

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

**COMPLAINT OF THE CITY  
AND COUNTY OF SAN FRANCISCO**

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Docket No. C2011-2

**CITY AND COUNTY OF SAN FRANCISCO'S ANSWER IN OPPOSITION TO MOTION  
OF UNITED STATES POSTAL SERVICE FOR PARTIAL DISMISSAL OF THE  
COMPLAINT**

The City and County of San Francisco ("San Francisco"), acting pursuant to 39 C.F.R. § 3001.21(b), respectfully submits this answer in opposition to the Motion of United States Postal Service for Partial Dismissal of the Complaint ("Motion").<sup>1</sup>

I. INTRODUCTION

San Francisco raises two sets of claims in its complaint, and they both fall squarely within the Commission's jurisdiction. In San Francisco, the local postmaster, Noemi Luna, decreed by letter in December 2008 ("the Luna Letter") that Single Room Occupancy buildings ("SROs") are categorically ineligible for centralized, apartment-style delivery to individual mailboxes for the residents.<sup>2</sup> In San Francisco, residential rooms at SRO building are permanent residences akin to a typical studio apartment except that residents often have to share bath and/or kitchen facilities. Complaint at ¶ 3. SROs are different from most apartment buildings in one important respect: the

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<sup>1</sup> Motion of United States Postal Service for Partial Dismissal of the Complaint, PRC Docket No. C2011-2 (June 7, 2011).

<sup>2</sup> The Postal Service "grandfathered in" SROs that had been receiving centralized delivery for more than 90 days before the Luna Letter.

socioeconomic status of their residents. Some of San Francisco's poorest and most vulnerable citizens live in SROs. *Id.* at ¶¶ 2-3, 18.

The Postal Service issued its SRO decree even though SROs are multi-unit residential buildings, and even though Postal Service regulations unambiguously provide for centralized delivery to multi-unit residential buildings. The decree in the Luna Letter is not an interpretation of the Postal Service's governing regulations. The Luna Letter makes no pretense of interpreting any regulation. It is simply an edict that mail delivery for SROs will be treated as falling into the same category as mail delivery to schools or to tourist hotels (as described in Section 615.2 of the Postal Office Manual ("POM")), instead of into the category of apartment houses, residential hotels, and other residential units (as described in Section 631.45 of the POM).

The City alleges that the rule announced in the Luna Letter cannot be squared with the Postal Office Manual. Nor can it be upheld as a *de facto* amendment to the existing delivery regulations in the POM.

The Postal Service all but concedes that the Commission has jurisdiction to hear San Francisco's claims. First, in its partial motion to dismiss, the Postal Service does not dispute the Commission's jurisdiction over San Francisco's primary claim—that the Luna Letter unreasonably discriminates between users of the mail who reside in SROs and users of the mail who reside in other multi-unit residential buildings in San Francisco. The Postal Service grudgingly states, "the Complainant has arguably alleged facts sufficient to complain of undue disparate treatment under section 403(c) . . . ." Motion at 2.

Second, the Postal Service implicitly concedes the Commission's jurisdiction over San Francisco's rulemaking challenge. The Postal Service does not contend that Commission lacks jurisdiction to enforce the rulemaking requirements of 39 U.S.C. § 401(2) and 39 C.F.R. 211.2(a). Instead, the Postal Service freely admits that the Luna letter is not a proper regulation. Mot. at 14. That is not a reason to dismiss San Francisco's claim. Rather, the Commission could now enter declaratory judgment on the merits in favor of San Francisco on that portion of San Francisco's claim, confirming that the Luna letter is not a valid Postal Service rule or regulation.

Thus, the only actual dispute before the Commission on this motion is whether and to what extent there is jurisdiction to hear San Francisco's challenge that the Postal Service is improperly relying on the Luna Letter as a rule or regulation—even though it now concedes the Luna Letter is not a valid rule or regulation—in order to deny service to residents of SROs in San Francisco, contrary to the governing POM regulation. San Francisco submits that the Commission has jurisdiction to hear this portion of the claim under 39 U.S.C. § 401(2), independently of whether San Francisco can also satisfy the criterion in 39 U.S.C. § 403(c) (that the challenged action also discriminates unreasonably among users of the mails).

This jurisdictional question may have wider implications. Put another way, if today the San Francisco postmaster sent out another letter, decreeing that no multi-unit residential buildings—whether SROs or not—will henceforth be considered eligible for centralized delivery, could the Commission (or anyone else) ever hear that claim? San Francisco submits that the answer is yes. The Commission does in fact have the power to review decrees made by the Postal Service and treated by the Postal Service as a

rule or regulation, but that are actually in violation of the Postal Service's governing regulations. The fact that the Postal Service later asserts that the decree is not really a regulation does not divest the Commission of jurisdiction.

## II. PROCEDURAL HISTORY

On May 18, 2011, the City and County of San Francisco filed its Complaint with the Commission, describing "deficiencies in mail delivery service in violation of Postal Service regulations." Complaint at ¶ 1. These deficiencies impact mail delivery to SRO buildings in San Francisco, California. Most SRO tenants are permanent residents and sign leases just like most tenants in most standard apartment buildings. See Complaint at ¶¶ 3-4, 18-19. The main differences between the typical SRO and the typical apartment building is that the SRO will contain shared kitchens and bathrooms; SRO residents also typically have a lower, often fixed, income. *Id.*

As explained below, in December 2008 the Postal Service began to refuse to deliver the mail to residents' individual mailboxes at SROs in San Francisco. Instead, from that point forward, it would only deliver the mail to SRO residents using "single point delivery"—dropping the mail at a single point (usually in the lobby), as might be done at a school or a tourist hotel under Section 615.2 of the POM.<sup>3</sup> Complaint ¶¶ 29-30, 40-44; POM § 615.2.

The Complaint seeks to remedy the harms caused by the Postal Service's announced approach to mail delivery to SRO residents. Count I asks this Commission to determine that the Postal Service must comply with POM § 631.45 by delivering mail

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<sup>3</sup> The Postal Service "grandfathered in" a handful of San Francisco SROs to which it had been delivering mail using centralized delivery for more than 90 days before it issued the letter describing its new approach to SRO mail delivery. Complaint, Exh. 1.

to individual mailboxes in San Francisco buildings, including SROs, that meet the plain requirements of POM § 631.45. See Complaint at ¶ 66. It alleges that the Luna Letter, which decreed the Postal Service’s future approach to mail delivery for San Francisco SRO residents either (1) is contrary to the plain language of validly enacted Postal Service regulations and therefore the Postal Service has failed to enforce its own regulations, or else, (2) is itself a regulation enacted without following the proper procedures. See Complaint at ¶¶ 57-66.

Count II of San Francisco’s Complaint is not challenged in the Postal Service’s Motion for Partial Dismissal. There, San Francisco alleges unreasonable discrimination among users of the mails in violation of 39 U.S.C. § 403(c), based on the Postal Service’s dissimilar treatment of similar buildings. See Complaint at ¶¶ 67-69.

### III. FACTUAL BACKGROUND

#### A. MAIL DELIVERY TO “APARTMENT HOUSES,” “FAMILY HOTELS,” AND “RESIDENTIAL UNITS”: POSTAL OFFICE MANUAL SECTION 631.45

Postal Service regulations mandating delivery to individual locked mailboxes spell out exactly how to accomplish mail delivery in this context. POM Section 631.45 unambiguously provides: “Delivery of mail to individual boxes in a residential building containing apartments or units occupied by different addressees (regardless of whether the building is an apartment house, a family hotel, residential units, or business units in a residential area and regardless of whether the apartments or units are owned or rented),” is contingent on four factors relating to the configuration of the building. The building must have “three or more units . . . with a common building entrance . . . [and] a common street address,” approved mailboxes where each apartment is provided one box, and “the grouping of the boxes for the building is at a single point readily

accessible to the carrier.” POM § 631.45. SROs are unquestionably "residential units," and they satisfy every other requirement for "apartment houses." Accordingly, under its own regulations, the Postal Service is required to provide individual mailbox delivery.

**B. THE POSTAL SERVICE’S DECEMBER 2008 CHANGE IN APPROACH TO MAIL DELIVERY TO SAN FRANCISCO SROS IN THE “LUNA LETTER”**

Despite the plain language of the Postal Office Manual, starting in December 2008 the Postal Service began to assert that SROs are to be treated like tourist hotels and schools, governed by 615.2 of the POM, meaning that all residents should be content to get a bundle of mail delivered to the front desk of the SRO. On December 18, 2008, the Postal Service set its altered approach down in writing, as a letter signed by San Francisco Postmaster Noemi Luna (the “Luna Letter”). See Complaint at ¶ 29 & Exh. 1.

**C. HARM CAUSED BY SINGLE-POINT DELIVERY TO SRO RESIDENTS**

San Francisco alleges that the Postal Service’s position is unreasonably discriminatory, and the Postal Service does not challenge this claim in its motion. The Postal Service’s edict places San Francisco SRO residents in a special, underserved category that is unlike those living in most other residential units in that city. This discriminatory approach to mail delivery is compounded by the fact that SRO residents rely on the mails perhaps more than most others, to receive critical correspondence—including federal and state benefits and medical correspondence and records. See Complaint at ¶ 45. Even beyond the discriminatory nature of the 2008 SRO edict, however, the result of the Postal Service’s change in approach is an array of harms that are continually inflicted on SRO residents and on anyone who pays for a stamp and

wants to send mail to a resident of an SRO in San Francisco. See Complaint at ¶¶ 20-23, 45-48.

Single-point delivery to SROs will continue to increase the likelihood of lost, stolen or otherwise “disappearing” mail. See Complaint at ¶¶ 45, 47. Such losses and thefts have increased and will continue to increase the chances that SRO residents will be unable to pay rent, will face eviction proceedings, will be forced into homelessness, will lose crucial financial and medical benefits, and will grow estranged from family and friends, amongst a host of other harms. See Complaint at ¶¶ 20-21, 45, 47-48.

**D. SAN FRANCISCO’S RESIDENTIAL HOTEL MAIL RECEPTACLE ORDINANCE**

San Francisco had hoped to improve the situation relating to mail delivery to SROs by adopting an ordinance requiring SROs to install individual, locked mailboxes for their residents. San Francisco’s Residential Hotel Mail Receptacle Ordinance, S.F. Admin. Code § 41E.3, (“Ordinance”); Complaint at ¶ 48. It was assumed that, consistent with POM Section 631.45, each resident in these buildings—whether or not called “apartments,” “family hotels,” or simply “residential units”—would get what Postal Service customers pay for—delivery of the mail to each recipient’s mailbox. Contrary to the Postal Service’s suggestion, the ordinance does not require that the Postal Service deliver mail in a specific way. See Complaint ¶ 22. Rather, that result is compelled by the Postal Service’s own regulations. POM § 631.45.

The Postal Service’s position, however, has caused some SRO landlords to question whether they must comply with the Ordinance. From their perspective, the Postal Service’s stated policy (as explained in the Luna Letter) is to refuse to deliver mail to newly-installed individual mailboxes at SROs, so the ordinance is an

unnecessary regulatory hurdle with which they need not comply. Complaint at ¶¶ 21-23, 48.

#### IV. ARGUMENT

##### A. THE COMPLAINT HERE ASSERTS CLAIMS DISTINCT FROM THOSE ALLEGED IN THE FEDERAL COURT ACTION

Without explaining how or why it could form the basis for a motion to dismiss any claim in San Francisco's Complaint, the Postal Service wrongly argues that the Complaint "effectively reviv[es] grounds already dismissed by the federal district court." Motion at 3-4. On May 5, 2009, San Francisco, together with three other plaintiffs, filed a complaint in the United States District Court for the Northern District of California alleging five claims for relief.<sup>4</sup> The first four claims alleged in the District Court Complaint are Constitutional claims and are still in active litigation against the Postal Service. The fifth sought declaratory relief, asking the Court to rule whether San Francisco's Residential Hotel Mail Receptacle Ordinance "complies with federal law and whether [San Francisco] may legally enforce its Ordinance requiring SROs to provide mailboxes that comply with Postal Service regulations for mail delivery." District Court Complaint at ¶¶ 57-60. In the Luna Letter, the Postal Service had argued that the Ordinance was somehow preempted by federal law. Complaint at Exh. 1.

This last claim is the only one against the Postal Service that was dismissed in the District Court litigation. See Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *City and County of San Francisco v. United States Postal Service*,

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<sup>4</sup> *City and County of San Francisco v. United States Postal Service*, No. 3:09-cv-01964-RS (EDL) (May 5, 2009).

No. 3:09-cv-01964-RS (EDL) (Nov. 5, 2009), at 5:24-7:2.<sup>5</sup> The District Court determined that statements in the Luna Letter suggesting that the Ordinance was preempted by federal law did not give rise to a “‘real and reasonable apprehension’ that the City ‘will be subject to liability,’” and so dismissed the claim. *Id.* (citations omitted). Here, San Francisco simply asks the Commission to require that the Postal Service comply with the Postal Service’s own regulations regarding mail delivery to “residential units” like SROs, preventing further discrimination under 39 U.S.C. § 403(c). San Francisco’s ordinances about installing mailboxes are not at issue here.<sup>6</sup>

Ironically, given its Motion, roughly eighteen months ago the Postal Service told the District Court that the plaintiffs should seek “review of SRO delivery in San Francisco by the adjudicative body designed by statute and regulation to do so,” the Postal Regulatory Commission. *Federal Defendants’ Reply Brief in Support of Motion to Dismiss Complaint*, No. 3:09-cv-01964-RS (EDL) (Nov. 5, 2009), at 7:13-14. The District Court agreed that it has the power to hear San Francisco’s Constitutional challenge. Complaint at ¶ 54. San Francisco also agrees with the Postal Service’s earlier representations that this Commission has jurisdiction to hear San Francisco’s regulatory challenges.

**B. THE COMMISSION HAS JURISDICTION UNDER 39 U.S.C. § 3662(a) OVER SAN FRANCISCO’S ALTERNATIVE CLAIM THAT THE LUNA**

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<sup>5</sup> The Order also dismissed those claims against the individual defendants as “superfluous to Plaintiffs’ claims against USPS.” *Id.* at 7:3-13.

<sup>6</sup> The Postal Service’s contention that the District Court dismissed “all claims based upon regulatory or statutory grounds” is false. None of the claims were expressly premised on regulatory or statutory grounds, and no “claims based upon regulatory or statutory grounds” were dismissed by the District Court.

LETTER IS AN UNLAWFUL REGULATION ENACTED IN  
CONTRAVENTION OF 39 C.F.R. § 211.2(a).

San Francisco contends that the Postal Service has been treating the Luna Letter as a regulation. The letter is an edict—it is no mere statement about operations or interpretation of existing rules. Without ever saying anything interpreting the Postal Service’s governing regulations, it simply groups SROs, along with their economically disadvantaged residents, with schools (under POM Section 615.2), depriving them of treatment as “residential units” (whether or not “apartment houses,” “family hotels,” or other “residential units”) under POM Section 631.45.

The Commission’s jurisdiction to review San Francisco’s claim on this basis could not be more clear: the Luna Letter was never published in the Federal Register and is obviously not one of the explicitly enumerated types of valid Postal Service regulations listed in 39 C.F.R. § 211.2(a). What is more, in its Motion the Postal Service concedes the obvious point that the Luna Letter is not a valid rule or regulation. Motion at 14.

The Postal Service’s concession does not deprive the Commission of jurisdiction to hear San Francisco’s claim. The contrary is true—the Postal Service’s statement in its Motion means that there is no dispute of fact or law on this question. The Commission can and should now enter declaratory judgment that the Luna Letter is not a valid Postal Service rule or regulation.

The issue raised by the Motion is whether the Commission has jurisdiction to take the next step, and review San Francisco’s claim that the Postal Service is in fact improperly relying on the Luna Letter as a rule or regulation, in violation of the Postal

Service's valid rules and regulations—specifically Section 631.45 governing mail delivery to residential units. Complaint at ¶¶ 30, 32-33, 64; Motion at 13.

The Postal Service suggests that the Commission lacks jurisdiction to review how it is relying on the Luna Letter because, it says, the Luna Letter is merely interpreting existing Postal Service regulations. Motion at 13-15. Again, that is a question that can be reviewed by the Commission, and is not a basis to reject a claim for lack of jurisdiction. There is no “interpretation” set out in the Luna Letter—no discussion of why SROs are like schools or why residents should be treated like elementary school students or staff instead of like residents in “residential units.” See *id.* In its Motion, the Postal Service confirms that, while not a true “regulation,” the Luna Letter is the Postal Service’s statement regarding how it will deliver the mail to SRO residents in San Francisco. Motion at 6-7.

Under 39 U.S.C. § 3662(a), the Commission is empowered to consider San Francisco’s challenge to it and to its use by the Postal Service based on 39 U.S.C. § 401(2) and 39 C.F.R. § 211.2(a) as an invalid rule or regulation that is contrary to the Postal Service’s valid rules and regulations.

- C. THE COMMISSION HAS JURISDICTION OVER SAN FRANCISCO’S CHALLENGE TO THE POSTAL SERVICE’S MISREADING OF ITS OWN REGULATIONS, WHICH IS A CLAIM THAT THE POSTAL SERVICE’S FAILURE TO FOLLOW POM § 631.45 IS A VIOLATION OF 39 U.S.C. § 401(2).

The Postal Service’s Motion seeks, in a single stroke, to divest the Commission of its crucial oversight responsibilities. Based on the Postal Service’s surprising reasoning, if the postmaster of another municipality were to issue a letter declaring that it would no longer deliver mail to apartment houses using centralized delivery, and

would instead leave the mail in the lobby, this Commission would not have jurisdiction to hear a dispute about that letter.

These are not unreviewable Postal Service actions. The Commission has the authority to review them—and to review San Francisco’s complaint. First, the Commission has jurisdiction to hear a regulatory challenge under 39 U.S.C. § 3662(a) based on Section 401(2), even where a complainant (like San Francisco here) can also meet the further requirements of Section 403(c). Of course, Section 3662(a) grants the Postal Regulatory Commission jurisdiction over complaints filed by “[a]ny interested person . . . who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations promulgated under any of those provisions). . . .”

In turn, the Postal Service has the power under Section 401(2)—which is within the Commission’s jurisdiction to review—“to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title.”<sup>7</sup>

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<sup>7</sup> Finally, 39 C.F.R. § 211.2(a), enacted under the authority of 39 U.S.C. § 401(2), is a comprehensive list of those rules and regulations. In full, 39 C.F.R. § 211.2(a) states:

(a) The regulations of the Postal Service consist of:

(1) The resolutions of the Governors and the Board of Governors of the U.S. Postal Service and the bylaws of the Board of Governors;

(2) *The Mailing Standards of the United States Postal Service, Domestic Mail Manual; the Postal Operations Manual; the Administrative Support Manual; the Employee and Labor Relations Manual; the Financial Management Manual; the International Mail Manual; and those portions of Chapter 2 of the former Postal Service Manual and chapter 7 of the former Postal Manual retained in force.*

(continued...)

San Francisco's regulatory challenge is not simply a challenge to a "purely operational" decision of the Postal Service. It is a claim based on the Postal Service's position, set out in the Luna Letter, that POM § 631.45 is not "necessary in the execution of its functions," in contravention of 39 U.S.C. 401(2). Count I of the Complaint simply does not "explode" the Commission's jurisdiction as the Postal Service suggests. See Motion at 9-13.

The Postal Service's reasoning also seems to depend on an unusual reading of the legislative history that created this Commission.

The Postal Accountability Enhancement Act ("PAEA"), enacted in 2006, which created the Postal Regulatory Commission and replaced the former Postal Rate Commission, makes this Commission's jurisdiction even clearer than was previously the case. Congressional testimony repeatedly emphasized that the soon to be formed Postal Regulatory Commission would have "*enhanced authority* to ensure that there [would be] *greater oversight* of the Postal Service as its management assumes greater responsibility." 152 Cong. Rec. S00000-15 (Dec. 8, 2006) (statement of Sen. Collins) (emphasis added); see *also id.* (statement of Sen. Frist) (The PAEA "transforms the Postal Rate Commission into the Postal Regulatory Commission and grants the new body enhanced authorities to ensure appropriate oversight of postal management."); 151 Cong. Rec. H6511-03 (July 26, 2005) (statement of Cong. Davis) ("the Postal Regulatory Commission will distinguish carefully between abuses of the Regulatory

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(3) Headquarters Circulars, Management Instructions, Regional Instructions, handbooks, delegations of authority, and other regulatory issuances and directives of the Postal Service or the former Post Office Department. Any of the foregoing may be published in the Federal Register and the Code of Federal Regulations.

Authority set out in section 404 and the legitimate exercise of managerial discretion by the Postal Service”); *id.* (statement of Cong. Davis) (“Strengthening the commission. This act will rename the Postal Rate Commission the Postal Regulatory Commission and give it teeth by granting it subpoena power and a broader scope for regulation and oversight.”). Indeed, the section-by-section analysis of the PAEA explains that the new “Section 3662 provides the Postal Regulatory Commission with *enhanced authority to respond to complaints of pricing, service, or other actions by the Postal Service in violation of law.*” H.R. Rep. 109-66(I), at \*52 (Apr. 28, 2005) (emphasis added).

Thus, following the enactment of the PAEA, the Postal Regulatory Commission’s grant of jurisdiction became broader than that of the former Postal Rate Commission. Even under 39 U.S.C. § 3662 as it existed prior to the enactment of the PAEA, the Postal Rate Commission had jurisdiction to hear complaints like this one. The Postal Rate Commission had jurisdiction to hear the complaints of “[i]nterested parties who believe . . . that they are not receiving postal service in accordance with the policies of this title. . . .”<sup>8</sup> For example, a complaint filed before the Postal Rate Commission in

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<sup>8</sup> The full text of 39 U.S.C. § 3662 prior to the enactment of the PAEA provided:  
Rate and service complaints.

Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title or who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe. The Commission may in its discretion hold hearings on such complaint. If the Commission, in a matter covered by subchapter II of this chapter, determines the complaint to be justified, it shall, after proceedings in conformity with section 3624 of this title, issue a recommended decision which shall be acted upon in accordance with the provisions of section 3625 of this title and subject to review in accordance with the provisions of section 3628 of this title. If a matter not covered by subchapter II of this chapter is involved, and the Commission after hearing finds the complaint to be justified, it shall (continued...)

2000 alleged (1) that the Postal Service made changes to the nature of mail service with respect to Sunday and holiday collections and processing in violation of a statute requiring a hearing prior to such a change and (2) that the then-current level of Sunday and holiday service did not conform to the requirements of the POM.<sup>9</sup> The Postal Rate Commission summarized the second grounds for the complaint:

Carlson alleges that the provisions of the POM flow from the policies of the Act. Therefore, if the Postal Service is not providing the level of service delineated in the POM, it is not providing the level of service required by the policies of the Act. Separately for each service in question, he alleges that the Postal Service is not providing the level of service delineated in the POM. Therefore, he concludes, the Postal Service is failing to provide the level of service that the policies of the Act require. Order No. 1307 at 9-10.<sup>10</sup>

The Postal Service sought to dismiss the complaint claiming—just as it does here<sup>11</sup>—that the provisions of the POM are not necessarily commensurate with the policies of the Act and, therefore, “the allegations regarding the POM . . . are outside the scope of 39 U.S.C. § 3662. . . . The Commission lacks jurisdiction to entertain complaints which fail to allege that the service provided is not in accordance with the policies of title 39. . .” Motion to Dismiss at 12-13.<sup>12</sup>

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render a public report thereon to the Postal Service which shall take such action as it deems appropriate.

<sup>9</sup> Douglas F. Carlson Complaint on Sunday and Holiday Collections, Docket No. C2001-1 (Oct. 27, 2000).

<sup>10</sup> Order Partially Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings, Docket No. C2001-1, Order No. 1307 (March 20, 2001).

<sup>11</sup> In fact, Daniel J. Foucheaux, Chief Counsel, Ratemaking, appears on the caption of both motions to dismiss.

<sup>12</sup> Answer of the United States Postal Service and Motion to Dismiss, Docket No. C2001-1 (Nov. 27, 2000).

Responding to this argument, the Postal Rate Commission noted that it “generally concurs with the Postal Service that various provisions of the POM may not necessarily rise to the level of interpreting or implementing a policy of the Act,” and that “failure to follow a provision of the POM is not per se conclusive in determining that the Postal Service has failed to follow a policy of the Act.” Order No. 1307 at 11, 14. The Postal Rate Commission went on to explain, however:

The significance of the POM in relation to the policies of the Act can only be determined after *examining the specific provisions of the POM and the related policies of the Act, in conjunction with the surrounding facts of the allegation. . . .* There are many instances where examining the POM could provide valuable insight into the Postal Service’s interpretation of a specific policy of the Act.

Order No. 1307 at 11 (emphasis added). Further, the Postal Rate Commission noted that the “Postal Service needlessly places itself in a precarious position when an internal manual, such as the POM, and the actual Postal Service policy or procedure, do not correspond. *This may require the Postal Service to explain its actual policy, regulation or procedure, and why the actual policy, regulation or procedure does not correspond to its written documentation.*” Order No. 1307 at 15 (emphasis added).<sup>13</sup>

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<sup>13</sup> Ultimately, the Commission Report in the matter notes that the Commission “declined to consider the Complaint issues related to the POM,” because it was “more interested in the actual Postal Service policies and practices involved in the Complaint. . . .” Commission Report, Complaint on Sunday and Holiday Collections, Docket C2001-1, at 7-8 (Nov. 5, 2002). To the extent the POM conflicted with the Postal Service’s actual practices, the Commission advised the Postal Service to immediately correct the POM. Public Report, Docket C2001-1, at 1 (Nov. 5, 2002). A reading of Order No. 1307 and the Commission Report reveals that while the Postal Rate Commission chose not to consider the Complaint issues related to the POM (as the Postal Rate Commission’s exercise of jurisdiction was discretionary, as opposed to the mandatory jurisdiction of this Commission), it clearly felt the exercise of such jurisdiction would have been proper.

Thus, under the old Section 3662, there is no question that San Francisco's Complaint states a valid claim. San Francisco alleges that the Postal Service is not providing the level of service required by the POM, and that the Postal Service is not providing the level of service required by the policies of the Act. The Postal Service's interpretation of 39 U.S.C. § 3662(a) in its Motion would thus divest the Commission of jurisdiction held by the old Postal Rate Commission.

Nowhere on its face does the existing Section 3662(a) prevent the Commission from hearing complaints requiring the examination of specific provisions of the POM and their relation to the policies of Title 39. In fact, through the explicit grant of jurisdiction over claims that the Postal Service is "not operating in conformance with the requirements of . . . 401(2)" the Commission is granted jurisdiction over precisely the type of claim brought by San Francisco. The Postal Service, at a bare minimum, will need to "explain its actual policy, regulation or procedure, and why the actual policy, regulation or procedure does not correspond to its written documentation." See Order No. 1307 at 15. The old Postal Rate Commission was empowered to hear such a regulatory challenge; so, too, does this Commission, which has an even broader set of powers provided by Congress.

## V. CONCLUSION

The City and County of San Francisco respectfully requests that the Postal Regulatory Commission deny the Postal Service's Motion for Partial Dismissal for the reasons set forth above. The Commission should issue a notice of proceeding in this action and allow San Francisco's regulatory challenge to move forward.

Respectfully submitted,

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