

Before The  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Complaint on First-Class Mail )  
Service Standards )

Docket No. C2001-3

REPLY BRIEF OF THE  
OFFICE OF THE CONSUMER ADVOCATE

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The Office of the Consumer Advocate (“OCA”), hereby submits its reply brief pursuant to Rule 34 of the Rules of Practice and Procedure of the Postal Rate Commission (“Commission”), 39 C.F.R. §3001.34, and pursuant to the Presiding Officer’s Ruling No. C2001-3/42.<sup>1</sup> Initial briefs were filed on August 12, 2004 in this proceeding by four participants, Mr. Carlson (Complainant), the United States Postal Service (Postal Service), Mr. Popkin for himself, and the OCA.

This complaint proceeding was initiated pursuant to 39 U.S.C. §3662 of the Postal Reorganization Act (“PRA”). This brief responds to the initial brief of the Postal Service and continues to recommend the proposed findings and recommendations as presented in the OCA's initial brief.

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<sup>1</sup> “Ruling Addressing Evidentiary Record Issue and Procedural Schedule,” May 14, 2004.

I. THE POSTAL SERVICE FAILED TO COMPLY WITH §3661 OF THE POSTAL REORGANIZATION ACT

The Postal Service claims it complied with §3661 of the PRA when it implemented in 2000 and 2001 the so-called Phase II of the service standard revisions submitted to the Commission in 1989. (USPS Br. at 4-5.) This argument fails on numerous grounds. As OCA pointed out in the initial brief, the Commission's order initiating this proceeding upon the complaint of Mr. Carlson found that he had made a *prima facie* case that the service standard changes were not part of Phase II of the prior plan submitted to the Commission but an entirely new plan. The Postal Service has not provided any new evidence that undermines Mr. Carlson's initial showing and the issue is thus resolved based upon the Commission's finding in the order initiating this proceeding.

Prior to implementing the so-called Phase II, the Postal Service failed to clear the first hurdle in §3661(b) that requires the plan to be submitted to the Commission "within a reasonable time prior to the effective date of such proposal..." A decade is clearly not a reasonable time. The phrase "reasonable time" is not mere meaningless statutory verbiage but is significant. Unless a plan is submitted within a reasonable time before implementation, review is very likely meaningless. Any plan for change must be reviewed in the context of the time period it will become effective, and the needs of those affected at the time the changes will be made. The delay that even the Postal Service brief admits was a "belated completion" and completed much later than "had

initially been anticipated" (USPS Br. at 5 and 15.) is beyond all reasonable time limits.<sup>2</sup> That fact alone, even if the plan had not been revised, would have been sufficient to require a re-submittal of the plan for contemporaneous Commission consideration and the gathering of mailer input and public review of the plan through the required hearing process.

The Postal Service re-argues the allegations in the Complaint, previously decided by the Commission, that Phase II is neither a change, nor a departure, nor an abandonment of the criteria that the Postal Service announced in Docket No. N89-1. (USPS Br. at 5.) To the contrary, the Postal Service did abandon, depart and change the criteria considered in Docket No. N89-1 in favor of the twelve hour drive-time rule. This radically changed the ZIP Code pairs affected by the service standard changes. Further, the Postal Service abandoned its plan to consult with all affected mailer groups (See Docket No. N89-1, T-2, App. A (Plan)). It also abandoned its agreement to discuss the modifications with bankers before implementing the service standard changes (OCA/USPS-8 (Tr. 376-77)) or publicizing the changes in advance. It also abandoned altogether any pretext of a further market study to determine mailer needs or preferences.

The Postal Service points out that the advisory opinion in Docket No. N89-1 reached negative conclusions. For instance, the opinion found that the underlying market research for the plan did not measure customer support and that the plan was technically flawed. (USPS Br. at 4.) The Postal Service says that it merely "respectfully

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<sup>2</sup> The Postal Service originally planned to complete implementation by December 31, 1990. (Docket No. N89-1, T-2, App. A at 28-30.) The implementation of 2-day and 3-day service standards was originally to be carried out from May, 1990 to the end of September, 1990 to include the consideration of

disagreed with the negative conclusions of the non-binding advisory opinion" of the Commission in Docket No. N89-1 and that it "exercised its prerogative to implement its realignment plan." (*Ibid.*) Our objection is not that the Postal Service's action did not accept the Commission's findings on the deficiencies of the market research and customer needs. The Postal Service was not required to accept the Commission's findings. However, the Postal Service, instead, followed an unanticipated course of action and significantly revised the plan, primarily as a result of reorganization and the passage of time.

The Postal Service's actions eviscerated the advantages of Commission review. It did not even move ahead with a plan based on the faulty market research or limited measure of customer support as it promised, but it totally eliminated those underpinnings of the plan which the Commission advised are important. The Postal Service thereafter significantly revised the plan to such an extent that a new plan emerged and it implemented a plan with no market research or customer input. The new plan was conceived without reliance on contemporary market research or analysis of customer needs. The revised plan also relied extensively on a complicated software package calculating drive-times. Neither the Commission nor the public, which has the right to a hearing on such issues, can be certain, without opportunity to review, that the software did what it purported to do and that it calculated the drive-times accurately and fairly. The Postal Service had the prerogative to move forward with the plan submitted, but it did not have the prerogative to change the plan and ignore §3661 and the

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the potential for additional use of rail service. (*Id.* at 29.) Throughout, the plan included dates for numerous discussions with mailers. (*Ibid.*)

Commission. Nor should this complaint proceeding be considered to serve as a satisfactory alternative to the Postal Service's obligations under §3661 of the PRA.

The Postal Service points to unusual circumstances like its reorganization as justification for delay in implementation and the appointment of the experienced Mr. Gannon as demonstrating the value of the revised plan. (USPS Br. at 6-7.) Mr. Gannon's credentials are not an issue here. For the reasons stated above, unreasonable delays are not permitted by law and no matter how appropriate the newly implemented plan may be, it did differ in many material ways from the initial realignment plan and the public and the Commission must have an opportunity to review the plan *before* implementation.

The Postal Service failed to follow the plan when deciding which ZIP Code pairs to change from 2-days to 3-days. The Postal Service gave notice in Docket No. N89-1 that the 2-day service standard definition would include those ZIP Code pairs that "met a minimum volume threshold" and that "had sufficiently reliable and timely air transportation to permit achievement of the standard." (USPS Br. at 7, footnotes omitted.) The record demonstrates the Postal Service plan meets neither of those significant criteria. The Postal Service has admitted that it did not consider volume in downgrading 2-day service to 3-day service. (DBP/USPS-19(b) (Tr. 147); DFC-T-1 at 11-12; DFC/USPS-GAN-17 (Tr.36); DFC/USPS-12 (Tr. 327).) It also admits that it never considered whether any air transportation was even available to avoid downgrading 76,440 ZIP Codes pairs to 3-day service. (Gannon-USPS-T1 at 9, DFC-T-1 at 14-15; DFC/USPS-GAN-54 (Tr. 49), DBP/USPS-47 (Tr. 181)) Nor did it consider whether air service between those locations was sufficiently reliable and timely.

(DFC/USPS-GAN-16 (Tr. 35).) The testimony of Mr. Gannon points out that there were difficulties with air transportation, (USPS Br. at 8.) but that does not justify totally ignoring the standard the Postal Service so clearly established for itself when it submitted its plan to the Commission. A wholesale rejection of air transportation is an unreasonable modification of the plan presented.

A new argument offered for the first time on brief suggests, in effect, a nationwide program to modify the Phase II changes. The Postal Service claims that in fact the original plan is being implemented as case-by-case adjustments are being made if the business/volume relationship is great enough and sufficiently dependable and timely air transportation exists. (USPS Br. at 9-10.) But the record demonstrates that, even if it were permissible under the statute to delay the planned changes indefinitely, as a practical matter, such changes are not occurring and probably cannot occur. This is because of the structural organization of the Postal Service limiting the ability of Area offices to enter into dedicated air contracts. (OCA/USPS-1-4 (Tr. 368-372); USPS-LRC2001-3/1.) Thus, the Postal Service has effectively abandoned a very significant part of the plan reviewed by the Commission as it is not, as a practical matter, making any attempt to restore 2-day service to those business/higher volume ZIP Code pairs that were downgraded.

Also, the Postal Service has not justified that it is inevitable the surface transportation standard must move so many service standards from 2-days to 3-days. The prior standard was a 600 mile radius for two day service and 2-day service was provided to those ZIP Code pairs that were downgraded under the twelve hour drive time criteria. There is no showing that the Postal Service was unable to maintain the 2-

day service standard under the old criteria for those ZIP Code pairs that enjoyed 2-day service or that for those particular ZIP Code pairs the service standards were not able to be maintained. For the Postal Service to unilaterally downgrade existing 2-day service without specific justification demonstrates, on its face, that the Postal Service *per se* is not providing the most expeditious service that it "shall" provide under the statute. The Postal Service deliberately and arbitrarily downgraded service that was by all appearances satisfactory or sufficiently consistent to meet mailers' needs. In any event, the Postal Service certainly had no contemporaneous market research to prove the mailers would prefer a change.

The Postal Service's initial brief argues that a few downgrades were all right because other ZIP Code pairs were upgraded. (USPS Br. at 10.) But that logic is not sound. The one has nothing to do with the other. As OCA demonstrated in the initial brief, merely because a ZIP Code pair does not fall within the twelve hour drive time period does not in any way demonstrate that other methods of service (or even making special exceptions to the drive time rules) are not available to provide adequate 2-day service. The only fact it does prove is that before the Postal Service implemented a more realistic drive time, those 49,348 ZIP Code pairs that had been receiving a 3-day service and were upgraded to 2-day service had not been receiving for many years adequate and the most expeditious service that the Postal Service management could easily have and, under the statute, should have, provided.

The Postal Service points out the paucity of record evidence on the question of what level of air transportation service would have been "reliable enough." (Br. at 11, note 10.) The gap in the record is not one which the Complainant should be obliged to

fill. That is one reason the Postal Service should be required to submit a new plan demonstrating why the 2-day ZIP Code pairs were downgraded to 3-days. One of the issues underlying such a demonstration would be--what is reliable air service? The Commission has already found the policy that consistency take precedence over expedition to be a specious argument. (Opinion, Docket No. N89-1 at 33.) The Postal Service should be advised to come forward to allow public discussion on the issue of just what is "reliable enough" and whether the vast majority of those ZIP Code pairs in question could actually receive service that is 33 percent better than currently received

The Postal Service objects that the record does not contain support for Complainant's testimony that there are light air passenger loads in the western states. (USPS Br. at 13.) But, the Complainant has at least raised an issue regarding light passenger loads in the western states, raising the question of whether air transportation service is more available to provide faster service than the Postal Service is currently providing. The Postal Service's broad brush rejection of air service is not a satisfactory response to the mandate of the PRA. Nor do the difficulties that commercial air service has in handling mail necessarily support the contention that air transportation service is insufficient to provide 2-day service in many cases. The Postal Service ought to be able to demonstrate it undertook a more proactive role to attempt to provide dedicated air service or to contract with airlines in a way to avoid these problems rather than wash its hands of the opportunity to maintain service at the level that has been previously provided. Further, the Postal Service readily admits that it did not even consider the impact of the new Fed Ex contracts as a means for restoring 2-day mail (DFC/USPS-GAN-27 (Tr. 347)) even though the termination of the Emery air contract, which the

FedEx contract more or less replaced, was cited as a reason for moving away from air transportation and 2-day service. (OCA/USPS-T1-6 (Tr. 392).)

We note too that all of the Postal Service arguments are being made after more than a decade of the Postal Service's spending millions of dollars on equipment to improve and speed up mail processing. With increasing populations in outlying areas it also seems probable that there is now an increase in the number of flights available to transport mail on a timely basis to many areas of the country. In any event, the passage of time has certainly rendered obsolete the facts on which the past decisions were made. Another, more recent phenomenon suggests that the Postal Service's recent changes needed to be reviewed in the context of today's computer technology. On its face, the contention that the Postal Service cannot provide the service to these downgraded ZIP Code pair customers that it provided over a generation ago is simply difficult to believe.

The changes in the realignment plan are substantive. As the Postal Service points out, the Postal Service developed computer software to allow "a more centralized and efficient approach." (USPS Br. at 17.) The parameters of that software were not part of the initial procedure. The software program makes certain assumptions regarding drive times and the driving environment that were not considered in the earlier case. (OCA/USPS-12-15 (Tr. 382-391)) Some of the interrogatory responses have detailed the assumptions that were made by the Postal Service, some of which should be open to discussion and scrutiny as to their impact. (DBP/USPS-11-rev. 10/22/01 (Tr. 129-135).) These are effectively substantive and material changes that the Postal Service made to the plan as they impacted the service standard for many ZIP Code

pairs. Moreover, the Postal Service admits the "design and implementation of Phase II of its realignment plan deviated procedurally from how it was anticipated, during Docket No. N89-1, that it would be implemented." (USPS Br. at 18-9.) This included a computer program that adopted a twelve hour drive time totally unknown during Docket No. N89-1 proceedings.

Although the Postal Service contends these were not material changes in First-Class Mail service and not changes within the meaning of §3661(b) and not different from the plan in Docket No. N89-1, the fact remains that many of the changes and adjustments were not anticipated during the Docket N89-1 proceedings. Besides the drive-time standards, the adjustments made to the California service standards through the use of pseudo-ADCs were a modification not based on the record submitted in Docket No. N89-1. Those modifications were not developed by Mr. Gannon's group until long after that case was completed. (USPS Br. at 21-22 citing USPS-T-1 at 6-8.)

## II. THE DOWNGRADES TO SERVICE VIOLATE THE POSTAL REORGANIZATION ACT

### A. Customer input was not obtained

The Postal Service argues the realignment plan submitted in Docket No. N89-1 was developed with customer input as demonstrated in the record of that proceeding. (USPS Br. at 25.) Although there was some customer input in that record, the record in this case demonstrates the Postal Service did not obtain the anticipated customer input as promised when implementing Phase II. Thus, it did not provide for the necessary public input to the plan as implemented. The PRA is clear. A plan must be submitted to the Commission. The plan originally submitted to the Commission included obtaining

customer input plus several other features that the Postal Service disregarded. The Postal Service cannot now say, "never mind," we submitted a proposal, and even though we changed it and did not follow the proposal, at least we submitted a proposal. But, that is not what the statute provides. It requires the Postal Service to obtain an advisory opinion on the proposal before change in nationwide service.

The Postal Service seems to read §3661(b) as allowing it to submit one plan with detailed provisions and promises once every generation. Even though it then disregards the plan and establishes a new one, the Postal Service says that is sufficient under the law. It is not consistent with the spirit or the terms of §3661. Every time a proposal to change nationwide service is designed, an advisory opinion should be submitted to the Commission.

Nor is it appropriate to now state that the Postal Service's Area offices will determine piecemeal whether air transportation is available to restore 3-day mail service back to 2-day mail service. The Commission should have the opportunity to consider, and to advise the Governors, after an opportunity for hearing, whether the Postal Service's management proposal for change has adequately considered the options, costs and benefits prior to implementing nationwide downgrades of service.

The Postal Service claims that now the second part of Phase II is underway whereby the local Areas will decide whether the downgraded service can be upgraded based on volume and the availability of air transportation. But the Postal Service is changing the burden which the statute places upon it. The law requires the Postal Service to submit proposals about changes in service *before* the changes are made; not make the changes and then claim it meets the statutory burden by looking at ways to

comply with the law (by providing for the most expeditious service) after service is downgraded.

The Commission's advisory opinion in Docket No. N89-1 recognized that in certain areas "current standards cannot reasonably be met" and in those areas, adjusting standards "is wise." (Op. at 2.) Note, however, that permissible downgrading assumed an analysis first determining that the standards cannot reasonably be met. Merely because the driving time exceeded 12 hours, it does not necessarily follow that the 2-day service standard cannot be reasonably met. We submit the Postal Service should consider that question before the downgrade. Clearly, it did not. It downgraded service based upon a rigid application of the 12 hour drive-time rule and only now, belatedly, says that service might be upgraded. Even if that were a reasonable approach under the statute, the record here shows that as a practical matter, the Area offices do not have the authority to coordinate nationally air transportation resources to upgrade service. As established, the organization discourages review for upgrades, or at least limits the authority of the local Areas to look to air transport contracts.

B. The Postal Service must comply with §101

The Postal Service also contends that the statute in §101(e) setting forth a "requirement for the most expeditious collection, transportation, and delivery of important letter mail" is "no more than a mandate...to maintain a collection, transportation, and delivery network that preserves the long-standing preferential status of 'important letter mail,' relative to other mailable matter." (USPS Br. at 30.) The Postal Service explains that it continues to give First-Class Mail preferential status relative to what were denominated lower classes of mail at the time of reorganization. The plain

meaning of the language does not support that interpretation. The Postal Service reading attributes the word "most" as in most expeditious as a comparative term--that is, most as compared to other services, whereas the word "most" is not used to mean more expeditious than other mail, but the most expeditious [as possible] collection, transportation and delivery of important letter mail. A fair reading of the statute is that it requires the Postal Service to undertake actions to assure that important letter mail will receive the greatest expedition in the delivery of mail. And why wouldn't the Congress want the Postal Service to give the highest consideration to providing the "best possible" service for important letter mail, and the "speediest service?"

The Postal Service is concerned about the impact of such a reading. It says that would mean the "Postal Service could never shift a service standard from overnight to 2-day or from 2-day to 3-day, even if there were undisputed evidence of universal support for such changes." The Postal Service is, of course, free to make adjustments and downgrade service if cost is a factor or if logistics do not permit it. In this case, the Postal Service has no records to show for each downgraded ZIP Code pair the situation that made it impossible to provide 2-day service; nor are there records that show what the cost of maintaining two day service would be (i.e. attempting to provide the best service possible.) Nor do we suggest an interpretation of §101(e) that "casts in stone" (USPS Br. at 29) the service standards in existence at the time of postal reorganization. Changes may be made and should be made only where the service cannot be maintained at a reasonable cost. The Postal Service has made no showing that this is true and, in any event, such a showing must be demonstrated in a §3661 submittal.

The Postal Service contends that it is merely enough that its service for important letter mail provide for a preferred status viv-a-vis other classes of mail. It says there is no further need for it to control the quality of the service for important letter mail. We contend service must be the most expeditious as the Postal Service is able to provide, not merely more expeditious than other classes of mail. If the Postal Service's position were to hold, and the Postal Service's argument is followed to its logical conclusion, all service standards could be extended by a day or two and the Postal Service would still be meeting the terms of the Act. Obviously, that is not the intent of the legislation.

The Postal Service interprets §101(e) as only requiring that it give a higher preference to important letter mail--First-Class Mail--as compared to other mail classes. (USPS Br. at 30.) This, it says, is what it does and is sufficient under the statute. We respectfully disagree. The section does not refer to other classes of mail; nor does it state the required expedition is in relation to other types of mail. "[T]he requirement for the most expeditious collection, transportation, and delivery of important letter mail" demands the Postal Service apply the best means available to those activities necessary to provide service for important letter mail. It stretches credulity to think that Congress would not have expected the Postal Service to provide the most expeditious service it could for the most valuable mail, but rather was content to allow the Postal Service to offer something less than the best possible service standard for the most important mail as long as it was more expeditious than other classes of mail.

The Postal Service seems shocked at the idea that it might be required to provide the most expeditious service possible to important letter mail and claims it is inconsistent with any reasonable reading of the PRA. (USPS Br. at 28-30.) The Postal

Service also notes that the Commission in Docket No. N89-1 did not say the proposed service downgrades were *per se* inconsistent with §101(e) and concludes the Commission did not believe the proposed downgrades would be a violation of §101. (USPS Br. at 29.) But, we do not contend that downgrading service is *per se* a violation of §101(e); only that the Postal Service must justify or submit a meaningful plan to this Commission about downgrading before it does so. That means looking at all reasonable means of transportation, including air transport as well as the cost of that service in a meaningful way in relation to other costs, as well as the impact of those costs on mailers.

It is unreasonable for the Postal Service to merely say that air transportation is more costly than surface transportation and then stop its analysis. It never determined what the cost impact was to the consumer, whether that impact is large or small or what other benefits might accrue through air transportation and the cost savings ancillary to that air transportation service. What would the improvement in service cost? The Postal Service is simply not meeting the requirements of the PRA to analyze the options before it, and certainly not providing this Commission or its customers with the information for review, as required by law.

For some unfathomable reason, the Postal Service considers it incomprehensible that the statute might actually require precisely what the statute clearly states the Postal Service must ("shall") do. The Postal Service states in its brief: "Taking Complainant's view to its logical conclusion, in order to give the 'highest' consideration to the 'most expeditious' transportation of important letter mail, the Postal Service is compelled to establish whatever operations and transportation are necessary to change all existing

First-Class Mail 3-day standards to 2-day and all existing 2-day standards to overnight." (USPS Br. at 29-30.) Why isn't that the responsibility of the postal management--with one important and obvious caveat, that before upgrading service, cost is a factor to be considered? It may be difficult and it may not be easily done, but just because delivery took 3 days fifty years ago is not a reason to maintain that standard and not improve on it, if possible. But OCA does not begin to suggest such a draconian approach to postal service. We only ask that those mailers who, as recently as the year 2000, enjoyed a 2-day service standard should be restored to the 2-day service standard pending further study to determine whether air transport is reasonably available for the longer term and at what cost. That is, the Postal Service should, for those mailers, "establish whatever operations and transportation are necessary" to provide the service previously provided.

The Postal Service observation is correct that the PRA does not dictate the number of days for service standards. (USPS Br. at 31.) Nor does the act impose any specific criteria to be employed in determining which ZIP Code pairs qualify for a given level of service. Sections 101(e) and (f) provide the broad policy guidelines and §101(e) provides the guideline for important letter mail. That guideline coupled with §101(f) requiring the highest consideration to the "prompt and economical delivery of all mail" establishes the Congressional mandate to postal management to provide the fastest possible delivery consistent with economy. Nowhere does that section discuss or interject a theory of consistent delivery. It is of course hoped that the network established by the postal service management will be organized in such a way as to provide reasonably consistent service, but that is a different process than first

organizing a network using the fastest modes of transportation available to establish standards with costs that are reasonable.

OCA's difficulty with the Phase II program is that the Postal Service has not made a convincing showing that it attempted to employ any type of air transport that would get the job done or to know why it could not be done, to know the actual number of delays for a given ZIP Code pair, or to know the cost of maintaining 2-day service previously offered. As we noted in our initial brief (OCA Br. at 20, note 3), this does not even go to the question of whether the Postal Service should be making the same attempt to provide 2-day service to all 3-day service areas, given the speed of air transport and improved organizational methods now available with computers.

OCA further agrees with the Postal Service's brief when it says §101(f) requires the Postal Service to consider not only promptness but matters of economy, cost and their impact on the prices that customers must pay. The Postal Service is not required to put on blinders and disregard the cost differences between modes of transportation. (USPS Br. at 32.) We agree with this, but this record consists primarily of Postal Service statements of management policies and procedures that Phase II did not rely upon any detailed Postal Service study or even a consideration of economy, cost, or price analysis. Even the Postal Service brief recognizes the Congressional preference for an air-taxi program established in the late 1960's that should have been employed if there was reasonable assurance air transport could be employed to shorten delivery time by one day.<sup>3</sup> There was no suggestion that air transport should be employed

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<sup>3</sup> The Postal Service brief, at 32-33, cites the Senate Post Office and Civil Service Committee's formal statements. Senate Report 91-912 at 17-19 (June 3, 1970)

mindlessly. That is our position, and it is consistent with the Senate committee preference expressed in 1970.

Finally, there has been no suggestion that the Postal Service facilities were not sufficient in any particular area to handle the mail before it downgraded the service standards. The Postal Service has made no claims that its facilities are not adequate or that sufficient labor is unavailable to process mail that was downgraded to 3-days. It appears therefore that the availability of transportation and the cost of transportation are the only grounds for the service downgrades.

### III. FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

Wherefore, for the above reasons, the Commission should find that the failure to submit the revised service standard plan to the Commission constituted a violation of §3661 of the PRA and that the Postal Service must file with the Commission a request for an advisory opinion pursuant to that section. The Commission should discuss in the report its conclusions regarding the statutory requirement to provide adequate service, discrimination resulting from certain applications of the revised plan addressed by Mr. Carlson, and the need for the Postal Service to provide the most expeditious service reasonably possible within cost constraints in the delivery of important letter mail, including a consideration of the rate impact of various service standards choices. Most importantly, pending the outcome of further proceedings, recommended above, the Postal Service should restore 2-day delivery service where service was downgraded to 3-day service in 2000 and 2001, pending the outcome of a §3661(b) proceeding.

Respectfully submitted,

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