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

COMPLAINT OF TYLER, TX LOCAL #1477	Docket No. C2013-7

MOTION OF THE UNITED STATES POSTAL SERVICE TO DISMISS COMPLAINT (April 30, 2013)

Pursuant to 39 C.F.R. 3030.12(b),[1] the United States Postal Service ("Postal Service") submits this motion to dismiss the Complaint filed on April 10, 2013, by the Tyler, TX Local #1477 of the American Postal Workers Union ("Local").[2] In its Complaint, the Local argues that the Postal Service's ongoing implementation of the Network Rationalization Plan, which was first announced in September 2011—and which was the subject of proceedings in Docket No. N2012-1—violates 39 U.S.C. § 101(d), section 302 of the Postal Accountability and Enhancement Act of 2006 ("PAEA"),[3] and unspecified provisions of the National Labor Relations Act ("NLRA"). As set forth more fully below, the Postal Regulatory Commission ("Commission") lacks jurisdiction to hear the Local's Complaint, which is both procedurally defective and fails to set forth any issues of material fact or law that would entitle the Local to relief. Accordingly, the Commission should dismiss the Complaint with prejudice.

[1] Pursuant to this rule, the Postal Service's Answer is deferred. If the Commission denies the Postal Service's motion or postpones disposition, the Postal Service's Answer is due within 10 days of the Commission's action.

[2] The Local also includes as complainants "Consumers of USPS," but makes no attempt to explain the allegations upon which it is asserting general claims by all Postal Service customers. Furthermore, the Local lacks standing to assert such a claim as it makes no allegations that it is representative of the entire class. *Cf.* Fed. R. Civ. P. 23.

[3] Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006).

BACKGROUND

On September 21, 2011, the Postal Service published an advance notice of proposed rulemaking ("ANPR") in the *Federal Register* to revise 39 C.F.R. Part 121.[4] The revisions in the ANPR proposed to alter the service standards for some market dominant products, thereby facilitating the consolidation of its mail processing operations and reduction in the number of facilities committed to these operations. The ANPR stated that, if the Postal Service determined to go ahead with its plan, it would seek an advisory opinion from the Commission pursuant to 39 U.S.C. § 3661 and would publish a notice of proposed rulemaking. As a result of the ANPR, the Postal Service received more than 4,200 comments, including comments from the national office of the American Postal Workers Union ("APWU").

On December 5, 2011, the Postal Service filed its request for an advisory opinion from the Commission ("Request") on the proposal to revise the service standards for market dominant products. *See* PRC Docket No. N2012-1. The Request also informed the Commission that the Postal Service was conducting a parallel notice-and-comment rulemaking to revise the service standards.

On December 15, 2012, the Postal Service published a Notice of Proposed Rule ("NPR") in the *Federal Register* proposing new service standards for certain market dominant products.[5] In response to the NPR, the Postal Service received more than 100 written comments.

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[4] Proposal to Revise Service Standards for First-Class Mail, Periodicals, and Standard Mail, 76 Fed. Reg. 58,433 (Sept. 21, 2011).

[5] Service Standards for Market-Dominant Mail Products, 76 Fed. Reg. 77,942 (Dec. 15, 2011).

On May 17, 2012, the Postal Service issued a press release announcing its intention to implement new service standards for market dominant products and consolidate its network in two phases.[6] The press releases stated that, on July 1, 2012, the Postal Service would implement the first phase of service standard changes which maintained overnight service for First-Class Mail designated as Intra-SCF,[7] and that the second phase would be implemented on February 1, 2014, unless the circumstances of the Postal Service change. The Postal Service published its final rule adopting this phased service standard implementation plan on May 25, 2012 ("Final Rule").[8] The press release was accompanied by a list of facilities at which consolidations were expected to be implemented during Phase 1.[9] In response to an inquiry from the Commission during Docket No. N2012-1, the Postal Service presented testimony making clear that the press release:

> reflected an overview of the modified network implementation plan at the time that . . . [it] . . . was published. The implementation plan is expected to evolve as numerous facility-specific details are refined and modified.

Docket No. N2012-1, Tr. Vol. 9 at 2712 (emphasis added); *see also*, *id*. at 2731.

From July 2012 through September 2012, the Postal Service closed or consolidated 46 mail processing plants as part of Phase 1, pursuant to the

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[6] Postal Service Press Release PR 12-058, Postal Service Moves Ahead with Modified Network Consolidation Plan (May 17, 2012). Docket No. N2012-1, Tr. Vol. 2713-14.

[7] Intra-SCF is defined as mail that originates and destinates in the same geographic area served by a single sectional center facility and that is entered before the critical entry time.

[8] Revised Service Standards for Market-Dominant Mail Products, 77 Fed. Reg. 31190 (May 25, 2012) (to be codified at 39 C.F.R. Part. 121).

[9] *See*, Docket No. N2012-1, Tr. Vol. 9 at 2719-25.

proposal submitted to the Commission in Docket No. N2012-1 and in accordance with the service standards established in the Final Rule. To avoid disrupting the 2012 fall catalog, election and holiday mailing surges, the Postal Service scheduled limited mail processing consolidations during that period with plans to resume Phase 1 closings and consolidations in early 2013.

During the break in Phase 1, the Postal Service determined that certain mail processing plant closures or consolidations originally scheduled for Phase 2 could be implemented during the latter part of Phase 1 while preserving operations necessary to achieve the service standards that took effect in July 2012. Accordingly, on January 14, 2013, the Postal Service issued a press release announcing that the Postal Service "Board of Governors has directed management to accelerate the restructure of Postal Service operations to further reduce costs in order to strengthen Postal Service finances." On March 26, 2013, the Postal Service notified leaders of the various postal unions, including APWU president Cliff Guffey, that pursuant to the Board of Governors' directive, the Postal Service would advance to Phase 1 the closing and consolidation activity for 53 mail processing plants originally scheduled for Phase 2 beginning February 1, 2014.[10] The letter further explained that the accelerated implementation schedule for the 55 mail processing plants would still permit the Postal Service to maintain the Phase 1 Intra-SCF service standard.

[10] By letter dated March 28, 2013, the Postal Service informed the national leadership of the various postal unions, including the APWU, that two additional locations were being moved from Phase 2 to Phase 1 implementation. The total number of locations, therefore, increased from 53 to 55.

The East Texas Processing and Distribution Center ("East Texas P&DC"), located in Tyler, Texas, was one of the mail processing plants identified in the March 26, 2013 letter as having its originally planned Phase 2 consolidation advanced to Phase 1. The East Texas P&DC currently serves the 756 through 758 3-digit ZIP Code service areas. The Postal Service plans to consolidate the operations at the East Texas P&DC to the Shreveport, North Texas, and Austin P&DCs.[11] The Area Mail Processing ("AMP") Feasibility Studies for this consolidation anticipates approximately $16 million in annual cost savings after it is fully implemented.[12]

RELEVANT LEGAL STANDARDS

Pursuant to 39 U.S.C. § 3662(a), any 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) may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe." The Commission's Rules of Practice and Procedure prescribe the form of a complaint. Under those rules, a complaint must, among other things:

- "Set forth the facts and circumstances that give rise to the complaint," 39 C.F.R. § 3030.10(a)(1);

[11] *See generally* Docket No. N2012-1, USPS Library Reference N2012-1/73 (East TX to Austin and N TX and Shreveport_Final). For 2013, the Postal Service plans to move the operations ultimately intended for the Austin P&DC to the North Texas P&DC. For 2014, the Postal Service plans to move those operations to the Austin P&DC as described in the AMP studies filed in Docket No. N2012-1.

[12] *Id.* at 1.

- "Clearly identify and explain how the Postal Service's action or inaction violates applicable statutory standards or regulatory requirements," *id.* §3030.10(a)(2);

- "State the nature of the evidentiary support that the complainant has or expects to obtain during discovery to support the facts alleged in the complaint," *id.* § 3030.10(a)(5);

- "State whether the issues presented are pending in or have been resolved by an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party; and if so, provide an explanation why timely resolution cannot be achieved in that forum," *id.* § 3030.10(a)(7); and

- "Include a certification that states that prior to filing, the complainant attempted to meet or confer with the Postal Service's general counsel to resolve or settle the complaint, why the complainant believes additional steps would be inadequate, and the reasons for that belief," *id.* § 3030.10(a)(9).

Within 20 days after a complaint is filed, the Postal Service generally must either file an answer or a dispositive motion. *Id.* § 3030.12.

Within 90 days after a complaint is filed, the Commission must either dismiss the complaint or, upon a finding that the complaint "raises material issues of fact or law, begin proceedings on such complaint." 39 U.S.C. § 3662(a); *accord* 39 C.F.R. § 3030.30(a). If, at the conclusion of that proceeding, it finds the complaint to be "justified," it may take appropriate action to remedy the noncompliance. 39 U.S.C. § 3662(c).

Accordingly, the issue before the Commission here is whether the Commission has jurisdiction to hear the Local's Complaint, and if so, whether the Complaint both satisfies the procedural requirements of 39 C.F.R. § 3030.10(a) and raises material issues of fact or law warranting the initiation of complaint proceedings. The Postal Service submits that the Commission lacks jurisdiction

to hear this Complaint and even assuming jurisdiction, the Complaint should be dismissed on both substantive and procedural grounds.

ARGUMENT

The Local's Complaint appears to make four arguments: (1) the AMP Feasibility Study process, as applied to the for the East Texas P&DC, violates section 302 of the PAEA; (2) the East Texas P&DC AMP public meeting was invalid because the Local did not have the unredacted, approved versions of the AMP Feasibility Studies at the time of that meeting; (3) the Postal Service failed to comply with the February 2013 USPS/APWU Agreement regarding provision of unredacted approved AMP Feasibility Studies to Local union officials subject to protective conditions approved by the National Labor Relations Board ("NLRB"); and (4) the rescheduling of the closure or consolidation of the 55 mail processing plants originally planned from Phase 2 (in 2014) of the Mail Processing Network Rationalization initiative to Phase 1 (in 2013) will result in a change in service in affected mail processing plant service areas. None of these allegations have merit or raise any issues of material fact or law sufficient to withstand a motion to dismiss.

The Postal Service will first address the jurisdictional concerns and why the Commission should dismiss the Complaint without evaluating the merits of the Local's arguments. The Postal Service will then address each argument in turn, demonstrating why none of the Local's arguments raise a material issue of fact or law. The Postal Service also will explain why the Complaint should be dismissed for failure to follow applicable procedures.

I. THE COMMISSION LACKS THE STATUTORY JURISDICTION TO HEAR THIS COMPLAINT.

Subject matter jurisdiction is a preliminary matter which must be established in every case. *See Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C.Cir.1963) (jurisdiction is a threshold question which must be examined); *see also United States v. Anderson*, 464 F.2d 1390 (D.C.Cir.1972) (a defect in jurisdiction may not be ignored). An adjudicatory body that lacks subject matter jurisdiction over the claims alleged in a complaint is unable to render a decision on the merits and must dismiss the case. *See, e.g.*, *Belbacha v. Bush*, 520 F.3d 452, 457 (D.C. Cir. 2008) (reinforcing that if a court "determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"). Here, as described in detail below, the Complaint fails to establish any grounds for concluding that the Commission has subject matter jurisdiction to hear the Local's allegations. As the Commission's complaint review is limited and the Local's claims fall outside of that limited scope, the Commission should dismiss the Complaint for lack of jurisdiction without addressing the merits of the Local's complaint.

A. The Complaint Fails to Allege Properly Any Statutory or Regulatory Violations that Give Rise to the Commission's Complaint Jurisdiction.

The Commission is an adjudicative body of limited review, as its authority to hear complaints is statutorily bound by 39 U.S.C. § 3662. Subsection 3662(a) limits the Commission's jurisdiction to only those complaints where the filing party properly alleges a violation by the Postal Service of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601 or those statutes in chapter 36 of title 39

which address postal rates, classes and services.[13] Under the Commission's rules, a complaint must clearly identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements, and it must include citations to the relied-upon section or sections of title 39 of the United States Code, or the relied-upon order, regulation, or other regulatory requirement. 39 C.F.R. § 3030.10(a)(2). As the Local's complaint fails to properly allege any violations of the enumerated sections, the Commission lacks jurisdiction to hear this Complaint.

The legislative history from the 108th and 109th Congresses makes clear that Congress had no intent to broaden the Commission's complaint jurisdiction in the PAEA to include matters not enumerated in subsection 3662(a), thereby confirming the exclusion of such matters as labor-management consultation processes, staffing decisions, or facility management. It is telling that, under both the PAEA and precursor bills to change the former section 3662, Congress consistently maintained the Postal Reorganization Act's title for section 3662 as "Rate and service complaints." *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he heading of a section [is a] tool[ ] available for the resolution of a doubt about the meaning of a statute." (internal quotation marks and citations omitted)). Thus, whatever provisions it may have included within the Commission's complaint jurisdiction, Congress intended to keep the Commission's eye on rate and service, not turn it toward other internal aspects of Postal Service operations. At its core, the instant Complaint can be fairly

[13] The United States Supreme Court has held that "[a] rule is jurisdictional if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Gonzalez v. Thaler*, 132 S.Ct. 641, 648 (2012) (internal quotations omitted).

interpreted to challenge staffing, labor-management relations, and network-management changes, however, not postal rates or service.

In promulgating section 3662(a) as part of H.R. 6407, the 109th Congress chose to enumerate specific statutes as narrow bases for Commission jurisdiction. Congress elected this approach over earlier bills that would have given the Commission jurisdiction over complaints concerning the entirety of chapters 1 and 4 of title 39. *See, e.g.*, H.R. 22, 109th Cong. § 205 (2006); S. 662, 109th Cong. § 205 (2006). At no time did the 108th or the 109th Congress deliberate on a proposal to give the Commission jurisdiction over all sections of title 39. Even at the time the Senate approved S. 662 in the 109th Congress, one of its key sponsors explained that the version of section 3662 contained therein – while broader than the eventually enacted version –

> does not and is not intended to preclude any interested party from securing a hearing before the Postal Regulatory Commission if it believes that the rates being charged or the manner in which services being provided to that mailer or mailer group violates the act. It is my hope that in conference that we can work to assure that <u>the Postal Regulatory Commission does not become embroiled in attempts to resolve disputes as to internal affairs or purely operational decisions of the Postal Service.</u> This provision is intended to protect the rights of the mailing public against the potential for monopoly abuse or other unjust or unfair conduct by the Postal Service <u>in terms of rates charged or the nature of service provided.</u>

152 Cong. Rec. S767 (daily ed. Feb. 7, 2006) (statement of Sen. Collins) (emphasis added). Given the clear intent in legislative history to narrow the Commission's complaint jurisdiction, it is wholly implausible that Congress would

have listed specific statutory bases in a section titled "Rate and service complaints," and then expected that the Commission's complaint jurisdiction be expanded beyond that to other unspecified sections of title 39 as well.

The Local's complaint appears to allege violations of sections 101(d) and 3662 of title 39 and section 302(c)(3) of the PAEA (as codified in the notes of section 3691 regarding the Postal Service Plan).[14] The Local also bases its Complaint on the terms of a settlement agreement regarding a claim presented by the APWU before the NLRB. As explained fully below, the Commission has no basis for asserting complaint jurisdiction based on these allegations.

1. The Commission lacks jurisdiction over labor relations matters.

As an initial matter, the Local's claims regarding the Settlement Agreement between the Postal Service and the APWU ("Settlement") and its associated Non-Disclosure Agreement ("NDA")[15] approved by the NLRB are labor matters exclusively under the jurisdiction of the NLRB. *See Operating Engineers Local 926 v. Jones*, 460 U.S. 669 (1983) (the Board's jurisdiction is exclusive and is not subject to other means of dispute adjustment that may be established by law, by private agreement or otherwise); *see also Auto Workers Local 1519 v. NLRB*, 619 F.2d 580, 104 LRRM 2050 (6th Cir. 1980). Section 3662 and the PAEA do not provide for Commission jurisdiction to review such matters or enforce the terms of the Settlement and NDA.

[14] It is difficult for the Postal Service to determine exactly which sections of title 39 the Local was relying upon in support of its Complaint given the failure to tie specific sections to specific causes of action. In a conservative effort to respond fully to each allegation, the Postal Service is treating the reference to any number which could be a section of title 39 as such.

[15] A copy of the NDA is attached to this Motion to Dismiss as Exhibit A.

Examining the legislative history of the PAEA, it appears that Congress steered clear of authorizing the Commission to oversee postal labor-management relations. In the PAEA, Congress notably declined to adopt the sole suggestion by the President's Commission on the Postal Service that the Commission have jurisdiction over an employment-related matter (pay comparability for bargaining-unit employees). *See* REPORT OF THE PRESIDENT'S COMMISSION ON THE UNITED STATES POSTAL SERVICE, EMBRACING THE FUTURE: MAKING THE TOUGH CHOICES TO PRESERVE UNIVERSAL MAIL SERVICE 44, 69, 115-16, 119, 122-23, & appx. C at 139, 177 (2003). In fact, the PAEA explicitly provides that "nothing in this Act" – including the changes to the Commission's complaint jurisdiction – "shall restrict, expand, or otherwise affect any of the rights, privileges, or benefits of either employees of or labor organizations representing employees of the United States Postal Service under . . . any handbook or manual affecting employee labor relations within the United States Postal Service[.]" Pub. L. 109-435, § 505(b), 120 Stat. 3236 (2006). While this provision certainly applies to collective bargaining agreements under chapter 12 of title 39, it emphasizes Congress' intent to preclude the Commission's complaint jurisdiction (as "[some]thing in this Act") over postal employment matters.

As such, section 3662 provides no mechanism for the Commission to review or resolve the Local's likely interpretation of the February 2013 Settlement approved by the NLRB. In any event, the relief sought from the Commission, issuance of a subpoena to enforce the terms of the Settlement and NDA, is

outside the scope of permissible remedies for the Commission to order.[16] As such, the Commission lacks jurisdiction to hear the Local's labor concerns or issue the proposed remedy.

2. The Commission lacks jurisdiction over PAEA section 302 matters.

Pursuant to the explicit terms of subsection 3662(a), the Commission also lacks jurisdiction to review the Local's claims brought under section 302 of the PAEA, as it is not one of the enumerated bases in subsection 3662(a). It appears from the Complaint that the Local is alleging that the Postal Service is violating section 302 of the PAEA by not following one or more of the substantive requirements of Postal Service Handbook PO-408, Area Mail Processing Guidelines ("Handbook PO-408"), which contains the guidelines for postal management analysis and decision-making regarding proposals to consolidate originating and/or destinating operations at mail processing plants. The Local may also be alleging that Handbook PO-408 is deficient as written because of a perceived failure to comport with section 302. The Commission lacks jurisdiction under either interpretation.

As set forth above, the Commission's complaint jurisdiction is limited to the sections enumerated in section 3662 and chapter 36 of title 39. Section 302 of the PAEA is neither explicitly identified in subsection 3662(a) nor is it part of

[16] While the Commission has the authority to request documents from the Postal Service and issue subpoenas, these requests are limited in scope to proceedings and issues before the Commission. See 39 C.F.R. § 3005.13 (subpoenas are limited to those requests which a party demonstrates relate to "a proceeding conducted by the Commission under title 39 of the United States code or that the purpose of the subpoena is to obtain information to be used by the Commission to prepare a report under title 39 of the United States Code"). The subpoena power does not extend to enforcing third-party orders from the NLRB or a settlement agreement as requested by the Local.

chapter 36. Further, although the text of section 302 of the PAEA appears as a note to section 3691, which is part of chapter 36, this placement was not made by an act of Congress, and therefore, it cannot confer jurisdiction to the Commission.

As explained in a response to a question posed to the Law Library Journal, statutes in the United States Code are organized either by explicit act of Congress or by the Office of Law Revision Counsel (”LRC”) within the House of Representatives. 78 L. Libr. J. 590 (1986). The response explained:

> The [LRC] was created in 1974 as part of the House of Representatives. That office prepares and submits new editions of the United States Code to the Committee on the Judiciary, which is authorized to prepare and publish new editions and supplements to the Code of the United States. The office also classifies newly enacted provisions of law into their proper positions in the Code. . . . In compiling the Code, the Office also includes material, either in notes or appendixes, to aid in the construction and interpretation of the Code. . . . Inclusion of [a] section . . . in the notes helps to insure that researchers will not overlook that portion of the statute.

Id. 592-93.

This issue of statutory location was further addressed in *Baez v. United States*, 715 F. Supp. 2d 1165 (D. Or. 2010). In *Baez*, the plaintiff argued that the phrase “this subchapter,” as it referred to the Immigration and Nationality Act (8 U.S.C. § 1255), did not include the Cuban Refugee Adjustment Act of 1996 (CAA) because it appeared in the note and not the text of section 1255. *See* 715 F. Supp. at 1177. Accordingly, the plaintiff argued that the CAA was not part of the subchapter and the Attorney General lacked the discretion to deny or grant

an adjustment application made pursuant to the CAA. *See id.* The government countered that:

> because the actual public law text of a 1976 amendment to the CAA contains a parenthetical reference to the CAA being found at '8 U.S.C. 1255, note,' the placement of the CAA following section 1255 [and within the 'subchapter'] was indeed a Congressional Act.

Id. at 1178. In response, the court held that while the CAA is clearly law as it is in the Statutes at Large, "it remains equally unclear that the presence of the CAA following section 1255(a) [in the notes] was intended by Congress to indicate that the CAA should be read as part of the INA." *Id.* Without a clear showing that the placement in the INA was an act of Congress, it must be determined to be a decision of the LRC. *See id.* As such, placement of the CAA as a note in section 1255(a) by the LRC did not render it part of the subchapter.

In the instant context, Congress specifically set forth that section 301 of the PAEA should be placed in chapter 36 of the United States Code and should appear as section 3961. In contrast, section 302 of the PAEA was silent as to its need to be published in the United States Code, or if it was determined to be published by the LRC, where it should appear. While section 302 of the PAEA references 3961 as the basis for the deadline by which the Postal Service must develop the Postal Service Plan, similar to the reference in *Baez*, section 302's placement in the United States Code was not a decision of Congress, but was instead made by the LRC. Accordingly, section 302 of the PAEA is not part of chapter 36, and the Commission lacks jurisdiction over claims asserting noncompliance with that section.

3. The Complaint fails to allege a proper subsection 101(d) or chapter 36 claim to attain jurisdiction.

While the Commission has jurisdiction over claims arising out of subsection 101(d) and chapter 36 of title 39, the Local has alleged no facts and made no claims which could be interpreted as asserting any such violations of those statutes. Subsection 101(d) states that "[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." Despite citing subsection 101(d), the Local makes no allegation that the Postal Service's consolidation of the East Texas P&DC has any effect on postal rates or the fair and equitable apportionment of costs among postal products. Instead, the Local alleges that the Postal Service's network rationalization plan is "inefficient" and "unreliable."[17] To merely cite a statute without presenting a proper claim pursuant to that statute is insufficient to establish jurisdiction. In fact, the United States Supreme Court specifically held that:

> [t]he[re] are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations.

McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1935); *see also Wheeler v. Pension Value Plan for Emps. of the Boeing Co.*, No.

[17] At best, such a claim implicates 39 U.S.C. § 101(a), which is not one of the enumerated statutes in section 3662. Thus, the Local cannot rely upon this unpled section 101(a) claim as a basis for asserting an application of the Commission's section 3662 complaint jurisdiction.

06-cv-500, 2007 WL 2608875 (S.D. Ill. Sept. 6, 2007) ("A complaint that merely recites the language of the statute under which an action is brought does not satisfy even the lenient federal notice pleading standard."). The Local has failed to satisfy this standard.

Likewise, the Local's citation to section 3662 is flawed. Section 3662 merely defines the Commission's complaint jurisdiction, procedures and remedies. It does not impose any substantive requirements on the Postal Service, nor does section 3662 create an independent basis upon which a party may initiate a complaint case. As such, section 3662 cannot be the basis for the Local's claim that the Postal Service violated any section of title 39. *See Wright v. Spindletop Films, L.L.C.*, No. 4:10–CV–4549, 2011 WL 3273125, at *4, n.2 (S.D. Tex. July 28, 2011) (citing the statute which provides the definition for the court's jurisdiction is insufficient as it fails to provide plaintiff with a cause of action).

Accordingly, none of the statutes alluded to in the Complaint confer the requisite jurisdictional grounds to overcome a motion to dismiss, and as such, the Commission, without even addressing the merits of the Local's allegations, should dismiss the Complaint for lack of jurisdiction.

B. The Commission Lacks Complaint Jurisdiction to Review Individual Processing and Distribution Center Closings or Consolidations or AMP Studies.

The Local is misguided in its apparent belief that the Commission is authorized to review the East Texas P&DC consolidation under section 3662. As described above, the Commission's complaint jurisdiction is limited, and it does

not include the appeal of a Postal Service decision to close or consolidate a mail processing facility. Congress illustrated its capability for providing a right of Commission appeal regarding the fate of particular facilities in 39 U.S.C. § 404(d) (providing Commission jurisdiction to hear appeals of Post Office closings and consolidations), something it manifestly chose not to do for a mail processing facility. This limitation on section 3662 complaint jurisdiction was recently emphasized in correspondence dated December 12, 2011 from Commission Chairman Goldway to Members of Congress. In that correspondence, the Chairman unequivocally affirmed that "[i]t is important to note, however, that individual closures and consolidations of mail processing facilities are not subject to review by the Commission under title 39 of the United States Code" (emphasis in original).[18] Accordingly, if the Commission construes the Complaint as seeking its review of the Postal Service's decision to consolidate the East Texas P&DC, the Commission should dismiss the Complaint for lack of jurisdiction.

II. THE LOCAL'S COMPLAINT FAILS TO RAISE ANY ISSUES OF MATERIAL FACT OR LAW.

A. The Local's Allegations Regarding the Sufficiency of the AMP Feasibility Study Process for the East Texas P&DC are Unsupported by the Record.

As explained above, it is unclear whether the Local is alleging that either: (1) the AMP Feasibility Studies for the East Texas P&DC do not satisfy the substantive requirements of Handbook PO-408, or (2) Handbook PO-408 is deficient as written. However, as explained above, the Commission lacks

[18] Available at http://www.prc.gov/prc-docs/home/whatsnew/N2012-1%20General%20Letter%20to%20Congress_OCRd_2331.pdf.

statutory jurisdiction to hear the Complaint under either scenario. Similarly, in either scenario, the specific allegations raised by the Complaint are unsupported by the record for those AMP studies, and as such, fail to raise any issues of material fact or law.

With respect to the allegations apparently directed at the sufficiency of the AMP Feasibility Studies for the East Texas P&DC, none of the allegations are supported by the record.[19] Allegations regarding the timeliness of the studies, or whether or not the studies take after-the-fact circumstances into account, ignore the practical realities of the network rationalization initiative and the AMP implementation process specifically, as well as decision-making in general.[20] An AMP Feasibility Study reflects the collection of recent operational, volume and financial data for a specified time frame and provides a basis for decision-making about the future mail processing network. As with any decision, there is a finite end to data collection before undertaking analysis of those data and making a decision. AMP decisions are made on the basis of a very robust data set, even if those data are less than absolutely perfectly complete in every imaginable respect.[21]

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[19] Specifically, the Complaint alleges that the AMP studies are outdated and not accurate (Complaint ¶ I.2.); do not account for changes in staffing (*Id.*); do not provide adequate public notice (*Id.*); are missing information and/or include false information (*Id.* ¶ I.4.); fail to address the impact on local businesses (*Id.* ¶ III.); do not account for the hidden costs of relocation (*Id.* ¶ III.); and do not account for the rise in parcel and third-class mail volume (*Id.* ¶ VIII.).

[20] *See, e.g.*, Complaint ¶ I.2. (alleging that the AMP studies are outdated and not accurate, and do not account for changes in staffing); *Id.* ¶ VIII (alleging that the AMPs do not account for changes in staffing (*Id.*); and do not account for the rise in parcel and third-class mail volume).

[21] The Local's preference that decisions be postponed until newer data can be analyzed, and perhaps postponed again until still newer or perfect data are available masks a preference that any potentially adverse decision be postponed perpetually.

Moreover, the AMP process includes a two-stage post-implementation review ("PIR") process.[22] PIR permits the Postal Service to independently evaluate an AMP consolidation decision independently in light of additional relevant operational or financial information unavailable at the time of the original decision and consider adjustments to implementation of that consolidation. Thus, there is an opportunity for postal management, albeit free from Commission oversight, to address relevant changes in circumstances that have occurred since the approval of the East Texas P&DC consolidation, including such matters as the staffing changes alleged by the Local. [23]

It is also worth noting that the Local's Complaint is premised on the fact that 55 consolidations originally scheduled for Phase 2 (in 2014) of the Mail Processing Network Rationalization initiative are now being implemented during Phase 1 (in 2013). As a result, these closures and consolidations are now scheduled to occur in closer proximity to the underlying AMP Feasibility Studies initially completed in early 2011 during Docket No. N2012-1. This result would seem to allay if not nullify the Local's concern regarding the original lag between the data on which the East Texas P&DC consolidation decision was based and the timing of the operational changes that result from that decision.

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[22] *See* Docket No. N2012-1, USPS Library Reference N2012-1/3 (USPS Handbook PO-408, *Area Mail Processing Guidelines*) at Chapter 7 "Post Implementation Reviews" ("Following implementation, an approved area mail processing (AMP) must be reviewed twice to assess whether planned savings, workhours, and levels of service are achieved. The post-implementation review (PIR) provides a process to evaluate the effectiveness of consolidating mail processing operations. The PIR measures actual data before and after AMP implementation. Additionally, the PIR compares the proposed savings or costs to the actual savings or costs after AMP implementation.").

[23] The Commission will observe that the Settlement and NDA approved by the NLRB provides a mechanism for the Local's officers to subscribe to protective conditions that permit their examination of unredacted copies of postal management's PIR of AMP consolidations. *See* NDA ¶ 6.

The Local incorrectly alleges that the AMP Feasibility Studies for the East Texas P&DC do not account for the "hidden" cost of relocation.[24] In fact, the AMP Feasibility Studies do address workhour, transportation, maintenance, and equipment costs associated with the relocation, as required by Handbook PO-408.[25] Finally, the Local alleges other deficiencies in the AMP Feasibility Studies regarding omitted or incorrect information.[26] The Local, however, does not identify any factual support for these allegations, nor does the Local allege that the AMP Feasibility Studies fail to sufficiently follow the Handbook PO-408 procedures.

With respect to the allegations apparently directed at the sufficiency of the AMP Guidelines put forth in Handbook PO-408, the Complaint fails to raise any issues of material fact or law.[27] The Complaint never identifies the particular portions of Handbook PO-408 that may not satisfy the statutory requirements.

Further, as with most of the issues in the Complaint, the sufficiency of the AMP process was examined in great detail during Docket No. N2012-1. When analyzing the AMP process in its Advisory Opinion in that case, the Commission recognized that "AMP studies are not designed or put forth as a way to provide

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[24] Complaint ¶ III.

[25] *See* Docket No. N2012-1, USPS Library Reference N2012-1/73 E TX into Austin-02-19-12_Final at 11-43; E TX into N TX-02-19-12_Final at 13-45; E TX into Shreveport-02-19-12_Final at 12-44. Insofar as relocation costs are incurred and attributed to a particular AMP during implementation of personnel transfers resulting from an AMP consolidation, such costs are subject to consideration during the analysis of the costs and benefits of the consolidation that occurs in PIR.

[26] Complaint ¶ I.2 (alleging that the Postal Service did not provide adequate public notice); ¶ I.4 (alleging that the AMP studies are missing information and/or includes false information); and ¶ III (alleging that the AMP studies fail to address the impact on local businesses).

[27] *See, e.g.*, Complaint ¶¶ I.3. and IV (alleging that the Postal Service is acting inefficiently by "not revis[ing] the AMP studies after changes have occurred").

complete potential cost savings. The Postal Service utilizes AMP studies to determine the operational feasibility of the proposed consolidations, and they do a reasonable job."[28]

The Postal Service has been implementing its AMP process per the current version of the Handbook PO-408 since 2008, and per a previous version of the Handbook PO-408 (reviewed by the Commission in Docket No. N2006-1) since 1984.[29] The Commission addressed the sufficiency of the current Handbook PO-408 process in Docket No. N2012-1, a proceeding in which the Local failed to intervene. The Commission should not permit the Local to compensate for that failure by now permitting it to abuse the section 3662 rate and service complaint process for the purpose of belatedly weighing in on network rationalization analytical issues examined exhaustively during the Docket No. N2012-1 service change review. Allowing such an after-the-fact challenge would greatly prejudice the Postal Service and other parties who complied with the litigation limits and requirements imposed by the Commission in that docket.

B. The Postal Service Public Meeting as Part of Its AMP Feasibility Study Process Was Valid; No New Meeting Is Required.

The Postal Service's public meeting as part of its AMP Feasibility Study process was valid, satisfying all the procedural requirements of section 302(c)(3)(D) of the PAEA and of Postal Service regulations in Handbook PO-408.

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[28] *See* Docket No. N2012-1, Advisory Opinion at Appendix G, p. 4.

[29] *See* Docket No. N2012-1, USPS Library Reference N2012-1/3 (USPS Handbook PO-408, *Area Mail Processing Guidelines*) at 1-3, Evolution of AMP.

Section 302(c)(3)(D) of the PAEA requires that the Postal Service "makes available information regarding any service changes in the affected communities, any other effects on customers, any effects on postal employees, and any cost savings." Additionally, section 302(c)(3)(D) of the PAEA requires that the Postal Service afford affected persons ample opportunity to provide input and to take such input into account when making a final decision.

The Local argues that by not providing it with unredacted, approved final versions of the AMP Feasibility Studies prior to the community meeting, the Postal Service failed to meet its procedural obligations under section 302 of the PAEA.[30] However, no such requirement exists in either the PAEA or in USPS Handbook PO-408.[31] Rather, section 302(c)(3)(D) of the PAEA requires the Postal Service to make available certain information regarding the effect of any service change on the community and postal employees and provide affected persons the opportunity to provide input.

As a preliminary response, the Postal Service notes that the Local's allegation of wrongdoing by the Postal Service is based on impossibility and what appears to be a lack of understanding of Handbook PO-408. The Local's

[30] The Local contends that the NLRB Settlement ruled that the Postal Service was required to provide the APWU and the Local with the unredacted final versions of the AMP Feasibility Studies prior to the community meeting, but this argument has no support in the documents provided and is contrary to the actual NDA. While the Postal Service agreed to settle the NLRB claim and provide the APWU and its locals with unredacted copies of the final version of the AMP Feasibility Studies, it does not concede that doing so is a statutory requirement under title 39 or the PAEA.

[31] Rather, PAEA subsection 302(c)(3)(D) requires the Postal Service to "provide adequate public notice to communities potentially affected by a proposed rationalization decision" before making available general "information regarding any service changes in the affected communities, any other effects on customers, any effects on postal employees, and any cost savings." This subsection also requires the Postal Service to "afford affected persons ample opportunity to provide input on the proposed decision" and to "take such comments into account in making a final decision."

argument that the Postal Service improperly withheld the unredacted, approved final versions of the AMP Feasibility Studies from it prior to the pre-decisional community meeting illogically assumes that final versions of AMP Feasibility Studies existed at the time of a community meeting. As the Commission is well aware, the community meeting takes place before the Postal Service's Area Office submits its service, operational, financial, and employee impact analyses to Postal Service Headquarters for review. Headquarters then reviews additional internal analyses and considers customer input, which may lead to the proposal being modified before a decision is made to approve or disapprove the consolidation. When a final (affirmative or negative) agency decision is made, the Postal Service Vice President for Network Operations signs the document reflecting the iteration of the AMP proposal (including the underlying data and analysis) on which that decision is based. If, for instance, the decision is in the affirmative, that document becomes the approved and final version of the AMP Feasibility Study subject to disclosure to the national APWU and the Local's officers under protective conditions pursuant to the NDA. Thus, a final version of an AMP Feasibility Study does not exist at the time the community meeting occurs. The Local's claim that the Postal Service should have provided it with documents that presumably could not exist prior to the community meeting must be dismissed.

C. The Local's Allegation that the Postal Service Failed to Provide a Timely Response to its Request for Unredacted Copies of Completed AMP Feasibility Studies Is Unsupported by the Record.

There is no basis for the Local's insinuation that the Postal Service has defaulted on its Settlement and NDA obligations concerning access to approved AMP Feasibility Studies. The NDA sets forth a detailed description of the process required for an APWU local to obtain an unredacted copy of an AMP Feasibility Study.[32] Specifically, it requires the Local to request an unredacted copy of the completed AMP Feasibility Studies and consent in writing to the terms and conditions of a nondisclosure agreement.[33] The NDA limits disclosure of confidential information contained in the unredacted AMP Feasibility Studies to the "Local president and official representatives of local unions affiliated with the APWU" who sign the nondisclosure agreement.[34] The Local failed to allege or demonstrate that it completed these requirements or that it is otherwise entitled to receive an unredacted copy of any AMP Feasibility Study.

Thus, the Local, and not the Postal Service, is responsible for the Local's failure to obtain unredacted copies of the AMP Feasibility Studies before filing the instant complaint. [35]

Even if the issue of access could be construed as a section 3662 rate or service complaint, without demonstrating consent to these terms and conditions

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[32] NDA ¶ 6.

[33] *Id.*

[34] *Id.*

[35] The Local asserts that it has requested, but not yet received certain documents from the Postal Service. Complaint ¶ VI. Despite making this assertion, and citing to an attachment not included with the Complaint filing, the Local provides no evidence to support this assertion.

through a signed nondisclosure agreement, the Local has no right to petition the Commission (or any other agency with actual jurisdiction to enforce the Settlement) to receive an unredacted copy of the approved AMP Feasibility Studies.[36]

Accordingly, the Local has failed to and cannot allege facts that establish a cause of action against the Postal Service regarding the unredacted AMP Feasibility Studies that is reviewable by the Commission under section 3662. The Local has failed to allege or provide any evidence that it is entitled to receive an unredacted copy of any AMP Feasibility Study sufficient to raise an issue of material fact or law, and the Commission should dismiss these allegations.

D. The Postal Service Is Not Required Pursuant to 39 U.S.C. § 3661 of Its Decision to Accelerate Implementation of Specific Mail Processing Plant Closings and Consolidations.

The operational changes associated with the 55 mail processing plants being challenged in the Complaint do not constitute a new nationwide change in service because no service standard change will result from these actions. The Postal Service presented the operational changes at issue in this Complaint to the Commission in PRC Docket No. N2012-1, and the Commission considered them before issuing its advisory opinion in that docket.[37] In addition to the operational changes at issue, PRC Docket No. N2012-1 included an evaluation of the proposed service standard changes under which the Postal Service is

[36] As explained in detail above, because the Commission does not have jurisdiction to adjudicate the Complaint, it is deprived from exercising its subpoena authority in this case.

[37] *See, e.g.,* PRC Docket No. N2012-1, USPS-LR-N2012-1/6 – List of Area Mail Processing Consolidation Opportunities Associated with Docket No. N2012-1 Request.

currently operating.[38] The Postal Service confirmed to the APWU by letters dated March 26, 2013, and March 28, 2013, that there will be no service standard changes in connection with the operational changes being challenged by the Local.[39] The proposed operational changes will alter only the size of Intra-SCF areas, and consistent with current practice, the Postal Service will have the ability to modify operational plans where necessary to meet current service standard commitments.[40] Absent a change in service standards on a nationwide or substantially nationwide basis, the Postal Service is not required to file another section 3661 request, as it already fulfilled its obligation to do so in Docket No. N2012-1.[41]

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[38] PRC Docket No. N2012-1, Advisory Opinion on Mail Processing Network Rationalization Service Changes (September 28, 2012) at 41-72.

[39] *See* Docket No. C2013-3, Complaint of Mid-Hudson Area Local and Consumers of USPS at untitled attachment, March 26, 2013 letter from Patrick M. Devine (USPS Manager, Contract Administration (APWU)) to Cliff Guffey (APWU President) ("March 26 Letter"); and *id.* at untitled attachment, March 28, 2013 letter from Patrick M. Devine (USPS Manager, Contract Administration (APWU)) to Cliff Guffey (APWU President) ("March 28 Letter"). The Local appears to reference these letters as an attachment to its Complaint, but no attachment was included with the Local's Complaint in this docket. Complaint ¶ VIII (referencing an attached list of 55 plants).

[40] Current Postal Service policy directs that when a mail processing plant is completely consolidated into another mail processing plant, as it is with the East Texas P&DC, the Intra-SCF area of the gaining location will grow to include both areas.

[41] Pursuant to 39 C.F.R. 121.1, the current service standard for Intra-SCF First-Class Mail is one day. On February 1, 2014, the service standards will change and only a subset of Intra-SCF First-Class Mail pieces will have a one-day service standard. Federal Register Vol. 77, No. 102 (May 25, 2012).

III. IN THE ALTERNATIVE, THE LOCAL FAILED TO SATISFY THE PROCEDURAL REQUIREMENTS OF 39 C.F.R. § 3030.10(A) NECESSARY TO FILE A COMPLAINT.

A. The Local Failed to Meet and Confer with the Postal Service's General Counsel Prior to Filing Its Complaint in Violation of 39 C.F.R. § 3030.10(a)(9).

The Local has not satisfied the requirement that prior to filing its Complaint, it must attempt to meet or confer with the Postal Service's General Counsel to resolve or settle the dispute as required by 39 C.F.R. § 3030.10(a)(9).[42] Pursuant to section 3030.10(a)(9), a complainant must:

> [i]nclude a certification that states that prior to filing, the complainant attempted to meet or confer with the Postal Service's general counsel to resolve or settle the complaint, why the complainant believes additional such steps would be inadequate, and the reasons for that belief.

The Commission clarified the level of effort necessary to comply with this requirement in its Order No. 195, *Order Establishing Rules for Complaints and Rate or Service Inquiries* ("Order No. 195"). As a prerequisite to filing a complaint, the complainant must first notify the Postal Service's General Counsel of its concerns and permit the parties to meet or confer regarding them.

> An e-mail, letter, or similar attempt at communication with appropriate Postal Service personnel explaining the nature of the complainant's concerns should ordinarily initiate the meet or confer requirement. After the complainant has initiated communication, the Postal Service has a reasonable time to resolve the issue, or notify the complainant that a resolution in a reasonable period of time is likely.

[42] While the Complaint makes reference to obligation to meet and confer, the language in the Complaint fails to rise to the level of a certification.

Order No. 195 at 16. As the Commission explained, "[t]he goal of the meet or confer provision is to ensure that complainants attempt to resolve their issues with the Postal Service prior to bringing a more formal proceeding to the Commission for its consideration." Order No. 195 at 15-16. However, to achieve this end, the parties must be permitted a reasonable opportunity in which to do so. Here, this simply did not occur, and the Postal Service urges that it should not be denied this opportunity.

Various United States district courts have established what affirmative steps are sufficient to satisfy the meet or confer requirement as it relates to standard motions practice. In *Bolger v. District of Columbia,* 248 F.R.D. 339 (D.D.C. 2008), the plaintiff filed its motion to compel without the mandatory certification that it had satisfied its burden to meet and confer with the defendant. The plaintiff was permitted to establish to the court that it had in fact done so by providing evidence of its extensive efforts. Specifically, the plaintiff showed that it had engaged in discovery with the defendant over a 14-month period, including four hearings, and had been in contact with the defendant regarding its concerns. However, the defendant had not responded to the plaintiff. *Bolger v. District of Columbia*, 248 F.R.D. at 343-344. Relying on *Bolger*, the court in *Robinson v. Napolitano*, explained that conferment requires the parties actually to meet and engage in two-way communication that enables meaningful discussion of contested issues, and that sending correspondence explaining the issues did not satisfy this requirement. *Robinson v. Napolitano,* No. 08-CV-4084, 2009 WL 1586959, at *3 (D.S.D June 4, 2009) (citing *Bolger* at 343-344 (D.D.C. 2008)).

Likewise, the court in *Home Design Services, Inc. v. Chris Kendrick Construction*, explained that the meet and confer requirement obligates counsel to "converse, confer, compare views, consult and deliberate" before it involves the court. *Home Design Services, Inc. v. Chris Kendrick Construction*, No. 08-CV-01978, 2009 WL 1973503, at * 2 (D. Colo. July 7, 2009). The court went on to say that, "merely informing an opposing party of an impending motion" does not satisfy a party's obligation. *Id.* (citing *Cotracom Commodity Training Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999)).

Prior to the Commission's docketing of the Complaint on April 10, 2013, the Postal Service and its General Counsel were unaware of the alleged dispute because the unit of the Postal Service Office of General Counsel responsible for complaints filed with the Commission received no requests to meet and confer with the Local regarding the substance of its allegations.[43] To date, the Postal Service's Office of the General Counsel has still not been contacted in an attempt to meet and confer regarding the dispute. Instead of certifying that the Local, the actual complainant in this case, met and conferred or attempted to meet and confer with the General Counsel, the Local simply alleges that officials from the national APWU met and conferred with the Postal Service's General Counsel.[44] These claims do not satisfy the Commission's rules.

First, the Local's allegation that national APWU officials met and conferred with the Postal Service's General Counsel is not supported by the record and

[43] Despite the Local's allegation that it submitted the Complaint to PRCCOMPLAINTS@prc.gov (*see* Complaint ¶ X), the Postal Service did not receive notice from the Commission's automated docketing system.

[44] Complaint ¶ IX.

directly contradicted by the information available to the undersigned counsel. The Local provides no evidence that any national APWU officials met and conferred with the Postal Service's General Counsel or her designees regarding the allegations as they relate to the East Texas P&DC consolidation—no letter, no email, no dates of an in person or telephonic conversation. The mere cursory claim without any evidentiary support is insufficient to support its certification that the national APWU actually met and conferred with the Postal Service's General Counsel about the East Texas P&DC consolidation. In response to the Complaint, the Postal Service surveyed Law Department staff responsible for Commission litigation, including the General Counsel, regarding any attempt by the Local or the national APWU to meet and confer about the consolidation of the East Texas P&DC. Counsel also contacted colleagues in the field. None indicated that they had met and conferred with the Local. In sum, no relevant Law Department personnel had any knowledge of any attempt to meet and confer.

Second, the national APWU is not the complainant in this action. Even assuming that such a meeting between national APWU officials and the Postal Service's General Counsel did occur, such a meeting would not satisfy 39 C.F.R. § 3030.10(a)(9). The Commission's rules require that the complainant certify that "the complainant attempted to meet and confer . . . ." § 3030.10(a)(9) (emphasis added). The Local makes no such claim that it met and conferred with the Postal Service, or that it attempted to complete this requirement, and its effort to utilize a

proxy to satisfy its procedural obligations falls short of requirement in the Commission's rule.

Accordingly, if the Commission does not dismiss the Complaint on jurisdiction grounds or because of the substantive failures previously described, the Commission should dismiss the Complaint for this procedural failure.

B. The Issues Presented in this Complaint Were Previously Resolved by the Commission in Docket No. N2012-1 as Required by 39 C.F.R. § 3030.10(a)(7).

Pursuant to 39 C.F.R. § 3030.10(a)(7), the Local is required to disclose in its Complaint that the issues presented were previously resolved by the Commission—specifically, the issues presented in the Complaint were examined in great detail in Docket No. N2012-1. This procedural defect should result in the Complaint being dismissed for failure to abide by the Commission's rules. More importantly, the Commission should dismiss the Complaint because the issues raised by the Local were previously addressed by the Commission in Docket No. N2012-1. Moreover, the national APWU, whose interests are aligned with and sufficiently represented the Local, was a party in the Docket No. N2012-1 proceedings and raised all of the arguments now presented by the Local.[45]

In Docket No. N2012-1, the Commission received evidence on the network rationalization initiative and how it satisfied all of the statutory requirements of title 39. Several parties, including the APWU national, raised

[45] It is important to highlight that the Local attempts to argue that it satisfied the meet and confer requirement because the national APWU allegedly met and conferred with the General Counsel (the Postal Service disputes that any such meet and confer actually occurred). With respect to issue preclusion, however, the Local must now attempt to argue that it is completely distinct from the national APWU and its interests were not represented in order to avoid dismissal for issue preclusion. The Local cannot be permitted to have it both ways.

issues through interrogatories, at the hearings, and on briefs about the operational limitations of network rationalization and its consistency with title 39. The Local is simply attempting to rehash those arguments upon which the Commission previously opined in an apparent attempt to short-circuit the advisory opinion process and essentially challenge issues in a now closed docket. These issues are *res judicata*.

Moreover, the Local had its opportunity to review the list of mail processing plants affected by network rationalization and raise its concerns in the N2012-1 docket if it believed network rationalization violated title 39. It chose not to do so. The Local cannot now ignore the months of proceeding and attempt to circumvent the N2012-1 case. Such a result would greatly prejudice the Postal Service and would have substantial financial and operational implications as the implementation of network rationalization is now ongoing.[46] This procedural history only strengthens the argument that the Commission should dismiss the Complaint for failing to present any issues of material fact or law not already addressed by the Commission.

CONCLUSION

Based upon the foregoing, the Commission should dismiss the Complaint with prejudice for lack of jurisdiction and, in the alternative, for failing to raise material issues of fact or law. If the Complaint is not dismissed with prejudice, the Commission should dismiss the Complaint without prejudice for failure to

[46] Nor should the Commission's own resources be committed to this exercise.

satisfy the meet and confer requirements prior to filing and for attempting to raise issues previously decided in Docket No. N2012-1.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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April 30, 2013

EXHIBIT A

AGREEMENT TO PROVIDE UNREDACTED COPIES OF APPROVED AREA MAIL PROCESSING FEASIBILITY STUDIES AND POST IMPLEMENTATION REVIEWS, SUBJECT TO LIMITED NON-DISCLOSURE

THIS IS AN AGREEMENT, effective as of the date signed by the United States Postal Service, by and between the United States Postal Service, an independent establishment of the Executive Branch of the United States Government ("POSTAL SERVICE"), and the American Postal Workers Union, AFL-CIO, with its principal place of business as 1300 L Street, N.W., Washington, DC 20005 ("APWU").

WITNESSETH

WHEREAS, the POSTAL SERVICE agrees to provide the APWU with redacted and unredacted copies of approved Area Mail Processing ("AMP") Feasibility Studies and Post Implementation Reviews ("PIRs").

WHEREAS, the POSTAL SERVICE has asserted that the redacted portions of the AMP Feasibility Studies and Post Implementation Reviews contain restricted and confidential information ("CONFIDENTIAL INFORMATION"), in the nature of: names and addresses of persons, the public disclosure of which is prohibited by 39 U.S.C. § 412, as well as commercially sensitive disaggregated current and proposed volume, work hours and productivity information; and proposed transportation cost estimates;

NOW, THEREFORE, in order to protect the claimed restricted, sensitive and confidential nature of the CONFIDENTIAL INFORMATION, the POSTAL SERVICE and the APWU agree as follows:

1. The APWU and its affiliated local unions shall be under no obligation to hold in confidence any information disclosed by the Postal Service in the redacted copies of the AMP Feasibility Studies and PIRs.

2. The APWU acknowledges that the CONFIDENTIAL INFORMATION is not owned by the APWU, and that nothing contained in this Agreement shall give the APWU any

right, title, or interest in the CONFIDENTIAL INFORMATION except as provided and limited by this Agreement. It is hereby understood and agreed between the parties, however, that the APWU may make notes and/or make copies of the CONFIDENTIAL INFORMATION, subject to the restrictions set forth in this Agreement.

3. The APWU agrees that it shall hold in confidence in perpetuity all CONFIDENTIAL INFORMATION, the disclosure of which is prohibited by 39 U.S.C. § 412 – i.e., the names and addresses of persons in the "Stakeholder Notification" portion of the AMP Feasibility Studies or PIRs.

4. The APWU agrees that it shall hold all other commercially sensitive CONFIDENTIAL INFORMATION provided to it for a period of five (5) years from the date the CONFIDENTIAL INFORMATION is provided by the POSTAL SERVICE. For that five (5) year period, unless written consent is obtained from the POSTAL SERVICE, disclosure of any CONFIDENTIAL INFORMATION by the APWU shall be restricted, and shall not be disclosed or disseminated, except to the following individuals ("RECIPIENTS"):

a. President, APWU, or successor;

b. Executive Vice President, APWU, or successor;

c. Director of Industrial Relations, APWU, or successor;

d. Directors of the Clerk, Maintenance and Motor Vehicle Service Divisions, APWU, or their successors;

e. Manager, Negotiations Support and Special Projects, APWU, or successor;

f. The law firm and staff of O'Donnell, Schwartz & Anderson, P.C.;

g. Any expert consultant retained by the APWU;

h. APWU Coordinators, Central, Eastern, Northeast, Southern, and Western Regions, or their successors;

i. Local president and official representatives of local unions affiliated with the APWU, including any grievance/arbitration advocate designated to handle

any related grievance, subject to the terms of paragraph 5 of this Agreement; and

j. Any arbitrator hearing any grievance or dispute involving the APWU and the POSTAL SERVICE, provided that: (i) the arbitrator is informed of the confidential nature of the CONFIDENTIAL INFORMATION; (ii) the arbitrator agrees to keep such information confidential and, (iii) to the extent the arbitrator relies on CONFIDENTIAL INFORMATION in his or her decision, the arbitrator and parties agree that any portion of the decision discussing CONFIDENTIAL INFORMATION will be maintained under seal.

5. The APWU shall use the CONFIDENTIAL INFORMATION only for purposes related to the examination and consideration of the AMP Feasibility Studies and PIRs, and consistent with its duties as bargaining agent for the Postal Service bargaining unit employees, and not inconsistent with any of the provisions of this Agreement. The APWU shall use the same degree of care as it employs with its own confidential information, but in all events shall use at least a reasonable degree of care.

6. The POSTAL SERVICE shall provide unredacted copies of the approved AMP Feasibility Studies and PIRs to the individuals listed in sub-paragraph 4(i) of this Agreement only upon written request and only after obtaining a signed copy of this Non-Disclosure Agreement, signed by the individuals who will have access to the CONFIDENTIAL INFORMATION. The Local president of the Local union affiliated with the APWU shall submit written requests for unredacted copies of the AMP Feasibility Studies and PIRs to the District Labor Relations Manager for the District in which the impacted facility or facilities are located. Any dispute that may arise between the parties at a particular local facility, should one occur, shall not have any effect or impact on this Agreement between the Postal Service and the APWU or any other locals affiliated with the APWU to the CONFIDENTIAL INFORMATION under the terms of to this Agreement.

7. The APWU shall not remove any restricted, proprietary, copyright, trade secret, or other legend from any form of the CONFIDENTIAL INFORMATION.

8. The APWU shall be under no obligation under the provisions of paragraph 3 to hold in confidence any CONFIDENTIAL INFORMATION which:

a. Is or becomes public through no fault of the APWU or the RECIPIENTS;

b. Was known prior to the time of disclosure by the POSTAL SERVICE;

c. Is properly received by it on a non-confidential basis from any third party who is lawfully entitled to make such disclosure;

d. At the time of disclosure to the APWU was known by the APWU free of restriction as evidenced by documentation in possession of the APWU;

e. Is required by a final court order, or an order of the National Labor Relations Board, to be disclosed without confidentiality restrictions; or

f. Is independently developed by the APWU without breach of this Agreement.

9. The parties shall designate representatives who are familiar with the information and data described in this Agreement who shall have the authority to resolve any technical issues of production of the information and data.

10. This Agreement expresses the entire agreement and understanding of the parties with respect to the subject matter hereof and supersedes all prior oral or written agreements, commitments, and understandings pertaining to the subject matter hereof. This Agreement shall not be modified or changed in any manner except in writing and signed by both parties.

11. The APWU enters into this Agreement without prejudice to its position that such information, or any part of it, must be disclosed without necessity of the restrictions in this Agreement. The APWU reserves the right to request disclosure of this information, or any part of it, without the restrictions contained in this Agreement, and to seek legal, administrative, and/or arbitral redress should the POSTAL SERVICE refuse. It is understood that the APWU, unless the POSTAL SERVICE agrees otherwise, is obligated to comply with the terms of this Agreement until such time as a legal administrative or arbitral tribunal issues a final decision requiring disclosure without restrictions, or with different restrictions.

12. This Agreement shall not be cited and/or used as precedent by either the APWU or the POSTAL SERVICE, except that either party may rely upon or cite to the terms of this Agreement in order to implement its terms, or in a grievance, arbitration or other dispute between the POSTAL SERVICE and the APWU concerning the disclosure of confidential information relating to facility consolidation or closure.

IN WITNESS WHEREOF, the POSTAL SERVICE and the APWU have executed this Agreement effective as of the date signed by the POSTAL SERVICE.

AMERICAN POSTAL WORKERS UNION, AFL-CIO

By: Greg Bell

Title: Executive Vice President

Date: 02/11/2013

UNITED STATES POSTAL SERVICE

By: [illegible]

Title: Manager, Contract Administration (APWU)

Date: 02/12/2013