

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

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Complaint of FCA, Ltd, d/b/a/  
LIFE TIME FITNESS

Docket No. C98-1

MOTION OF THE UNITED STATES POSTAL SERVICE  
TO DISMISS COMPLAINT  
(November 10, 1998)

In accordance with 39 U.S.C. § 3662, as implemented by the Rules of Practice and Procedure of the Postal Rate Commission (39 C.F.R. § 3001.81 through 3001.87), and for the reasons stated below, the United States Postal Service hereby moves that the Commission dismiss the September 21, 1998, Complaint of Life Time Fitness in the above-captioned proceeding.<sup>1</sup>

I. The Material Facts Are Not In Dispute

There is some uncertainty surrounding some of the circumstances underlying the Complaint in this proceeding. Nevertheless, for purposes of this Motion, the Postal Service does not dispute the material facts:

Complainant, Life Time Fitness, of Eden Prairie, Minnesota, contracted with Prime Net Marketing Services, a bulk mail permit holder in St. Paul, Minnesota, for the preparation and execution of a Standard (A)<sup>2</sup> mailing to consist of nearly 100,000

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<sup>1</sup> This Motion should not be interpreted as minimizing the significance of any failure to deliver mail one or more days beyond its delivery service commitment window. It only should be construed as explaining why the Postal Service considers that the request for consideration of the Complaint under § 3662 should be denied.

<sup>2</sup> Formerly, third-class mail.

pieces. The mail pieces were taken by Prime Net to the Bulk Mail Entry Unit at the St. Paul Processing & Distribution Center (P&DC) of the United States Postal Service on January 5, 1998, where they were accepted for processing and delivery by the Postal Service to addresses in the Minneapolis-St. Paul metropolitan area.

At ¶¶ 3 and 12, the Complaint alleges that before the mail was deposited at the St. Paul P&DC, Life Time Fitness examined a copy the contents of a "Service Commitment" electronic diskette publicly distributed by the USPS National Customer Support Center and concluded that the service commitment for Standard (A) Mail reflected in the contents of that diskette represented a "warranty or guaranty to perform within the stated time period . . . [and that the diskette did] not contain an express waiver of liability for failing to comply with this commitment." The contents of that diskette indicate that the service commitment of the Postal Service for Standard (A) Mail originating in the St. Paul 3-digit ZIP Code area and destinating in 3-digit ZIP Code areas within the Minneapolis-St. Paul metropolitan area does not exceed 3 days.<sup>3</sup>

In its Complaint, Life Time Fitness alleges that, within a week after Prime Net deposited the mail in question at the St. Paul P&DC, telephone inquiries were directed to local postal personnel to determine the status of mail pieces intended for delivery in the service area of two classified branch post offices in the Minneapolis-St. Paul-

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<sup>3</sup> Attached to the Complaint as Exhibit A is a copy of a printout of a Service Commitment map which appears to come from the USPS Service Commitment diskette for Fiscal Year 1998, Quarter 1. That printout indicates which destinating 3-digit ZIP Code service areas in the continental United States are within either the 3-day, 4-day, 5-day, 6-day, etc., service commitment area for Standard (A) Mail originating in the 551 3-digit ZIP Code area (St. Paul). The mailing which is the subject of the Complaint took place in January, 1998, which was during Quarter 2 of FY 98. There were no changes between Q1 and Q2 in the service commitment for the origin-destination 3-digit ZIP Code pattern of the mailing described in the Complaint. A copy of the FY 98 Q2 USPS Service Commitment diskette has been filed with the Commission as Library Reference USPS LR-1/C98-1.

metropolitan area. The Complaint alleges that USPS personnel indicated, in response to these inquiries, that portions of the mailing either had been delivered or would be delivered by January 14, 1998. Complaint, ¶ 5 and Exhibit C.

Attached to the Complaint as Exhibit D is an estimate that the Postal Service took up to 12-15 days to complete delivery of the mailing. At ¶ 6, the Complaint alleges that some unspecified number of "individuals had received mailings as late as the end of the month of January 1998, some three weeks after deposit with USPS."<sup>4</sup>

The Complaint, at ¶ 7, acknowledges that, on some unspecified date, representatives from Life Time Fitness, Prime Net Marketing Services, and the Postal Service met to discuss the January 5, 1998, mailing and the possibility of a postage refund.

**II. The Subject Matter of the Complaint Does Not Raise A Matter Of Policy To Be Considered By The Postal Rate Commission Under 39 U.S.C. § 3662**

**A. The Scope Of The Commission's Authority Is Clear**

The Postal Rate Commission is authorized under 39 U.S.C. § 3662 to consider complaints which raise questions concerning whether postal services are being provided in accordance with the policies of the Postal Reorganization Act, title 39, United States Code. However, for the reasons stated herein, the Commission should decline to consider the Complaint of Life Time Fitness.

In pertinent part, 39 U.S.C. § 3662 provides that

Interested parties . . . who believe that they are not receiving postal service in accordance with the policies of . . . title [39, United States Code] may lodge a complaint with the Postal Rate Commission in such form and in such manner as it shall prescribe. The Commission may in its discretion hold hearings on such complaint. . . . If a matter not covered by subchapter II of this chapter is

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<sup>4</sup> The Postal Service is aware of no basis for confirming or refuting these claims.

involved, and the Commission after hearing finds the complaint to be justified, it shall render a public report thereon to the Postal Service which shall take such action as it deems appropriate.<sup>5</sup>

The Commission's regulations which implement this statute are published at 39 C.F.R. §§ 3001.81 through 3001.87. Section 3001.82 indicates:

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 . . . with regard to an individualized, localized or temporary service issue shall generally not be considered as properly raising a matter of policy to be considered by the Commission.

B. None Of Complainant's Allegations Raise An Issue Within The Scope Of § 3662

The Complaint alleges that, notwithstanding its mandate in 39 U.S.C. § 101(a) to provide "prompt, reliable, and efficient services," the Postal Service

failed to make timely delivery of portions of a single Standard (A) mailing deposited in the Minneapolis-St. Paul metropolitan area in January, 1998; and

was "dilatory" in responding to Complainant's concerns when it became apparent that the mailing was not being delivered in a manner consistent with the published service commitment.

Complainant also asserts that the USPS Service Commitment diskette it allegedly examined and relied upon before the mailing contains an express or implied guarantee that Standard (A) Mail will be delivered within its specified service commitment window. Finally, the Complaint concludes that, because Life Time Fitness received "no value whatsoever" for its purchase of postal services obtained in reliance on the service commitment, it is entitled to a postage refund. Complaint, ¶ 15.

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<sup>5</sup> Even if the Complaint asserted that Standard (A) Mail, or this particular Standard (A) mailing, is subject to a postage refund by virtue of some policy in the Act, and the Complaint were deemed to be a matter covered by subchapter II, the Postal Service considers that it still should be dismissed for the reasons stated in this Motion.

1. The Complaint Is Individual, Localized And Temporary

The Postal Service concedes that the service provided with respect to some unquantifiable portion of the January 5, 1998, mailing did not meet the published service commitment for that mail. The Postal Service also admits that its efforts to address this matter, during the time that the mailing was in transit did not produce a result satisfactory to itself or the mailer. Nevertheless, the allegations in the Complaint still do not raise an issue of policy for consideration by the Commission within the meaning of 39 U.S.C. § 3662, as implemented by 39 C.F.R. § 3001.82.

The Postal Service does not dispute that the service rendered in this instance was not, as a whole, "prompt," when judged by the applicable service commitment for Standard (A) Mail. Even if the Postal Service conceded that delivery also was not "reliable" or "efficient," the Complaint does not raise an issue of whether Standard (A) Mail service, on a substantially nationwide basis, contravenes the policies of the Act. By its very terms, the Complaint raises "an individual, localized, . . . [and] temporary service issue not on a substantially nationwide basis," within the meaning of § 3001.82. In its dismissal of a similar complaint, the Commission emphasized that

*[a]ll of the specific deficiencies alleged by the complainant relate either to . . . [him] as a particular mail user or to alleged localized mail service deficiencies. Of singular importance in reaching this conclusion is the fact that the complainant's allegations relate to issues of Postal Service operational practices or mail delivery services, rather than to policies set forth in the Act. When read together, the governing statute and the Commission's rules of practice intend that the statutory complaint procedure is to entertain only those complaints which involve policy matters, substantially nationwide in scope, relating to postal services or the application of rates and fees or the Domestic Mail Classification Schedule. The local mail processing aspect of the subject allegations clearly does not satisfy this requirement.*

PRC Order No. 435, at 3 (June 11, 1982). The Complaint of Life Time Fitness involves

only one mailer, clearly making this an "individual" matter.<sup>6</sup> The origin and destination of the mailing was the Minneapolis-St. Paul metropolitan area, clearly making this a "localized" matter. Only one mailing was involved, clearly making this a "temporary" matter. On any of these bases alone, the Postal Service considers that the Commission should dismiss the Complaint. The combination of all three of these factors in this instance should serve to make that result more compelling.

2. The Complaint Alleges No Arbitrary, Discriminatory, Capricious, Or Unreasonable Action

The Commission has indicated that the absence of "substantially nationwide" impact, by itself, is not dispositive on the issue of whether a complaint invoking § 3662 should be dismissed. In response to complaints which question whether a postal operating procedure or practice<sup>7</sup> (otherwise lacking substantially nationwide implications) or the actual service provided to a mailer conforms with the policies of the Postal Reorganization Act, the Commission has stated that its policy is to hold hearings only when the surrounding circumstances raise the question of whether the Postal Service policy or action was unduly discriminatory, or otherwise arbitrary, capricious or unreasonable. See Docket No. C84-3, PRC Order No. 580, at 5-6; Docket No. C84-2, PRC Order No. 540, at 5 (December 6, 1983); Docket No. C83-2, PRC Order No. 524, at 10.<sup>7</sup> (September 2, 1983). The Complaint makes no allegation of unduly discriminatory, arbitrary, capricious or unreasonable action.

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<sup>6</sup> The reference to 99,236 "adversely affected" mail recipients in ¶ 13 of the Complaint does nothing to change the real character of the underlying matter: the Postal Service mishandled one bulk mailing of one customer. See, PRC Order No. 435, at 4.

<sup>7</sup> Or some action seeking to conform thereto.

### 3. The Complaint Proves That The Postal Service Was Responsive

The Complaint alleges that the Postal Service was "dilatory" in responding to the mailer's concerns about the late mailing and asserts that the this allegedly dilatory response provides either a supplementary or independent basis for a § 3662 complaint. Even if the allegation were true, this aspect of the Complaint should be dismissed for the reasons discussed above in section II.B.1.

Moreover, on its face, the Complaint rebuts any assertion that the postal personnel, who were unable to improve matters to Complainant's satisfaction, were dilatory in their response to the problem. Paragraphs 5 and 7, and Exhibit C, of the Complaint document a series of communications between mailer representatives and local postal personnel seeking to deal with the status of the mailing. These same factual allegations refute any suggestion that the USPS personnel seeking to resolve the matter acted unreasonably, arbitrarily, capriciously, or in a manner which unduly discriminated against Life Time Fitness. However ineffective their efforts may have been in making the situation better, the postal personnel acted in a reasonable and proper fashion in trying to address Life Time Fitness' concerns.<sup>8</sup> In an earlier proceeding, the Commission opined that the bare fact that the Postal Service was not able to produce a satisfactory conclusion from the standpoint of the mailer does not provide sufficient reason for the Commission to conduct a hearing to review this matter. See Docket No. C83-1, PRC Order No. 512, at 3. (July 12, 1983). The instant Complaint fails to meet the threshold requirements for hearing enunciated in previous Commission Orders and should be dismissed.

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<sup>8</sup> As was the case with the situation underlying the Complaint filed in an earlier case. See Docket No. C83-2, PRC Order No. 524, at 10 (September 2, 1983).

4. Any Attempt To "Bootstrap" The Complaint Would Subvert The Purpose Of § 3662

The Complaint in this matter could be construed as asserting that any failure to meet the service commitment for a Standard (A) mailing is *per se*, arbitrary, capricious, unduly discriminatory or unreasonable and, therefore merits examination by the Commission under § 3662. However, concurrence with this view would compel the Commission to conduct a hearing any time a mail sender or recipient invoked § 3662 in response to a disappointing postal transaction. Such proceedings would ignore the necessary and reasonable limits placed on the scope of § 3662 jurisdiction, which exist to restrict the Commission's focus to questions concerning whether the Postal Service, on substantially nationwide basis, is failing to comply with some policy of the Postal Reorganization Act in its delivery of some postal service.

However dedicated the Postal Service might be to providing "prompt, reliable, and efficient" services in accordance with 39 U.S.C. § 101(a), there are a non-minuscule number of mail transactions, among the over 200 billion that occur each year, which are disappointing to the affected customers and to the postal employees responsible for trying to satisfy those customers. However, § 3662 does not exist for the purpose of injecting the Commission into the role of conducting a *post mortem* examination every time a disappointing postal transaction occurs.

III. Complainant's Misunderstanding Concerning The Existence Of A Standard (A) Mail Delivery Service Guarantee Does Not Raise An Issue Which Merits A Hearing Under § 3662

At the heart of the Complaint is the assertion that there is either an express or implied guarantee of a postage refund, in the event of a failure of the Postal Service to meet its Standard (A) Mail service commitment. As explained below, there is no such guarantee. Nor is there any reasonable basis for presuming or implying one. Second,



there is no basis for asserting that the contents of the USPS Service Commitment diskette contradict the terms of Standard (A) Mail service, as that service is defined in the Domestic Mail Classification Schedule and the Domestic Mail Manual.

Complainant's alleged misunderstanding of the contents of the diskette cannot be blamed on the Postal Service. Nor does that misunderstanding raise an issue for consideration by the Commission within the scope of § 3662.

A. There is No Express Or Implied Standard (A) Mail Service Guarantee

Each fiscal quarter, the Postal Service internally and publicly distributes an electronic Service Commitment diskette. The contents of that diskette include information indicating the level of delivery service the Postal Service is committed to trying to provide for various mail classes between any 3-digit ZIP Code origin-destination pairs. However, contrary to the assertions in ¶ 15 of the Complaint, the information in that Service Commitment diskette cannot reasonably be interpreted as a delivery service "guarantee" or as implying that the failure to deliver Standard (A) Mail within the specified service commitment obligates the Postal Service to make a postage refund.<sup>9</sup>

The general terms of Standard (A) Mail service are established by the Domestic Mail Classification Schedule. The DMCS provisions relating to Standard Mail, for all times relevant to the mailing in question, are those reflected at 39 C.F.R. Part 3001, Subpart C, Appendix A, § 310 *et seq.* (July 1, 1998).

The Postal Service enacts regulations in accordance with its residuum of authority to interpret mail classifications.<sup>10</sup> The regulations interpreting the DMCS are

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<sup>9</sup> Nor can liability for a refund reasonably be presumed from the absence of an express waiver of liability in the contents of the diskette.

<sup>10</sup> See, *National Retired Teachers Association v. United States Postal Service*, 593 F.2d 1360, 1363 (DC Cir. 1979).

published in the USPS Domestic Mail Manual,<sup>11</sup> which is incorporated by reference at 39 C.F.R. § 111.1. The DMM

contains the basic standards of the United States Postal Service (USPS) governing its domestic mail services; descriptions of the mail classes and special services and conditions of their use; and standards for rate eligibility and mail preparation. Domestic mail is classified by size weight, content, service, and other factors.

DMM § G020.1.1. Provisions which describe Standard (A) Mail include DMM § D600.1, which defines the service objective for such mail.

The term "service commitment" is synonymous with such commonly used postal terms as "service objective" and "service standard." The Postal Service defines this latter term as: "A stated goal for service achievement for each mail class."<sup>12</sup> The service commitment represents the level of service the Postal Service strives to provide – its operational goal, the standard it tries to achieve, the benchmark against which actual service performance is measured.

Service commitment information for the various mail classes is published in a variety of materials made available by the Postal Service to the general public. One widely disseminated publication is the annual National Five-Digit ZIP Code and Post Office Directory.<sup>13</sup>

The general terms and conditions of Standard (A) Mail service are spelled out in the Domestic Mail Classification and the Domestic Mail Manual. The Service

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<sup>11</sup> For all times relevant to this litigation, DMM Issue 53 (January 1, 1998) was in effect.

<sup>12</sup> Glossary of Postal Terms, USPS Publication 32, at 107 (May 1997).

<sup>13</sup> See, for example, the 1998 National Five-Digit ZIP Code and Post Office Directory, Volume 2, page 10-3. For all times relevant to this Complaint, the general Standard (A) Mail service commitments have been exactly as reflected in that document, a copy of which is attached to this Motion as Exhibit A.

Commitment diskette contains no information which contradicts DMCS § 352, which plainly states: "Standard Mail may receive deferred service." Nor do the diskette's contents contradict DMM § D600.1.0, which declares: "The USPS does not guarantee the delivery of Standard Mail within a specified time. Standard Mail might receive deferred service."<sup>14</sup> Thus, there is no basis for the assertion that Standard Mail has an explicit or implied delivery service guarantee. If anything, the contents of the diskette clarify -- with exacting specificity for all 3-digit ZIP Code origin-destination pairs -- the nature of Standard (A) Mail delivery service commitment to which the DMCS and DMM explicitly attach no postage refund guarantee.

The Service Commitment diskette serves a very valuable, very clear, but very limited purpose. There is no more need for the diskette to explain postage refund policy or disclaim postage refund liability for failure to meet service commitments than there is for it to indicate rates and fees, technical specifications for addressing and barcoding and presorting, size and weight limits for the various mail classes, or postage payment options. All of that information is published in the DMM and other widely disseminated public documents. Accordingly, it is unreasonable to presume a postage refund guarantee for Standard Mail or any of the other mail classes referenced in the diskette, on the basis of the absence of a refund disclaimer among its contents, as the Complaint argues at ¶ 12. This conclusion is compelled by the very limited nature of the contents of the diskette and the absence of any conflict between its contents and

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<sup>14</sup> In contrast, the Commission's attention is invited to DMCS § 182, which reflects the terms under which Express Mail categories are subject to a postage refund guarantee, in the event of non-compliance with the applicable service commitments. See also, DMM § D500.1.1 through 1.4.

All mail is subject to the postage refund policies in DMM § P014.2.0. For instance, refunds are available when no service is rendered. See DMM § P014.2.1.a. Based upon the factual allegations in the Complaint, it appears incontrovertible that service was rendered to Life Time Fitness.

the DMCS or DMM. It is further buttressed by the exceptional status of the Postal Service's only service commitment-related postage refund policy, which applies to Express Mail.<sup>15</sup>

B. The Misunderstanding Of A Single Postal Customer Does Not Raise An Issue Of Policy To Be Considered Under § 3662

The Complaint attempts to portray Life Time Fitness as having received and detrimentally relied upon service "guarantee" information provided by the Postal Service. As demonstrated above, there is no reasonable basis for such a conclusion.

The Commission should reject Life Time Fitness' "detrimental reliance" claim because there is no assertion that Prime Net Marketing Services, the bulk mail permit holder which actually prepared the mail pieces and entered them into the mail stream, shares Life Time Fitness' alleged misunderstanding about a Standard (A) Mail service guarantee.<sup>16</sup> For whatever reason, the Complaint is silent on the issue of what Prime Net Marketing Services understands about the terms of Standard (A) Mail service.

There is no basis in the Complaint for imputing Life Time Fitness' lack of knowledge to anyone else and there is no allegation that the absence of a statement of

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<sup>15</sup> The one mail class not referenced in the diskette's contents.

<sup>16</sup> Without revealing any commercially-sensitive client or volume information, the response to this Motion can include a stipulation concerning Prime Net Marketing Service's extensive experience as a bulk mail permit holder, as well as the considerable number of mailings and volume of third-class mail and Standard (A) Mail it has entered at postal facilities in the Minneapolis-St. Paul area in the last several years. The Commission could conclude from such a stipulation that Prime Net Marketing Service had actual or constructive knowledge that there is no postage refund guarantee for late delivery of Standard (A) Mail. Upon such a finding, the Commission should impute such knowledge to Complainant, given the agency relationship involved.

Alternatively, at the risk of jeopardizing Prime Net Marketing Services' competitive position and the reputation it presumably enjoys as a knowledgeable mail preparation business, the response to this Motion is free to assert that Prime Net was ignorant about whether there was a postage refund guarantee in the DMCS or DMM for the late delivery of Standard (A) Mail.

postage refund policy among the contents of the diskette has caused any mailer other than Life Time Fitness to "detrimentally rely" on its contents. Since the Complaint alleges that only one mailer operated under the misapprehension that postage is refunded for late Standard (A) Mail, the Postal Service submits that such a complaint is patently "individual" and "localized" and should, by now, be "temporary," within the meaning of 39 C.F.R. § 3001.82. There is no basis for concluding that the diskette's contents raise an issue concerning whether Standard (A) Mail service contravenes the policies of the Act on a substantially nationwide basis. Accordingly, the Complaint should be dismissed.

#### IV. The Complaint Requests Relief Which The Commission Cannot Provide

A final reason why the Commission should not hear the Complaint is that it seeks relief the Commission is not authorized to provide. In pertinent part, § 3662 states that

[I]f . . . the Commission after hearing finds the complaint to be justified, it shall render a public report thereon to the Postal Service which shall take such action as it deems appropriate.

Thus, even if the Commission asserted jurisdiction to hear the complaint and made findings either that

the Postal Service failed to make timely delivery of a significant portion of the January 5, 1998, Standard (A) Mailing; or that

it was "dilatatory" in responding to the mailer's concerns; or that

its Service Commitment diskette implied a postage refund "guarantee" which was detrimentally relied upon;

the Postal Service respectfully submits that the Commission still is not authorized to provide the relief requested in ¶ 15 of the Complaint – a postage refund.<sup>17</sup> "Section

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<sup>17</sup> Postage refunds for domestic postal services are governed by the terms of the DMCS and DMM. Administrative procedures for the pursuit of such a refund are

3662 limits the Commission's power relative to service complaints to issuing a nonbinding, advisory document after a hearing." Docket No. C83-1, PRC Order No. 512, at 2. Since the statute only authorizes the Commission to advise the Postal Service to take such action as the Postal Service, in the exercise of its own discretion, deems appropriate, the Complaint requests relief which the Commission lacks authority to provide.

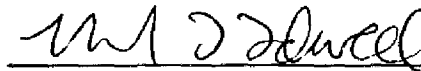
For the foregoing reasons, the Complaint should be dismissed in its entirety.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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Ratemaking



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Attorney

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described in DMM P014.2.8 and 2.9. The payment of a refund is discretionary on the part of the Postal Service. See, *Combined Communications v. United States Postal Service*, 891 F.2d 1221, 1231, n.6 (6th Cir. 1989). There is no allegation that these procedures have been formally employed at all by Complainant or that postal personnel have responded to any such request in an unduly discriminatory, arbitrary, capricious, or unreasonable manner. Thus, there is no basis for Commission review of this matter under any reasonable reading of 39 U.S.C. § 3662 or 39 C.F.R. § 3001.82.

# UNITED STATES POSTAL SERVICE Service Commitments

(ZIP Coded mail only)

Mail Class	Over-night	2nd Day	3rd Day	4th Day	5th Day	6th Day	7th Day	8th Day	9th Day	10th Day	Notes
Express Mail											Directories available at your local post offices.
Priority Mail											Primarily a two-day product.
First-Class Mail											11 ounces or less.
Periodicals											Surface preferential
Standard Mail (B)											See local BMC Manager for Parcel Post Commitments.
Standard Mail (A)											Mail entered at the Destination P&DC has a 2 & 3 day commitment.

For additional information contact the MANAGER SERVICE POLICIES AND PROGRAMS, POSTAL HEADQUARTERS, 475 L'ENFANT PLAZA SW, WASHINGTON DC 20260-2806.

**CERTIFICATE OF SERVICE**

I hereby certify that, in accordance with section 12 of the Rules of Practice, I have this day served the foregoing document upon:

Bonnie L. Wilkins, Esq.  
Kennedy & Graven, Chartered  
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