

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

COMPLAINT ON CHANGES IN RETAIL HOURS

Docket No. C2014-1

**NOTICE OF UNITED STATES POSTAL SERVICE OF FILING ERRATA TO  
ANSWER IN OPPOSITION TO MOTION FOR AN EMERGENCY ORDER**

The Postal Service hereby provides notice of filing errata to the United States Postal Service Answer in Opposition to Motion for an Emergency Order (Opposition), which was initially filed on May 7, 2014.<sup>1</sup> On May 8, 2014, one day following the Postal Service's filing of its Opposition, Douglas F. Carlson (Complainant) filed an erratum to his Complaint.<sup>2</sup> This erratum included a letter as part of Exhibit 1 to the Complaint that was apparently, inadvertently omitted from the initial Complaint filing.<sup>3</sup>

The Postal Service files these errata to ensure accuracy in the arguments proffered in its Opposition and to address new information provided by Complainant in the Complaint Erratum that was not otherwise contained in the original version of the Complaint. The revised Opposition contains textual changes on pages 14-16 and changes to the footnote numbering from note 38 through the end of the document. These changes are highlighted in gray. Please also note that the page breaks on pages 14-20 differ from the initial Opposition as a result of the highlighted changes. Finally, the revised Opposition also contains a correction of a typographical error on page 13.

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<sup>1</sup> United States Postal Service Answer in Opposition to Motion for an Emergency Order (hereinafter Opposition), PRC Docket No. C2014-1 (May 7, 2014).

<sup>2</sup> Douglas F. Carlson Notice of Filing of Corrected Exhibit 1 to Complaint on Changes in Retail Hours and Emergency Request for Injunctive Relief (hereinafter Notice), PRC Docket No. C2014-1 (May 8, 2014); and Douglas F. Carlson Complaint on Changes in Retail Hours and Emergency Request for Injunctive Relief [Erratum] (hereinafter Complaint Erratum), PRC Docket No. C2014-1 (May 8, 2014).

<sup>3</sup> See Notice; Complaint Erratum.

Respectfully submitted,

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**UNITED STATES POSTAL SERVICE  
ANSWER IN OPPOSITION TO MOTION FOR AN EMERGENCY ORDER**

(May 7, 2014)

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Pursuant to Postal Regulatory Commission Order No. 2073 and 39 C.F.R. § 3001.21(b), the Postal Service files this Answer in Opposition to the allegations filed by Douglas F. Carlson (Complainant) requesting emergency relief as part of his Complaint filed on April 30, 2014 (Emergency Motion). For the reasons set forth below, the Postal Regulatory Commission (Commission) should deny the Emergency Motion.

### **Preliminary Statement**

Paragraph 31 of the Complaint, titled Emergency Request for Injunctive Relief, is insufficient to meet the high burden of establishing that emergency injunctive relief is available and appropriate in this case. As an initial matter, Complainant requests a remedy that is not statutorily available to him. Moreover, even if such a remedy were available, he fails to establish the required elements to justify such relief.

Complainant makes simple assertions without any factual or legal support regarding his likelihood to succeed on the merits and the chance that some unidentified customers may suffer irreparable harm of an unspecified type or form. Further, he completely fails to address the requirements of balancing equities and analyzing the public interest. Such unsupported assertions and procedural missteps are fatal to Complainant's ability to satisfy the requirements necessary to justify a grant of a remedy as extraordinary as emergency injunctive relief.

### **Background**

On April 30, 2014, Complainant filed the Complaint with the Commission alleging violations of 39 U.S.C. § 3661(a) and (b) and violations of the Postal Operations Manual

(POM).<sup>1</sup> The Complaint included a single paragraph entitled “Emergency Request for Injunctive Relief” which requested that the Commission prevent the Postal Service from implementing any changes in retail hours in the San Francisco District until the Commission has resolved the issues in the Complaint.<sup>2</sup> On May 1, 2014, the Commission issued Order No. 2073 which determined that paragraph 31 constituted a Motion for Emergency Injunctive Relief and directed that answers to the Motion for Emergency Injunctive Relief be submitted no later than May 7, 2014.<sup>3</sup>

### Argument

#### **I. NEITHER 39 U.S.C. § 3662(c), NOR THE COMMISSION’S RULES OF PRACTICE AND PROCEDURE, PROVIDE FOR INJUNCTIVE RELIEF**

There is no statutory or regulatory basis for the relief sought by Complainant in his Emergency Motion. Congress has not delegated to the Commission the authority to issue emergency injunctive relief. Rather, the plain language of section 3662(c) limits the Commission’s remedial authority to retrospective relief. The language in 39 C.F.R. § 3030.50 further supports this limitation.<sup>4</sup> As such, the Commission should deny the relief requested in the Emergency Motion.

When Congress intends to provide an agency with the authority to issue preliminary injunctive relief, it delegates this authority expressly.<sup>5</sup> Although each of the powers possessed by an agency must be conferred from Congress, the requirement of

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<sup>1</sup> Douglas F. Carlson, Complaint on Changes in Retail Hours and Emergency Request for Injunctive Relief (hereinafter “Complaint”), PRC Docket No. C2014-1 (April 30, 2014).

<sup>2</sup> *Id.* ¶ 31.

<sup>3</sup> Order No. 2073, Order Setting Time to Answer Emergency Request for Injunctive Relief, PRC Docket No. C2014-4 (May 1, 2014).

<sup>4</sup> 39 C.F.R. § 3030.50 provides that “[i]f the Commission finds that a complaint is justified, it will order that the Postal Service take such action as the Commission determines appropriate to . . . [r]emedy the effects of any non-compliance.”

<sup>5</sup> See *Trans-Pac. Freight Conference of Japan v. Fed. Mar. Bd.*, 302 F.2d 875, 880 (D.C. Cir. 1962).

express delegation is particularly strong with respect to the power to issue injunctive relief.<sup>6</sup> Congress has not conferred the power to issue emergency preliminary injunctive relief on the Commission, and without this grant from Congress, Complainant lacks a basis to seek the relief sought in the Emergency Motion.

The language of section 3662, which establishes the Commission's authority under complaint procedures, further reinforces the fact that emergency injunctive relief is unavailable. Section 3662(c) is titled "Action required if complaint found to be justified" and describes the Commission's remedial authority in complaint proceedings. Section 3662(c) provides that if the Commission finds a complaint to be justified, it shall then order actions necessary "to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance." The same is true for 39 C.F.R. § 3030.50, which contains similar language. This remedial authority is retrospective, both in the statute and the Commission's own rules, and does not extend to preliminary relief.

Further, the focus of section 3662(c) on the "effects" of Postal Service conduct clarifies the retrospective nature of the Commission's remedial authority. Generally, no effects emanate from an action not yet taken. The examples provided as part of section 3662(c) reinforce this retrospective nature. The acts of "adjusting," "cancelling," "discontinuing," and "making up for" all serve to reverse an action already taken.<sup>7</sup> It is significant that the plain language of section 3662(c) offers four examples of the

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<sup>6</sup> *Id.* ("We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency.").

<sup>7</sup> 39 U.S.C. 3662(c).

Commission's remedial power, and none concern preemptive action.<sup>8</sup> Accordingly, based on its plain language, section 3662(c) does not grant the Commission the authority to issue preliminary relief, and, the relief requested in the Emergency Motion is contrary to section 3662(c)'s requirement that the Commission find "noncompliance" before exercising its remedial power.<sup>9</sup>

Moreover, courts have rejected attempts to impose injunctive relief made by other regulatory agencies operating pursuant to complaint authority similar to that of the Commission.<sup>10</sup> Like the requirement that the Commission make a finding of noncompliance before issuing a remedy under its complaint authority, in *Trans-Pacific Freight Conference of Japan v. Federal Maritime Board*, the D.C. Circuit held that the Federal Maritime Board (FMB) only had remedial authority conditioned upon a finding of a legal violation.<sup>11</sup> The D.C. Circuit explained that where an agency's remedial authority is conditional, that agency cannot issue a remedy without satisfaction of the condition placed upon that remedial authority.<sup>12</sup> The D.C. Circuit accordingly reversed a cease and desist order of the FMB directing a private enforcement body acting for a shipping

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<sup>8</sup> Cf. 39 U.S.C. § 404(d)(5) (providing an example of congressional delegation of authority to issue preliminary relief to the Commission through the authority to "suspend the effectiveness of the determination of the Postal Service until the final disposition of the appeal"); 39 C.F.R. 3025.30 (providing for suspension of a Post Office discontinuance determination pending Commission decision on the underlying appeal).

<sup>9</sup> In fact, an earlier version of the Postal Accountability and Enhancement Act of 2006 (PAEA) would have given the Commission the power to suspend competitive negotiated service agreements pending the outcome of a complaint proceeding, based on factors substantially identical to the standards for issuing an injunction. See H.R. 22, 109<sup>th</sup> Cong., § 205 (2005) (as passed by House). Even this limited authority was not included in the final version of the PAEA, which clearly demonstrates that Congress considered, but rejected, giving the Commission injunctive authority under section 3662.

<sup>10</sup> See, e.g., *Trans-Pac.*, 302 F.2d at 878 (reversing order of Federal Maritime Board (FMB) imposing preliminary injunctive relief in the form of cease and desist order, where FMB's remedial authority was conditioned upon finding a violation of the Shipping Act, and no violation was found, and the only justification for the FMB's order was a finding of irreparable injury).

<sup>11</sup> *Id.* at 878-80.

<sup>12</sup> *Id.*

industry organization to suspend its issuance or collection of fines “until the [FMB] issues a final order in this proceeding.”<sup>13</sup> Section 22 of the Shipping Act defined the FMB’s remedial authority as empowering the agency “to make such order as it deems proper, including an order for reparations to Complainant for the injury caused by the violation of the Act.”<sup>14</sup> The FMB issued its cease and desist order before it issued a final order, and prior to finding a violation of the Shipping Act.<sup>15</sup> In reversing the cease and desist order, the D.C. Circuit explained that FMB’s remedial authority under section 22 was conditioned upon the finding of a violation of the Shipping Act.<sup>16</sup> The FMB supported its cease and desist order with a finding of “irreparable injury,” but not a violation of the Shipping Act, and thus the D.C. Circuit found that issuance of that order fell outside the FMB’s authority.<sup>17</sup>

Application of the reasoning in *Trans-Pacific* to the instant controversy compels a finding that Complainant cannot obtain the emergency injunctive relief he requests in the Emergency Motion. Like the FMB, the Commission’s remedial authority under its complaint procedures is conditional on a finding of noncompliance or a legal violation. Here, Complainant seeks issuance of emergency injunctive relief without completion of the complaint process and before the Commission has been given any opportunity to determine compliance, much like the cease and desist order that was granted and subsequently reversed by the D.C. Circuit in *Trans-Pacific*. The Commission must therefore

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<sup>13</sup> *Id.* at 877.

<sup>14</sup> *Id.* at 878.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 878-879.

yield to the underlying holding in *Trans-Pacific* and deny the relief sought in the Emergency Motion.

Finally, the Commission also lacks authority to issue preliminary injunctive relief pursuant to 39 U.S.C. § 503.<sup>18</sup> Section 503 states, in pertinent part, that the Commission may “take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people prescribed under this title.” The scope and authority of such “necessary and proper” language has been well examined by the D.C. Circuit and the U.S. Supreme Court in other contexts, and these Courts have consistently found that such language cannot be utilized to provide authority which is contrary to that enumerated by Congress or inconsistent with the general statutory scheme.

For example, the D.C. Circuit specifically held that despite “necessary and proper” language in the statutes related to the National Mediation Board, the extent of an agency’s power is limited to that specifically delegated by Congress and any acts taken pursuant to such “necessary and proper” clauses cannot contravene specifically enumerated powers.<sup>19</sup> Likewise, in *Motion Picture Association of America, Inc. v. F.C.C.*, the D.C. Circuit held that when two

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<sup>18</sup> In Order No. 1387, the Commission did not resolve the issue of whether it has authority to issue preliminary injunctive relief, holding that the issue had not been fully briefed. The Commission did raise, *sua sponte*, however, the proposition that section 503 may provide such authority. See Order No. 1387, Order Denying American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, PRC Docket No. C2012-2 (June 29, 2012), at 14. As discussed in the text above, the authority in section 503 may not be extrapolated to include the issuance of injunctive relief in complaint proceedings.

<sup>19</sup> See *Railway Labor Executives’ Ass’n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (“Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”).

statutes are enacted together, the agency at issue cannot read the silence as to certain specifically delineated authority as a delegation of authority to issue specific regulations or take specific acts.<sup>20</sup> In the instant case, the Commission cannot ignore the limitations of section 3662 and interpret section 503, which were enacted together, to grant extraordinary power, such as the authority to grant preliminary injunctive relief. As such, the Commission's authority to issue remedies to complaint cases are limited to those provided in section 3662, which does not include preliminary injunctive relief.

Furthermore, pursuant to the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, agencies are only permitted to promulgate such rules and regulations and take such actions as necessary to fill those gaps left in the legislation, be they explicitly or implicitly delegated to the agency.<sup>21</sup> However, when the legislation specifically provides for the situation at issue and no such gaps exist, agencies lack authority to expand their authority beyond the statutory limits.<sup>22</sup> Here, Congress has specifically provided the authority of the Commission to issue remedies for rate and service complaints in 39 U.S.C. § 3662(c) and (d). The Commission may not violate this circumscription by asserting additional authority to issue preliminary injunctive relief under the "necessary and proper" language in section 503. Such an action would violate the basic tenets of administrative law, the specific directives from Congress, and decades of Supreme Court and D.C. Circuit precedent.

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<sup>20</sup> 309 F.3d 796, (D.C. Cir. 2002).

<sup>21</sup> 467 U.S. 837 (1984).

<sup>22</sup> *Ethyl Corp. v. E.P.A.*, 51 F.3d 1053, 1060 (D.C. Cir 1995).

In reviewing the scope of statutory authority dissimilar to that of the Postal Regulatory Commission, the Supreme Court, in *United States v. Southwestern Cable*, held that the Federal Communications Commission (FCC) was authorized to issue certain interim relief under its general “necessary and proper” authority, even when not specifically set forth by statute. However, the Court deemed this result be appropriate because the FCC’s field of regulation was an “area of rapid and significant change,” the interim relief was not inconsistent with the Communications Act of 1934.<sup>23</sup> This situation is unlike that of the Postal Regulatory Commission, where the mail system is neither “new” nor “dynamic” and Congress had no need to provide the Commission with expansive and limitless power to regulate potential unforeseen advances.<sup>24</sup> Ultimately, the Commission’s authority to issue remedies in complaint actions is limited to those provided in section 3662(c) and (d), and it cannot rely on section 503 as a basis to issue preliminary injunctive relief.

## **II. COMPLAINANT FAILS TO MEET THE STANDARD FOR A PRELIMINARY INJUNCTION**

Even if emergency injunctive relief were an available remedy, Complainant has wholly failed to establish that he would be entitled to such relief.<sup>25</sup> A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing

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<sup>23</sup> 392 U.S. 157 180-181 (1968).

<sup>24</sup> *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943).

<sup>25</sup> Complainant and the Commission have described the requested remedy at issue as “emergency injunctive relief.” Consistent with past Commission practice, the Postal Service is applying the well-established standard for preliminary injunctive relief. See, e.g., PRC Order No. 1387, at 3 (treating the APWU’s Emergency Motion as seeking a preliminary injunction to preserve the status quo).

that the plaintiff is entitled to such relief.”<sup>26</sup> In seeking a preliminary injunction, Complainant must establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) that injunction is in the public interest.<sup>27</sup> The Commission must then balance the relative strength of the arguments in each of the four categories in determining whether to grant a preliminary injunction.<sup>28</sup> Complainant bears the burden of proof when requesting a preliminary injunction, and in this case, he completely fails to satisfy this burden on any of the four elements.

Given his high burden, Complainant’s attempt to pigeonhole his request for emergency injunctive relief as a single paragraph in a Complaint, rather than a formal motion, highlights the insurmountable deficiencies in his argument. As a result, paragraph 31 of the Complaint lacks any factual or legal analysis to properly support a motion for emergency injunctive relief as required by 39 C.F.R. § 3001.21(a).

#### **A. Complainant Cannot Succeed on the Merits.**

To obtain a preliminary injunction, Complainant must make a clear showing that he is likely to succeed on the merits of his claim. Complainant, however, fails to establish any such likelihood. Instead, without support or explanation, the Complaint simply states in paragraph 31 that “Complainant is reasonably likely to prevail on the merits on this complaint.”<sup>29</sup> Complainant, however, must provide at least some analysis

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<sup>26</sup> *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

<sup>27</sup> *Id.* at 20; see also *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (agreeing with the Ninth Circuit that the Supreme Court’s decision in *Winter* requires plaintiffs to prove likelihood on each factor of the preliminary injunction analysis); PRC Order No. 1387 at 3-4.

<sup>28</sup> PRC Order No. 1387 at 4.

<sup>29</sup> Complaint ¶ 31.

of how and why the allegations in the Complaint are likely to prevail, and the bald assertion in his Emergency Motion does not satisfy this burden. This failure to provide even a scintilla of support for his claim is fatal and must result in the denial of Complainant's request.

Furthermore, the lower standard preferred by Complainant, "reasonably likely," instead of the "likely" standard set forth by the U.S. Supreme Court, highlights the inadequacy of Complainant's request.<sup>30</sup> While the difference in standards may seem slight, the addition of the word "reasonably" by Complainant appears to be an attempt to evade the burden of establishing the likelihood of success on the merits. Nevertheless, because of the absence of any assessment of how Complainant could possibly succeed, he has not come close to satisfying this burden. Ultimately, a single generalized and conclusory sentence does not constitute evidence sufficient to show that he has any chance of actually succeeding in his underlying claim. Thus, the Commission should deny the request under any standard.

In contrast to the deficient analysis provided by Complainant, the complete and accurate analysis below demonstrates that Complainant cannot and will not succeed on the merits. Complainant's request for emergency injunctive relief in paragraph 31 is limited to his assertion that the Postal Service "did not provide the appropriate level of public notice."<sup>31</sup> This allegation is rooted in Complainant's assertion that the Postal

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<sup>30</sup> While the Supreme Court has set forth "likely to succeed on the merits" as the preliminary injunction standard, the D.C. Circuit, as cited by the Commission in Order No. 1387, has utilized the standard of "substantial likelihood of success on merits." *Compare Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) with *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009). For this case, however, a determination of which standard should be applied is not necessary as both standards are clearly more burdensome than the "reasonably likely" standard proposed by Complainant, and neither is satisfied in the Complaint.

<sup>31</sup> To the extent that the Commission also looks to Complainant's section 3661(a) and (b) claims, Complainant also lacks any likelihood of success on the merits. With respect to 3661(a), as highlighted

Service did not satisfy certain policies and procedures in POM section 126.42, including allegations that the Postal Service did not adequately display signs at some Post Offices and that the posted signs did not direct customers to the nearest Post Office that can provide retail service outside of the new hours of operation.<sup>32</sup> The Commission, however, does not have jurisdiction to review the claims as presented in the Complaint, so Complainant cannot succeed on the merits of this argument.

The Commission's authority to adjudicate complaints, which is set forth in 39 U.S.C. § 3662(a), allows an interested person to bring a complaint when "the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, 601, or [chapter 36] (or regulations promulgated under any of those provisions)."<sup>33</sup> In the instant action, Complainant cites no statutory basis for his POM violation claim, let alone one of the enumerated sections granting the Commission jurisdiction. Instead, Complainant merely contends in paragraphs 13

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on page 13-14 below, Plaintiff has failed to make a proper application for relief. With respect to 3661(b), which relates to the August 2012 amendment to the POM, that claim is not timely for emergency relief. See, e.g. Former Postal Rate Commission Order No. 1307, Order Partially Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings, PRC Docket No. C2001-1 (March 20, 2001), at 14 (dismissing Complainant's allegation regarding a POM change that took place 12 years prior to the filing of the Complaint). The amendment also did not constitute a nationwide change in service as the removal of the customer needs language cited by Complainant as the basis for his claim still remains in POM section 126.41. Moreover, the amendment to the POM did not constitute a nationwide change in service because it was not a prescriptive set of instructions from Headquarters for field management to implement hours adjustments using this amended language. In essence, Complainant's allegations in the instant controversy amount to challenges in the reduction of retail hours at a handful of retail facilities in the San Francisco District. This, however, does not give rise to a "nationwide" or "substantially nationwide" change in service; instead, these allegations consist of a localized, geographically limited change. As such, given the small number of facilities involved and their limited geographical service areas, there is no basis for the Commission to find that it has jurisdiction to entertain the complaint under 39 USC 3662(b) as section 3661 is not implicated by the localized actions at issue here. See Docket No. N2009-1, Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches (March 10, 2010) at 2 ("If the full impact of [the Station and Branch Optimization] program had been limited to 162 disparate facilities, it would be unlikely to constitute a nationwide change in service.").

<sup>32</sup> Complaint ¶¶ 13-29; POM 126.42.

<sup>33</sup> 39 U.S.C. § 3662(a).

through 29 of the Complaint that the Postal Service has violated section 126.42 of the POM, and thus he is entitled to emergency injunctive relief. However, as the POM is not one of the specifically enumerated provisions in section 3662(a), Complainant lacks a basis to seek Commission relief.

To the extent that Complaint may be relying on 39 U.S.C. § 401(2) for the proposition that the POM is a regulation which may be challenged as being inconsistent with title 39, this argument also fails.<sup>34</sup> Section 401(2) provides one of the general powers granted to the Postal Service by Congress, specifically the power “to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title . . . .”<sup>35</sup> While a violation of this section is one of the enumerated bases for an interested person to bring a complaint before the Commission, Complainant has not relied upon section 401(2) in his analysis and the allegations in the Complaint are not so reasonably related to section 401(2) to form the basis for any such claim.

In addition, section 401(2) only applies to the adoption, amendment and repeal of Postal Service rules and regulations. In the instant claim set forth in Complaint paragraphs 13 through 29, Complainant alleges a substantive violation of the policies in the POM, not in the procedures of adoption, amendment or repeal of sections of the POM. Such a claim regarding a substantive violation of the POM is not cognizable pursuant to section 401(2). In fact, the authority of the Postal Service to adjust retail

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<sup>34</sup> Complainant makes no reference to section 401(2) in his Complaint, and the Commission should not permit him to present such a claim based in any potential reply brief to this Opposition. Nevertheless, the Postal Service will set forth why any potential argument based on section 401(2) also fails to state a claim to foreclose any possibility that Complainant attempts to rely upon this section at a later time.

<sup>35</sup> 39 U.S.C. § 401(2).

hours is authorized by 39 U.S.C. § 404(a)(3), which is not one of the enumerated provisions in section 3662(a) providing a basis for Commission jurisdiction to entertain a complaint.

Furthermore, even if the Emergency Motion could be deemed to be addressing the August 2012 amendment of the POM, the section that Complainant cites was amended almost two years ago. Thus, pursuit of emergency relief under section 401(2) at this time regarding the 2012 amendments to the POM, which again Complainant has not even made, would be untimely for purposes of an emergency motion.<sup>36</sup>

Moreover, even if a violation of a regulation were cognizable under section 401(2), Complainant also would be required to show how the regulation and its potential violation are inconsistent with the other sections of title 39 enumerated in section 3662(a). Complainant, however, has made no logical argument that POM section 126.42 violates any section of title 39; nor has he even argued that the alleged POM violations are contrary to any provisions in title 39, let alone those enumerated in section 3662(a). Instead, Complainant simply alleges that the posting dates for the public notices and the substance of such notices were insufficient. Any such insufficiency is not a violation of any section of title 39.

If the Commission reads the lack of any factual or legal support in the Complaint in the light most favorable to Complainant, paragraph 29 represents the closest that Complainant comes to alleging that the regulations and the Postal Service's actions in adjusting retail hours at approximately 25 postal facilities violate title 39. In paragraph 29, Complainant states that the adjustment in retail hours "will not provide customers

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<sup>36</sup> See, e.g., Former Postal Rate Commission Order No. 1307 at 14.

adequate and efficient postal services.” This alleged standard, presumably taken from 39 U.S.C. § 3661(a), however, is not accurate and cannot be the basis for a title 39 violation. Instead, section 3661(a) states that “[t]he Postal Service shall develop and promote adequate and efficient postal services.” Complainant has not alleged that the Postal Service has not developed and promoted adequate and efficient postal services. In fact, he has made no allegations regarding the Postal Service’s attempts to develop or promote postal services, but has instead ignored those key words and placed a statutory burden on the Postal Service where none exists. As such, Complainant’s alleged statutory violations in paragraphs 8-12 of the Complaint fail to establish a section 3661(a) violation, and thus, fail to support any potential section 401(2) claim.

Ultimately, to realize even the slimmest chance at success on the merits for Complainant, the Commission must read into the Complaint facts that are not alleged, legal arguments that are not presented, and analysis which simply does not exist. The Commission should not set out to perform what Complainant has failed to do. Even if the Commission were to undertake this work, it is highly unlikely that Complainant has any chance of ultimately succeeding on the merits in this case as required for emergency injunctive relief.

**B. Complainant Will Not Suffer Irreparable Harm in the Absence of Preliminary Relief.**

Complainant asserts that the planned changes in retail hours “will inflict irreparable harm on customers in the San Francisco District by depriving them of the postal services they need” and that such changes “will require them to make costly and disruptive changes to their business and mailing practices.”<sup>37</sup> **Complainant also**

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<sup>37</sup> Complaint, ¶ 31.

includes a letter as an attachment to the Complaint in which he asserts that the change in retail hours will cause him inconvenience and a reduction in the value of his Post Office Box.<sup>38</sup> These assertions fail to satisfy the burden of establishing that Complainant will suffer harm in the absence of preliminary relief for the reasons described below.

The only allegations of harm in the body of the Complaint are contained in paragraph 31. These vague allegations of a deprivation of postal services and the need for customers to make unspecified costly changes to business and mailing practices are without any factual support in paragraph 31 or elsewhere in the Complaint. Complainant's assertions fail to identify how or why a customer would have to change its behavior due to these modest changes in retail hours, or how or why such a change in behavior would be disruptive or costly. Moreover, it is unclear how modest changes in retail hours, would constitute a deprivation of needed postal services when, as Complainant asserts, these retail facilities will still remain open until 5:00 or 6:00 in the evening.

Complainant also includes a letter as an attachment to the Complaint in which he asserts that he will no longer be able to "pick up items for which a call slip has been placed in [his] box" on weekdays because of the change in hours.<sup>39</sup> He further asserts that he "will experience a significant loss in value if [he] cannot pick up items from the window on weekdays."<sup>40</sup> While it is unclear that such assertions will actually cause harm, the harms asserted are clearly not irreparable.

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<sup>38</sup> *Id.* at Ex. 1.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

To the extent that any harm is alleged, the allegations are limited to injuries, in terms of money, time, and energy (for example, “costly and disruptive changes to [customers’] business and mailing practices”).<sup>41</sup> Such allegations are insufficient to qualify as irreparable.<sup>42</sup> As the Commission previously recognized in its order denying a request for emergency injunctive relief in PRC Docket No. C2012-2, alleged harm in the form of “substantial costs” is insufficient to justify emergency injunctive relief.<sup>43</sup>

### C. The Balance of Equity Does Not Tip in Complainant’s Favor.

Complainant makes no attempt to discuss the balance of equity in his Emergency Motion. In fact, the Complaint does not include any discussion that would constitute an attempt to satisfy this element required to establish a need for a preliminary injunction. As the Commission has previously recognized, “[i]n balancing the equities, the Commission must consider the relative harms alleged by the parties.”<sup>44</sup> Given that Complainant has not identified any specific harm, let alone an irreparable harm, this factor should tip heavily in favor of the Postal Service.

Nevertheless, if the Commission were to grant a preliminary injunction preventing the Postal Service from implementing the changes to retail hours planned for certain retail facilities, the Postal Service would suffer real harms. The daily financial losses

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<sup>41</sup> *Id.* ¶ 31.

<sup>42</sup> See *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”) (quoting *Virginia Petroleum Jobbers Ass’n. v. FPC*, 259 F.2d 921, 925 (1958)); see also PRC Order No. 1387 at 9-10.

<sup>43</sup> PRC Order No. 1387 at 9.

<sup>44</sup> PRC Order No. 1387 at 11.

suffered by the Postal Service are significant and widely recognized, and any further financial loss caused by a delay in implementation of cost-saving changes in retail hours would also be significant. In the past several years, mail volume has declined substantially. The result is that fewer pieces of mail are sent. Mail volume declined by nearly 1.5 billion pieces in fiscal year 2013.<sup>45</sup> At the same time, the country's population continues to increase, adding over 770,000 delivery points (e.g., homes, businesses) to the postal delivery network during the last fiscal year.<sup>46</sup> While volume is declining, the size of the postal delivery network is expanding, and postal revenue is failing to adequately cover costs.

Because of these realities, the Postal Service is experiencing multi-billion dollar annual deficits. In fiscal year 2013, the Postal Service reported a net loss of approximately \$5 billion; this is its seventh consecutive financial loss, resulting in a total net deficit of \$46.2 billion since fiscal year 2007.<sup>47</sup> Due to these large financial losses, the Postal Service has initiated significant cost-savings programs, wherever possible. If retail facilities are under-utilized during certain hours, it is economically responsible for local management to consider adjusting operating hours. If anyone opposed to any local adjustment of retail hours at any facility is entitled to obstruct that adjustment via emergency preliminary injunctive relief, local postal management will be crippled as it endeavors to find greater efficiencies in its operations.

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<sup>45</sup> United States Postal Service 2013 Annual Report to Congress (2013) at 40; available to the public at [http://about.usps.com/publications/annual-report-comprehensive-statement-2013/annual-report-comprehensive-statement-2013\\_v2.pdf](http://about.usps.com/publications/annual-report-comprehensive-statement-2013/annual-report-comprehensive-statement-2013_v2.pdf).

<sup>46</sup> PRC Annual Compliance Determination, PRC Docket No. ACR2013, (March 27, 2014) at 120.

<sup>47</sup> PRC Analysis of United States Postal Service Financial Results and 10-K Statement for Fiscal Year 2013, PRC Docket No. ACR2013, (Revised April 10, 2014) at ii and 3.

Moreover, effective May 4, 2014, the Postal Service has already changed the hours of operation at almost all of the retail facilities at issue in the San Francisco District. To the extent that the relief requested is not rendered moot by these changes, emergency relief that requires the Postal Service to reverse these changes would further tip the balance of equity in the Postal Service's favor, as such a reversal could cause customer confusion, an outcome that would clearly be inconsistent with Complainant's alleged concerns. Additionally, a required reversal of the hours changes could impose additional complications for the Postal Service in the form of overtime and out-of-schedule pay issues, sign replacement costs, and potential service impacts.

Permitting local postal managers to make necessary, reasonable, and proportional changes in retail hours based on customer usage and operational needs is imperative to the success of the Postal Service. As such, the equities in this case weigh heavily in the favor of the Postal Service.

**D. A Preliminary Injunction Is Not in the Public Interest.**

Again, Complainant makes no attempt to discuss the public interest in his Emergency Motion, and as such, fails to satisfy this element required to establish a need for a preliminary injunction. A preliminary injunction preventing these modest operational changes, on the other hand, would harm the Postal Service and would not advance the public interest. Complainant provides no explanation or support for a contrary conclusion. A stable Postal Service providing sustainable and comprehensive postal services is in the public interest. In order to ensure such stability, particularly in light of the financial situation outlined above, local postal management must be able to capture operational efficiencies when possible.

The Postal Service is “an independent establishment of the executive branch of the Government of the United States.”<sup>48</sup> As such, it “operate[s] as a basic[,] fundamental service provided to the people by the Government.”<sup>49</sup> The Postal Service “give[s] highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.”<sup>50</sup> In order to continue providing universal mail service, the Postal Service must find ways to reduce costs in order to survive. As the Commission itself has previously recognized, “the Postal Service’s ability to continue to meet its service obligation is in serious jeopardy. . . .”<sup>51</sup>

Moreover, Congress has given the Postal Service specific authority to manage its operations. Section 404(a) states that “the Postal Service shall have the following specific powers, among others:

- (1) to provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail.”

\* \* \*

- (3) to determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed.”

Thus, Congress has explicitly given the Postal Service the power to determine what processes and locations would best and most efficiently meet the needs of the service.

The issuance of injunctive relief would frustrate the public interest, which has been

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<sup>48</sup> 39 U.S.C. § 201.

<sup>49</sup> 39 U.S.C. § 101(a).

<sup>50</sup> 39 U.S.C. § 101(e).

<sup>51</sup> 2011 Annual Compliance Determination Report (ACD) (March 28, 2012) at 21. The ACD further explains the financial problems the Postal Service currently faces throughout Chapter 4, entitled “Postal Service Financial Condition.” *Id.* at 21-41; see also the Postal Service’s 2011 Annual Report to Congress and Comprehensive Statement.

defined by Congress as allowing the Postal Service to make appropriate management decisions in order to operate most effectively.

As explained above, if individual complainants are permitted to obtain emergency injunctive relief each time local postal managers make a determination about the hours of a retail facility, the Postal Service would be unable to continue to provide postal services in an efficient and effective manner. Such impediments to the Postal Service's statutory authority to make reasonable and rational operational determinations would weigh heavily against the public interest.

Requiring the Postal Service to delay implementation of the planned changes in retail hours until the Commission rules on the Complaint does nothing to further the public interest. It simply causes delay and impedes management from fulfilling its statutory obligations to run the Postal Service efficiently.

### **Conclusion**

Based upon the foregoing, the Commission should deny the Emergency Motion.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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