service standards litigated in Docket No. N89-1 considered customer need. Participants in Docket No. N89-1 should not have been alarmed by the proposed changes in two-day delivery standards because the standards clearly provided for two-day delivery when customer need existed and reliable air transportation was available.

Customer need no longer is a factor in determining two-day delivery areas. *Mr. Gannon's declaration contains not one word about customer need as a criterion for setting a two-day delivery area. Instead, Mr. Gannon applied a formula that considered truck travel times only. Declaration at ¶ 18. The Postal Service's new policy of not considering the needs of customers represents a*

substantial departure from the standard for two-day delivery announced and litigated in Docket No. N89-1. Not surprisingly, ignoring the needs of customers also leads to inadequate mail service, as I discuss in section II.C., *infra*.

6. Other evidence suggests that the changes implemented in 2000 and 2001 do not constitute a mere implementation of the service standards reviewed in Docket No. N89-1.

For the reasons explained previously, the changes implemented in 2000 and 2001 *do not constitute an implementation of the service standards reviewed in Docket No. N89-1* because the Postal Service recently changed the definition of two-day First-Class Mail service standards.

Two other points support my contention. First, Mr. Gannon stated that “we also concluded that any implementation of Phase 2 (the changes between 2-Day And 3-Day service standards) that had occurred had been sketchy at best.” Declaration at ¶ 13. To the extent that Mr. Gannon intends to suggest that no changes occurred as a result of the realignment plan reviewed in Docket No. N89-1, he is mistaken. The realignment plan led to *extensive* downgrades in service standards from two days to three days, certainly in the West but elsewhere as well.

Second, my January 27, 2001, Freedom of Information Act request, referenced in paragraph 38 of my complaint and in paragraph 25 of Mr. Gannon's declaration, requested a copy of every document and other record that, *inter alia*, explains reasons or justifications for any change in service standards implemented in 1998, 1999, 2000, or 2001 for mail destined to the San Francisco Bay Area SCF's of San Francisco, Oakland, and San Jose. If the Commission is to believe the story that the Postal Service asserts in its motion to dismiss that the Postal Service was merely implementing a realignment plan reviewed in Docket No. N89-1, why did the Postal Service not supply any documents from Docket No. N89-1 in response to my FOIA request? These documents clearly would have been responsive to my FOIA request. Although I am reluctant to

assume that the Postal Service complied with FOIA in responding to my FOIA request,¹¹ the Postal Service's failure to produce a single document relating to Docket No. N89-1 suggests that the Postal Service invented this defense after I filed this complaint with the Commission.

Suppose, however, that the Postal Service did truly believe that it was complying with the realignment plan reviewed in Docket No. N89-1. In response to my FOIA request, the Postal Service should have provided documents related to Docket No. N89-1. The Postal Service should not be surprised that my complaint does not recognize a relationship between the current changes and the realignment plan reviewed in Docket No. N89-1.

7. Even if the recent changes in service standards were construed as merely an implementation of a realignment plan duly reviewed in Docket No. N89-1, too much time has passed for the Postal Service to justify failing to obtain an advisory opinion.

In seeking to dismiss this complaint, the Postal Service is clinging to a desperate hope that the Commission will view the nationwide changes in service standards and the redefinition of two-day mail service as simply a belated implementation of the realignment plan reviewed in Docket No. N89-1. Even if the Commission were to conclude that the recent changes are merely an implementation of the realignment plan reviewed in Docket No. N89-1, the Commission nevertheless should rule that too much time has passed between the advisory opinion and the implementation. Therefore, the Postal Service had a duty to submit this proposal for an advisory opinion before implementing it.

In Order No. 1312, the Commission ruled that "as to substantially nationwide changes in the nature of postal services, the Postal Service can not adequately plan, develop, promote, and provide adequate and efficient postal

¹¹To date, the Postal Service has ignored my appeal of the Postal Service's decision to withhold information in response to this FOIA request. I submitted this appeal on March 10, 2001. Under FOIA, a response was due within 20 working days. 5 U.S.C. § 552(a)(6)(A)(ii).

services without the input and review provided through a § 3661(b) proceeding because an essential step in the process would be omitted.” Order No. 1312 at 4. Few people would argue that the Internet has changed the speed of business. With e-mail and Web sites, people expect information fast. These days, hardly a day goes by without someone in the postal world asserting that the electronic age renders the current statutory scheme governing the Postal Service obsolete. Regardless of whether the statute is obsolete or not, one conclusion is clear: the world in which the Postal Service operates its core business, delivery of hard-copy First-Class Mail, is much different now than it was in 1989 and 1990 while Docket No. N89-1 was being litigated.

The changes in First-Class Mail service standards implemented in 2000 and 2001 fundamentally change the nature of First-Class Mail service. Particularly in the western states, First-Class Mail now is slower than it was previously. Does this change meet the needs of postal customers? Nationally, does the Postal Service’s decision to use truck transportation for three-day delivery instead of dedicated air transportation for two-day delivery represent a proper balance of costs and benefits? Do these changes in First-Class Mail service standards undermine the competitiveness of First-Class Mail and further threaten the Postal Service’s ability to compete in the delivery marketplace? We do not have answers to these essential policy questions because the Postal Service deprived its customers of a public hearing to evaluate the proposed changes in service standards and to answer these questions.

The decision whether too much time has passed between an advisory opinion and implementation requires a review of all the circumstances. In the earlier parts of the 20th century, an advisory opinion might not have become stale in 10 years. However, the rapid changes that occurred during the 1990’s potentially rendered conclusions from Docket No. N89-1 old and outdated. For most people, the Internet and e-mail did not even exist in 1990; today, they dominate communications. The Postal Service cannot dispute the changes that

have occurred since 1990. In fact, in commenting in Docket No. C2001-1 on why fewer mail-processing facilities process outgoing mail on holidays in 2001 than prior to 1988, the Postal Service stated that “the mailing environment as it existed prior to 1988 is not the mailing environment of today, and the Postal Service focuses on addressing and resolving the issues that it must confront in today’s world, not yesterday’s.”¹² The advisory opinion issued in Docket No. N89-1 focused on issues in yesterday’s world, not today’s. Even if the changes implemented in 2000 and 2001 represent a mere belated implementation of the realignment plan reviewed in Docket No. N89-1, the underlying *purpose* of section 3661 compelled the Postal Service to seek an updated advisory opinion to reflect changed conditions.

A 10-year-old advisory opinion can become stale in another way. In 10 years, *mailers change*. *New businesses form, and others close*. More fundamentally, some mailers retire or succumb to old age, while others come of age. A fresh request for an advisory opinion would have allowed a new group of mailers to provide input in the Commission proceeding. These mailers reflect today’s mailers — those people whom changes in the nature of postal services will affect. This policy consideration also confirms that the Postal Service could not properly have relied on an 10-year-old advisory opinion.

The Commission and Postal Service should consider another important fact. In Docket No. N89-1, the Commission did not agree with the Postal Service’s contention that customers prefer consistency over speed — that is, that customers would prefer to increase the standard time to delivery in favor of greater consistency at the slower standard. PRC Op. N89-1 at 33. In fact, the Commission called the Postal Service’s conclusion “specious.” *Id.* The Postal Service disregarded the Commission’s advice and proceeded to implement the realignment plan anyway. Ironically, the conclusion that the Commission reached in Docket No. N89-1 may hold with even greater force today, as speed

¹²Docket No. C2001-1, Response to DFC/USPS-9, filed June 12, 2001.

surely is a top criterion for postal customers in 2001. In this sense, the Commission's advisory opinion would not be stale. However, the purpose of an advisory opinion is to review a proposed change in the nature of postal services under current conditions, with input from current mailers, and the only way to obtain adequate public input is to conduct the review contemporaneously with the changes, not 10 years prior.

In sum, regardless of whether the new service standards represent a mere implementation of the realignment plan reviewed in Docket No. N89-1, the Postal Service's main argument in support of the motion to dismiss has no merit. The Postal Service had a statutory obligation to obtain an advisory opinion before redefining the service standard for two-day First-Class Mail and implementing nationwide changes in service standards.

C. FIRST-CLASS MAIL SERVICE IS NOT ADEQUATE.

Section 3661(a) of title 39 requires the Postal Service to provide adequate and efficient postal services. Section 3662 grants the Commission jurisdiction to hear a complaint that alleges that the Postal Service is not providing "postal service in accordance with the policies of this title." This complaint alleges that the Postal Service is not providing adequate service. Complaint at 4, ¶ 20; see *also* Complaint at 4–6, ¶¶ 22–32. Therefore, the Commission has jurisdiction to hear this complaint.

At this stage of the proceeding, I do not need to prove my allegation that First-Class Mail service is not adequate. Order No. 1307 at 9. However, I must demonstrate that my belief is reasonable. *Id.* I have easily satisfied my burden.

1. Adequacy of service is related to customer need.

Any evaluation of the adequacy of service must consider customers' needs. Service is not adequate if it does not meet customers' needs.

2. In changing service standards, the Postal Service has not considered the needs of customers.

In evaluating my allegations of inadequate service, the Commission should keep in mind that the Postal Service does not know, and certainly did not consider, the needs of customers in redefining two-day delivery areas nationwide. The Postal Service's motion to dismiss this complaint should be denied because the Postal Service has failed to rebut my allegations. Several examples of the failure to consider the needs of customers exist.

First, and most revealing, the Postal Service stated that it "lacks sufficient information" to confirm or deny paragraph 34 of my complaint, where I alleged that "[b]usiness and residential customers need two-day delivery for First-Class Mail travelling between many SCF's for which the Postal Service changed the service standard from two days to three days in 2000 and 2001." Complaint at 7, ¶ 34; Answer at 9, ¶ 34. The Commission may not dismiss my reasonable allegations of inadequate service when the Postal Service cannot even comment on whether customers need two-day delivery between SCF's for which the Postal Service changed the service standard from two days to three days. If the Postal Service has not assessed customers' needs, it cannot assert that service is adequate.

Second, at paragraph 18 of his declaration, Mr. Gannon articulated his "formulaic" approach to defining two-day delivery areas. If the truck can reach the destination in 12 hours or fewer, the delivery standard will be two days. Otherwise, the delivery standard will be three days. Nowhere in his declaration did Mr. Gannon explain how the needs of customers entered into his decisions. Indeed, consideration of customer need appears incompatible with his definition of two-day delivery standards and his formula. The only conclusion from the materials that the Postal Service has submitted in support of its motion to dismiss is that the Postal Service did not consider the needs of customers in implementing these changes in service standards. Therefore, the Postal Service

has failed to rebut any allegations of inadequate service. Furthermore, given the Postal Service's statutory obligation to provide adequate service, Mr. Gannon's definition of two-day delivery areas may be arbitrary.

Third, the Postal Service's own survey evidence from Docket No. N89-1 indicates that customers need two-day First-Class Mail service from Seattle to San Francisco. Complaint at 5, ¶ 26; Answer at 7, ¶ 26. Customers lost this two-day service in the recent "realignment." The Postal Service does not explain how the revised service standards meet these documented customer needs.

In sum, the Postal Service cannot seriously assert that it is providing adequate service because it failed to consider the needs of customers when redefining the service standard for two-day First-Class Mail delivery and implementing nationwide changes in service standards.

3. My allegations of inadequate service are reasonable.

At the complaint stage, I am obliged only to state reasonable allegations that the Postal Service has violated the policies of the Act. Order No. 1307 at 9. I do not need to prove my complaint before the Commission decides whether to hear the complaint. *Id.* I have provided several reasonable allegations by way of specific examples.

First, in my complaint, I have provided several examples of SCF's between which three-day delivery standards are not likely to be adequate. These SCF's generally include San Francisco Bay Area SCF's as origin SCF's and major metropolitan areas in the West as destination SCF's. Complaint at ¶ 23. Importantly, I did not limit my allegation to these SCF's. *Id.*

Second, I have alleged that a substantial volume of remittance mail travels from California to Arizona and SCF Las Vegas NV. See Complaint at 5, ¶ 24 and Answer at 6, ¶ 24. Customers tend to need fast service for remittance mail.

Moreover, the speed with which remittance mail is delivered may have significant financial consequences for creditors.

Third, I have alleged that at least one major California bank services California customers by First-Class Mail from operations centers in Arizona and Oregon. Complaint at 5, ¶ 25; Answer at 7, ¶ 25. This bank is Wells Fargo Bank. Mail related to bank and credit-card accounts tends to contain important financial information whose delivery time concerns postal customers, including banks themselves. A recent newspaper article in the *Reno Gazette-Journal* confirms that Wells Fargo customers noticed, and were concerned by, the slowdown in mail delivery to Reno.¹³

Fourth, as explained previously, survey evidence from Docket No. N89-1 indicates that customers need two-day First-Class Mail service from Seattle to San Francisco. Complaint at 5, ¶ 26; Answer at 7, ¶ 26. The new service standard is three days.

Fifth, some customers receive three-day service to and from their state capital. Complaint at 6, ¶ 28; Answer at 7, ¶ 28. Customers tend to have business relationships with state agencies, including the Department of Motor Vehicles, tax agencies, and departments that provide entitlement payments.

Sixth, customers residing in neighboring SCF's receive three-day service. Complaint at 6, ¶¶ 29–31; Answer at 7, ¶¶ 29–31. Nearby postal customers tend to have business and personal relationships with each other, and three-day mail delivery is not likely to be adequate.

A few comments concerning three-day delivery standards for adjacent SCF's are necessary. Mr. Gannon attempts to justify the new three-day delivery standard for mail from Ashland, Oregon, to Yreka, California — communities that are located 33 miles apart — by explaining that the mail actually travels 1,313

¹³ See <http://www.rgj.com/news/stories/news/996825028.php>.

miles. See Declaration at ¶¶ 34 and 35. While some mail consolidation for processing and transportation is necessary and efficient, consolidation should not lead to three-day delivery standards for nearby communities. Two-day standards may be understandable under the circumstances, but three-day delivery standards are inadequate. Mr. Gannon also explains why the delivery standard for mail from Yreka to Ashland (the reverse direction) is overnight. If the Postal Service had been changing overnight standards, Mr. Gannon suggests that this instance of non-reciprocal service standards would have been resolved by making Yreka to Ashland a three-day standard as well. Declaration at ¶ 36. Mr. Gannon has provided a perfect example of why the Postal Service needs the intelligence that the public input and Commission advice from a section 3661(b) proceeding provide.

Mr. Gannon also creates the impression that the volume of mail at issue is not significant. He states that only two trays of mail per day travel from SCF Medford OR 975, which includes Ashland, to SCF Redding CA 960, which includes Yreka. Declaration at ¶ 34. These SCF's comprise rural areas with small populations. We have no basis against which to measure the significance of two trays of mail for a nearby SCF. A better measure of volume would be on something approximating a per-capita basis or in relation to volume from SCF Medford OR 975 to other destinations. Two trays of mail for this area might constitute a significant volume representing the correspondence that one would expect between nearby communities. If asked, the residents of this area probably would consider a three-day delivery standard inadequate. Insufficient information exists on the issue of three-day delivery standards for adjacent SCF's to justify a determination of the merits of the allegation at the motion-to-dismiss stage.

All these allegations represent a reasonable belief that the revised service standards lead to service levels that are not adequate.

4. Analysis of adequacy of service also must consider whether customers can afford options for faster delivery.

As I explain in greater detail in section IV, *infra*, customers sending mail from, say, San Francisco to San Diego, Phoenix, Seattle, Portland, or Las Vegas have only one basic choice for their one-ounce First-Class letters: 34 cents for delivery in three days. If they want faster service, they must upgrade to Priority Mail for \$3.50. The next option is overnight or two-day Express Mail for \$12.45. Some customers on fixed or limited incomes simply cannot afford Priority Mail or Express Mail. Therefore, adequacy of service must consider that some customers who use First-Class Mail service have no other options. Is three-day delivery to destinations where customers need two-day delivery adequate for customers who cannot afford any alternatives? By bypassing the advisory-opinion process, the Postal Service failed to receive public input and Commission advice that would have evaluated this serious and fundamental question.

5. I do not need to state all possible examples of a violation of a policy of the Act.

To sustain a complaint, I have no obligation to state all possible examples of violations of the Act. Rather, I can sustain a complaint if I state a sufficient number of reasonable allegations to implicate a policy of the Act.

The Postal Service attacks my complaint by alleging that my examples of inadequate service constitute, at most, individualized and localized service issues. As I have explained previously, my examples are simply examples of widespread problems. With approximately 22,250 origin-destination ZIP Code pairs having been downgraded from two-day delivery to three-day delivery, I cannot even begin to list all the relevant examples in the complaint. I have, however, identified the types of issues of inadequate service that these changes implicate. Thus, I have satisfied this requirement.

6. My allegations of inadequate service do not represent individual or localized issues that the Commission may not consider under Rule 82.

Rather than considering my allegations of inadequate service in their totality, the Postal Service separates the allegations into individual components, then moves for dismissal of each under Rule 82.

Rule 82 provides, in pertinent part:

The Commission shall entertain only those complaints which clearly raise an issue concerning whether or not rates or services contravene the policies of the Act; thus, complaints raising a question as to whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user or with regard to an individual, localized, or temporary service issue not on a substantially nationwide basis shall *generally* not be considered as properly raising a matter of policy to be considered by the Commission.

Rule 82 (emphasis added). Ignoring the word "generally," the Postal Service argues that my examples of inadequate service constitute individual and localized service issues that are not on a substantially nationwide basis. Therefore, the Postal Service moves to dismiss.

The statute grants the Commission jurisdiction to hear complaints alleging that the Postal Service is not providing services consistent with the policies of the Act. Rule 82 represents the Commission's attempt to describe distinguishing characteristics of complaints that do and do not implicate policies of the Act. Rule 82 exists to screen out complaints that do not rise to the level of alleging a violation of the Act. Thus, under Rule 82 the Commission will decline to hear complaints that involve individual mailers or service problems in a few cities, as these complaints are not likely to implicate policies of the Act.

Under Rule 82, the Commission will not automatically dismiss a complaint that states only individual, localized, or temporary service issues. Rather, the test, as signalled by the word "generally," is whether the complaint properly raises a matter of policy for the Commission to consider.

No question exists that the changes in service standards that the Postal Service implemented in 2000 and 2001 hit the western states disproportionately

hard. Despite service-standard upgrades in other parts of the country, over 99 percent of the changes in the Pacific Area were downgrades from two days to three days. Complaint at 11–12, ¶ 54; Answer at 16, ¶ 54. Over 79 percent of the changes in the Western Area were downgrades from two days to three days. Complaint at 12, ¶ 55; Answer at 16, ¶ 55. The concerns about adequacy of service are obvious. Texas cities, which fall into the Postal Service's Southwest Area, also took significant hits to their two-day delivery areas.

In addition to the widespread negative effects in the western United States, downgrades occurred nationwide. Often, the downgrades involved large destination cities to which a significant volume of mail probably travels. For example, two-day delivery to Chicago disappeared for many customers in New York, New Jersey, Connecticut, Massachusetts, Florida, and Alabama as well as already-beleaguered customers in Colorado, Utah, and Texas. Many customers in Ohio, New Jersey, New York, and Connecticut lost two-day service to Atlanta, as did Texas customers. Chicago customers lost two-day service to the Boston area. All these changes, and many more, raise questions about adequacy of service because the Postal Service made these changes without considering the needs of customers. The concerns about adequacy of service are nationwide, and paragraph 23 of the complaint allows for many more ZIP Code pairs than those specifically listed to raise an issue about the adequacy of service.

As paragraph 31 of the complaint confirms, examples of three-day service between adjacent SCF's are not limited to those cited in the complaint at paragraph 30. Complaint at 6, ¶ 31; Answer at 7, ¶ 31.

Thus, even by the Postal Service's reading of Rule 82, my complaint alleges facts that raise service issues on a substantially nationwide basis.

However, even if the Commission focuses on the western states, my complaint implicates policies of the Act. The word "nationwide" is not defined. It might refer to population. Including Texas but excluding Hawaii, the western

states comprise 30 percent of the nation's population.¹⁴ If "nationwide" means geographic area, the affected states include 57 percent of the nation's land.¹⁵ This figure includes Alaska, where residents receive three-day mail service to and from their state capital. If Alaska is excluded, the western states comprise 48 percent of the nation's land.¹⁶ However, whether 30 percent, 48 percent, or 57 percent meets the definition of "substantially nationwide" is not the issue. Rather, the test, under section 3662 and Rule 82, is whether my allegations that the Postal Service is providing inadequate service raise policies of the Act. I submit that the answer is yes. The Commission cannot ignore the needs of such a large portion of the country for adequate postal services. Inadequate service in the western United States does not comprise a "localized" problem for purposes of Rule 82.

In addition, when evaluating a complaint under Rule 82, the Commission must consider the nature and magnitude of the problem; a rigid mathematical analysis to determine whether the number of people or number of square miles affected constitutes "substantially nationwide" will not, in all cases, lead to a correct determination of whether a complaint raises policies of the Act.

The Commission also should consider the totality of the circumstances. Here, the Postal Service has changed the nature of postal services without first requesting an advisory opinion. These changes have led to the allegation that *service is not adequate. Moreover, the criteria for two-day delivery that are the subject of this complaint do not consider the needs of customers. Thus, the new criteria arguably raise an adequacy-of-service issue per se. Under the totality of the circumstances, my complaint raises a valid adequacy-of-service issue.*

Another sound approach exists for determining under Rule 82 whether a complaint raises policies of the Act. This complaint arose, in part, because the

¹⁴2000 United States Census.

¹⁵*The World Almanac and Book of Facts* (New Jersey, 2001).

¹⁶*Id.*

Postal Service redefined the service standard for two-day mail delivery without first seeking an advisory opinion under section 3661(b). Without the intelligence and public input gained from this process, the Postal Service implemented changes that raise questions about adequacy of service. For the sake of argument, assume that the adequacy-of-service issues are limited to the western states and that service problems in the western states do not constitute a “substantially nationwide” problem. If the advisory-opinion process had revealed that the new standard for two-day delivery would rob customers in western states of most of their two-day delivery area, without considering their needs, would the Commission have ignored this problem because the problem was not “substantially nationwide”? I doubt it. In a section 3661(b) proceeding, the Commission would have carefully considered the needs of customers in the western states, and the Commission would have raised concerns that the proposed service standards would not provide postal customers with adequate service.

If the Commission would have considered a service problem in a section 3661(b) proceeding, the Commission should consider a complaint under section 3662 that raises that service problem if the complaint arose, in part, because the Postal Service failed to obtain an advisory opinion before implementing the service changes at issue. That advisory opinion would have created an opportunity for the Commission and the public to consider that service issue. From a policy perspective, a section 3662 proceeding to consider the service issues helps to remedy the harm to the public from the Postal Service’s failure to request an advisory opinion. I am not necessarily suggesting a general rule. Rather, in a case such as this one where parties can argue about whether the adequacy-of-service issue is “substantially nationwide” and where the Postal Service failed to seek an advisory opinion, examining whether the Commission would have considered the service issues in the section 3661(b) proceeding is instructive for determining whether the service complaint implicates policies of the Act.

**D. THE CHANGES IN FIRST-CLASS MAIL SERVICE STANDARDS
UNDULY AND UNREASONABLY DISCRIMINATE AMONG USERS
OF THE MAIL.**

Section 3662 grants the Commission jurisdiction to hear a complaint that alleges that the Postal Service is not providing “postal service in accordance with the policies of this title.” The Act prohibits the Postal Service from unduly or unreasonably discriminating among users of the mail, except as specifically authorized by title 39. 39 U.S.C. § 403(c). This complaint alleges that, compared to the two-day delivery areas provided to users of the mail in other states, the changes in First-Class Mail service standards unduly and unreasonably discriminate against users of the mail located in California and other western states, in a manner not specifically authorized by title 39, by depriving them of two-day First-Class Mail service to a reasonable number of neighboring states with which they have significant contacts and need two-day First-Class Mail service. Complaint at 9, ¶ 43. Therefore, the Commission has jurisdiction to hear this complaint.

As I explained in section II.B., *supra*, the Postal Service has changed the criteria for two-day First-Class Mail. Availability of air transportation no longer is an important factor. Rather, in most instances, the Postal Service has shrunken two-day delivery areas to include only destinations within the reach of ground transportation. If a destination is beyond the reach of ground transportation in two days, the Postal Service probably changed the service standard to three days. With customer need off the table, this “realignment” process was, as Mr. Gannon, stated, formulaic. See Declaration at ¶ 18.

Previously, the Postal Service determined two-day delivery areas by evaluating (1) customers’ need for two-day First-Class Mail service and (2) the availability of reliable air transportation. See section II.B., *supra*. The old criteria were consistent with general notions of universal service: customers received two-day mail service to destinations in their general geographic area with whom they had substantial contacts. On the East Coast, customers receive two-day

service to many neighboring states. Customers on the East Coast have substantial contacts with neighboring states. The Postal Service uses surface transportation to reach these destinations. In the western states, customers also have substantial contacts with neighboring states; remittance processors and banks provide two of many examples. See Complaint at 5, ¶ 24 and Answer at 6, ¶ 24. In the West, however, distances are much longer.

The Postal Service has changed the criteria for two-day First-Class Mail. Distance, not customer need and the availability of air transportation, now drive two-day delivery areas. These new criteria mean that postal customers in the western states now receive two-day First-Class Mail service to very few surrounding states compared to the service that postal customers residing in other parts of the country receive. The sole reason for the disparate treatment is distance.

The new criteria for two-day First-Class Mail service standards unduly and unreasonably discriminate against users of the mail located in California and other western states, in a manner not specifically authorized by title 39. Postal customers on the East Coast receive two-day First-Class Mail service to areas where they need two-day service; customers in California and other western states do not. Particularly when viewed against the backdrop of this country's long commitment to universal postal services, *see, e.g.*, 39 U.S.C. § 101, the inordinate focus on distance constitutes undue and unreasonable discrimination against users of the mail in California and other western states. Residents of California and other western states pay the same rates for First-Class Mail as everyone else, yet we receive a lower level and value of service, as measured by our needs, than customers residing elsewhere in the country.

The Postal Service's discussion of this discrimination issue obscures a central point. See Motion to Dismiss at 32–39. Despite the difficulties inherent in operating a national postal system in a large and geographically diverse country, policies that consider the needs of customers will lead to better results than

policies that do not. Ignoring the needs of customers, as has occurred here, leads to services that fulfill customers' needs to a varying degree based on where those customers chose to live. Section 403(c) does not permit service criteria that dismiss the possible use of available air transportation and provide service levels that depend solely on distance. Such service criteria have an inherently discriminatory effect.

The Postal Service pretends to read my complaint as suggesting that the Postal Service should have adopted one set of guidelines for California and other western states and another set of guidelines for the remainder of the nation. Motion to Dismiss at 33. This suggestion is silly. A single guideline that considers the needs of customers as well as distances — such as witness Lazerowitz's guideline reviewed in Docket No. N89-1 — will lead to nationwide service that is not undue or unreasonably discriminatory.

The Postal Service notes that the Commission did not conclude in Docket No. N89-1 that the proposed service standards were undue or unreasonably discriminatory. Motion to Dismiss at 36. This argument appears again when the Postal Service asserts that the two-day service standard at issue in this complaint was reviewed in Docket No. N89-1 and was not found to be undue or unreasonably discriminatory "on its face." *Id.* at 38–39. These assertions are merely another incarnation of the fiction under which the Postal Service is operating throughout the entire motion to dismiss. In implementing the changes in service standards in 2000 and 2001, the Postal Service changed the definition of the two-day delivery area. The new definition is not the definition that the Commission and the public reviewed in Docket No. N89-1. I am not surprised that the Commission did not find the previous definition of the two-day delivery area to be discriminatory because that definition considered the needs of customers and the availability of reliable air transportation. The Commission has issued no opinion thus far on the current definition of two-day delivery, so Docket

No. N89-1 provides no precedent on the discriminatory nature of the new definition.

The Postal Service asserts that “[p]aragraph 41 of the Complaint alleges that the shift by the Postal Service of more 2-day service standard First-Class Mail from air to surface transportation unduly and unreasonably discriminates against California and Western mail users.” Motion to Dismiss at 34. The Postal Service then proceeds to defend against this argument. Once again, we have an example of the fiction present throughout the motion to dismiss. Paragraph 41 of the complaint reads:

The criteria and process that the Postal Service employed to change First-Class Mail service standards in 2000 and 2001 do not ensure that the revised standards will not unduly or unreasonably discriminate against users of the mail located in California and other western states, in a manner not specifically authorized by title 39.

The Postal Service has invented its own paragraph 41. In any event, I should point out that nowhere do I complain about shifting “more” two-day mail from air transportation to surface transportation. I am not concerned about the method used to transport two-day mail. However, I am concerned when two-day mail, however it is transported, is shifted to a three-day service standard.

Finally, in attempting to label the issues in this complaint as merely localized issues, the Postal Service asserts that this complaint would lead the Commission to “step into the shoes of postal transportation managers” and “second-guess literally hundreds of thousands” of truck-versus-plane decisions. Motion to Dismiss at 38. This alarmist attitude does not help in resolving matters of national import. This complaint would lead the Commission to do what it would have done in hearing the request for an advisory opinion that the Postal Service should have sought. The Commission would have evaluated the national policy, perhaps focusing on some case studies to evaluate the effects of the policy. The impetus of this complaint is the new national definition of the two-day standard for First-Class Mail, not every decision implemented under this national

policy. The focus in this complaint on specific examples was necessary for stating a valid complaint.

In sum, the serious allegations of undue and unreasonable discrimination against a substantial number of users of the mail implicate a policy of the Act and provide the Commission with jurisdiction to hear this complaint.

III. MOTION TO AMEND COMPLAINT

On the basis of my review of Mr. Gannon's declaration, I am filing a motion to amend my complaint to allege violations of 39 U.S.C. §§ 101(e) and (f).¹⁷ Section 101(e) states:

In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

Section 101(f) states, in part:

In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service.

These provisions of the Act provide the Commission additional grounds on which to sustain this complaint. The new definition of two-day First-Class Mail delivery areas shifts mail to three-day delivery if surface transportation cannot deliver it in two days. This definition does not contemplate use of air transportation for two-day mail. The disastrous consequences of this definition are abundantly clear for the western states. Section 101(e) requires the Postal Service to give "highest consideration" to the "most expeditious" transportation and delivery of important letter mail. The new definition of two-day delivery areas does not give any consideration, let alone "highest consideration," to the "most expeditious" transportation methods.

¹⁷Douglas F. Carlson Motion for Leave to Amend Complaint, dated August 11, 2001.

Moreover, by indiscriminately selecting surface transportation for two-day mail and applying a formula nationwide, “[i]n selecting modes of transportation” the Postal Service is not giving “highest consideration to the prompt and economical delivery of all mail,” as section 101(f) requires.

To the extent that the new service standards for two-day First-Class Mail give greater priority to consistency than speed, see Declaration at ¶¶ 18 and 27, these goals arguably are inconsistent with sections 101(e) and 101(f). Section 101(e) requires the Postal Service to give “the highest consideration” to the requirement for “most expeditious” transportation and delivery of important letter mail. The phrase “the highest consideration” requires that expeditious transportation receive a higher priority in decision-making than any other criterion. Other criteria may be considered, but expeditious transportation receives highest priority. Shifting mail from air transportation for delivery in two days to surface transportation for delivery in three days, even in the name of greater consistency, violates section 101(e). This change also violates section 101(f), which requires the Postal Service to give “highest consideration” to prompt and economical delivery of mail. The Postal Service has not alleged that air transportation is too expensive to be economical, and nothing in Mr. Gannon’s declaration explains how these changes to slow delivery of 3.4 billion pieces of First-Class Mail are consistent with section 101(f). Complaint at 11, ¶ 53; Answer at 15, ¶ 53. The amended complaint will provide additional grounds for Commission jurisdiction.

IV. ELIMINATION OF AIRMAIL SERVICE: A HISTORICAL PERSPECTIVE

A brief look at history may help to underscore the significance of the recent change in the nature of postal services. Prior to 1976, customers sending First-Class Mail could choose between ordinary First-Class Mail service and airmail. In 1976, the rate for airmail was only four cents higher than the rate for

ordinary First-Class Mail.¹⁸ When the Postal Service eliminated separate airmail service, much ordinary First-Class Mail already was moving by air.¹⁹ In proposing to eliminate separate airmail service, a Postal Service witness stated that “[w]e have now reached the point where we have the capability of providing service to first-class mail which, on a national basis, will regularly equal or exceed airmail service performance[.]”²⁰ Airmail service had a delivery standard of overnight or two-day service.²¹

In some ways, postal services in western states are now less sophisticated, and less adequate, than they were when airmail existed as a separate service. Presently, customers sending mail from, say, San Francisco to San Diego, Phoenix, Seattle, Portland, or Las Vegas have only one basic choice for their one-ounce First-Class letters: 34 cents for delivery in three days. If they want faster service, they must upgrade to Priority Mail for \$3.50. The next option is overnight or two-day Express Mail for \$12.45. Customers’ options in 2001 for delivery of correspondence or bill payments in two days are not attractive and certainly are not low in cost.

When airmail existed, customers unsatisfied with ordinary First-Class Mail had an option: they could upgrade to airmail service for just pennies more than the price of a basic First-Class postage stamp. Eliminating airmail service seemed justified at the time because First-Class Mail was receiving service as good as, or even better than, airmail service.²²

The recently implemented service standards in the western states seem to have destroyed the premise upon which elimination of airmail service was justified. In fact, if the Postal Service had bothered to inform customers about these changes in their service standards, one could imagine that customers

¹⁸PRC Op. R75-1.

¹⁹Docket No. N75-2, Direct Testimony of Joseph J. Jones at 3.

²⁰*Id.* at 6.

²¹*Id.* at 1.

²²*Id.* at 6.

might now desire a return to a separate airmail service so that they could receive two-day service without spending \$3.50 on Priority Mail.

The birth of airmail was a major event in postal history. Airmail accelerated cross-country communications. The elimination of separate airmail service in 1976 arguably was a watershed event as well, as it reflected a normalization of the use of air transportation for our nation's First-Class Mail. At least in the western states, the recent changes in service standards appear to be another major event in postal history. Unfortunately, these changes are a step *backwards* to an earlier day when air transportation was not used to move a significant portion of mail and when airmail was not available as an upgrade option. These changes also represent an abandonment of a commitment to provide fast mail service using the best available technology and modes of transportation. In the post-2001 postal world, customers in the western states — and many other states as well — will receive three-day mail service to most destinations, rather than two-day service, and they have no opportunity for a reasonably priced upgrade to two-day service.

This historical perspective confirms that yes, indeed, the Postal Service has implemented a change in the nature of postal services that has affected service on a nationwide or substantially nationwide basis. In enacting section 3661, Congress envisioned Commission involvement and public input into a monumental decision such as this one. The Commission would serve the public well by exercising its discretion to hear this complaint.

V. CONCLUSION

I have amply demonstrated that the Commission has jurisdiction on several grounds to hear this complaint. The final question is whether the Commission should exercise its discretion to hear this complaint.

Few issues concerning postal services are more fundamental than the delivery standards for First-Class Mail. These standards drive the speed of mail delivery and determine whether customers can receive the service that they need for 34 cents or \$3.50 (Priority Mail) or \$12.45 (Express Mail). Many customers on limited incomes can afford only basic First-Class Mail service, so changes in service standards may effectively deprive them of services. The subject matter of this complaint should lead the Commission to exercise its discretion to hear the complaint.

The Commission also should consider issues of policy and procedure. The Postal Service redefined the delivery standard for First-Class Mail without obtaining the advisory opinion required under section 3661(b). The Postal Service deprived the public of one of its few opportunities to provide input on changes to postal services. By violating proper procedure, the Postal Service harmed the public. The Commission can help to undo some of the damage by hearing this complaint, thus giving the public an opportunity to express views and concerns that the Commission will incorporate into a public report.

Finally, these changes in service standards are a major issue in the West. I am aware of nine front-page newspaper articles revealing these changes in service standards to the public.²³ Articles appeared in at least four other newspapers as well.²⁴ One newspaper published an editorial cartoon mocking the new service standards.²⁵ All these articles appeared after I filed my complaint. The independent judgments of nine newspaper editors to place this story on the front page indicate that these changes in service standards are a significant issue for postal customers.

²³*Denver Post*, July 19, 2001; *Oakland Tribune*, July 28, 2001; *Alameda Times-Star*, July 28, 2001; *Daily Review* (Hayward, California), July 28, 2001; *The Argus* (Fremont, California), July 28, 2001; *Tri-Valley Herald* (Dublin, Pleasanton, and San Ramon, California), July 28, 2001; *San Mateo County Times*, July 28, 2001; *Reno Gazette-Journal*, August 3, 2001; and *San Francisco Chronicle*, August 9, 2001.

²⁴*Las Cruces Sun-News* (New Mexico), July 19, 2001; *Ukiah Daily Journal* (California), July 20, 2001; *Las Vegas Review-Journal*, July 28, 2001; and *Stockton Review* (August 8, 2001).

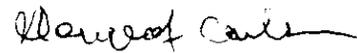
²⁵*San Mateo County Times*, July 28, 2001.

Perhaps most significantly, six newspapers owned by the Alameda Newspaper Group published an editorial on August 6, 2001, calling for the Postal Service to rescind these changes.²⁶ This article appears as Exhibit 1.

In short, postal customers are counting on the Commission to exercise its discretion and hear this complaint. A public report from the Commission, which will inform postal management and provide an influential analysis of this problem for Congress and the public, is the first, and perhaps only, hope that postal customers have of experiencing a restoration of two-day delivery areas that meet their needs.

Respectfully submitted,

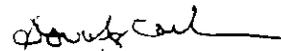
Dated: August 11, 2001



DOUGLAS F. CARLSON

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the Postal Service in accordance with section 12 of the *Rules of Practice*.



DOUGLAS F. CARLSON

August 11, 2001
Omaha, Nebraska

²⁶ *Oakland Tribune*, *Alameda Times-Star*, *Daily Review* (Hayward, California), *The Argus* (Fremont, California), *Tri-Valley Herald* (Dublin, Pleasanton, and San Ramon, California), and *San Mateo County Times*.

EXHIBIT 1

P. Scott McKibben
President and Publisher

Nancy Conway
Vice President,
Executive Editor

Michael Lynch
Executive Vice President
Advertising/Marketing

Patrick Brown
Executive Vice President
Administration

Mario Dianda
Editor

Dennis Miller
Sr. Vice President/Production

Jim Dove
Sr. Vice President/Circulation

Tom Tuttle
ANG Editorial Page Director

Robert Jendusa
Sr. Vice President/Human Resources

OPINION

CONGRESS shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, RATIFIED DEC. 15, 1791

MONDAY August 6, 2001

ANG NEWSPAPERS

LOCAL 7

West loses as postal service cuts back

OUR OPINION

Douglas Carlson of Santa Cruz, a self-appointed thorn in the Postal Service's all-too-vulnerable side, refers to it as "discrimination" against "California and other Western states."

The other part of this postal faux pas that necessitates wearing a clothespin on your nose is the simple fact that without Carlson's persistence we might never have known about this inequity.

The service introduced it surreptitiously by rearranging its out-of-town mail standards earlier in the year without saying a word. Only at Carlson's insistence did the financially troubled independent federal agency admit it had remapped delivery schedules in Western parts of our nation by substituting slow, but steady truck transportation for airline service that had become so unreliable as to often leave mail sacks languishing on runways.

As it turns out, much of the brunt of this brand of postal shortchanging is borne by the Bay Area and other parts of the Pacific Coast and West with which it naturally connects.

About 1.5 billion pieces of first-class mail now get day-late delivery if they're headed to or from much of Arizona, Nevada, New Mexico, Oregon, Washington, etc.

Even which side of the San Francisco Bay you live on can affect delivery as our initial example demonstrates. In this era of e-mail, cell phones and other modes of instant communication, such a difference can obviously put businesses and individuals at a disadvantage.

It can even cost you money if you expect something to be delivered in two days and it arrives in three. Consider credit card companies and other firms — even public utilities — which have become less merciful about late payments than they used to be. In those cases, day-late delivery can result in penalty fees being assessed against the accounts of unwitting consumers who expect Uncle Sam's agent to deliver their payments in two days, not three.

We empathize with the Postal Service's problems — increased competition from e-mail, private delivery

companies and other electronic devices have decreased demand and revenue to the point where up to \$5 billion in losses are projected over two years — but resent this secret attempt to balance its books on our backs.

Western residents are being treated as second-class citizens. The U.S. Postal Service has a responsibility to provide equal service to everyone. How they do it is their problem.

If it wasn't for Carlson, we might not even know about this clandestine attempt to get away with providing us with unequal service. He is to be thanked and praised for bringing it to public attention.

The Postal Service's board of governors now has the task of correcting this inequity forthwith. If it won't or can't, perhaps it's time to open up first-class mail service to competition.

If nothing else, it would almost certainly improve first-class mail service in the West and make it more equitable with the rest of our nation.

What a concept, on-time delivery for two-day mail.

"Neither snow, nor rain, nor heat, nor gloom of night stays these couriers from the swift completion of their appointed rounds."

General Post Office of New York City inscription

EXCEPT in California and other Western states where clandestine changes in the U.S. Postal Service's delivery schedules are apt to result in your letter being delivered a day late.

Put another way, the quasi-public entity that employs the men and women in blue service owes West Coast residents equal service for equal pay.

Send a first-class letter from Boston to Washington, D.C., and it arrives in two days. Send the same letter from San Francisco to San Diego and it takes three days.

Both cost 34 cents, the latest, ever-growing, first-class mail rate implemented early this year. Thus, those of us living in Western states get second-class service at first-class prices.

Call it unfair or unequal treatment.