

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Tony Hammond, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Nanci E. Langley

Complaint of American Postal Workers Union,
AFL-CIO

Docket No. C2013-10

ORDER GRANTING MOTION FOR RECONSIDERATION
AND GRANTING MOTION TO DISMISS

(Issued May 27, 2015)

I. INTRODUCTION

On March 7, 2014, the American Postal Workers Union (APWU) filed a Motion for Reconsideration of the dismissal of its complaint regarding violations of 39 C.F.R. § 121.1.¹ The Postal Service filed an opposition to the Motion for Reconsideration.² For the reasons set forth below, the Motion for Reconsideration is granted, the Commission's prior order dismissing the complaint and amended complaint is vacated,³ and the Postal Service's motion to dismiss the complaint is granted.

¹ Motion for Reconsideration of the Dismissal of APWU's Complaints Regarding Violations of 39 C.F.R. § 121.1, March 7, 2014 (Motion for Reconsideration).

² Opposition to APWU's Motion for Reconsideration, March 14, 2014 (Opposition).

³ Order Dismissing Complaint, February 27, 2014 (Order No. 2000).

II. BACKGROUND

A. The Complaint

On September 5, 2013, APWU filed a complaint alleging violations by the Postal Service of 39 U.S.C. §§ 3661, 3691, and 403(c).⁴ APWU alleged that the Postal Service is failing to comply with its service standard regulations in violation of title 39. *Id.* at 9. The Postal Service moved to dismiss the Complaint on September 25, 2013,⁵ and the APWU filed a response on October 17, 2013.⁶

On November 27, 2013, the Commission issued Order No. 1892, granting the motion to dismiss the claims arising under 39 U.S.C. §§ 403(c), 3661, and 3691(b)(1)(B),⁷ and deferring ruling on the claim arising under 39 U.S.C. § 3691(d). In its order, the Commission considered the Postal Service's contention that APWU, because it allegedly suffered no injury, lacks standing to pursue its claims. The Postal Service argued that the relevant provision, section 3662(a), which permits "any interested person" to bring a complaint, means something more than users of the mail. Motion to Dismiss at 8. The Commission rejected this contention and concluded that APWU is an interested person for purposes of filing the Complaint. Order No. 1892 at 8-9. The Commission deferred ruling on APWU's claim under 39 U.S.C. § 3691(d) and offered APWU an opportunity to file supplemental information to support this latter

⁴ Complaint of American Postal Workers Union, AFL-CIO Regarding Violations of 39 U.S.C. 3661 and 3691, September 5, 2013 (Complaint).

⁵ United States Postal Service Motion to Dismiss the Complaint of the American Postal Workers Union, AFL-CIO, September 25, 2013 and United States Postal Service Motion to Dismiss the Complaint of the American Postal Workers Union, AFL-CIO [Errata], September 26, 2013, collectively (Motion to Dismiss).

⁶ Response of American Postal Workers Union, AFL-CIO to USPS Motion to Dismiss, October 17, 2013.

⁷ Order Granting, In Part, Motion to Dismiss and Holding Complaint in Abeyance Pending Further Action, November 27, 2013, at 15-16 (Order No. 1892).

claim.⁸ The Commission stated that if APWU elected to file supplemental information, it must “identify the specific standards it believes are being violated, the harm alleged to be caused to it by those violations, and allege facts it intends to elicit that, if proven, would constitute violations of those regulations.” *Id.* at 16.

B. The Amended Complaint

Rather than file supplemental information, on December 13, 2013, APWU filed an amended complaint alleging violations by the Postal Service of 39 U.S.C. § 3691 and 39 C.F.R. § 121.1.⁹ In the Amended Complaint, APWU alleges that the Postal Service “is violating service standards on a nationwide or substantially nationwide basis.” *Id.* at 9. It provides examples where local APWU unions in Texas, Pennsylvania, New York, New Jersey, Colorado, and Florida have reported that the Postal Service is failing to meet the 1-day and 2-day service standards for First-Class Mail in certain cases. *Id.* ¶¶ 25-77.¹⁰ It also describes the experience of the Westside Pioneer weekly newsletter, whose subscribers have complained that they do not receive the newsletter on time. *Id.* ¶¶ 65-69. Finally, the Amended Complaint states that APWU conducted a test mailing of 40 letters nationwide from APWU’s Washington, DC office to various APWU members across the country. *Id.* ¶ 78. It asserts that 25 percent of the letters mailed were not delivered according to the applicable 2-day or 3-day service standards for First-Class Mail. *Id.* ¶ 79.

⁸ The opportunity to provide additional information was provided pursuant to 39 C.F.R. § 3030.20. That section authorizes the Commission, in its discretion, to permit a complainant or the Postal Service to submit additional information.

⁹ Amended Complaint of American Postal Workers Union, AFL-CIO Regarding Violations of 39 U.S.C. § 3691 and 39 C.F.R. § 121.1, December 13, 2013 (Amended Complaint).

¹⁰ The original APWU Complaint relied upon the experiences of local unions in 10 cities or communities. See Complaint ¶¶ 30-57. The Amended Complaint cites experiences in 6 cities or communities, only two of which (Local 251 in Brooklyn, New York, and Local 247 in Colorado Springs, Colorado) were also discussed in the original Complaint.

The Postal Service filed a response seeking to dismiss the Amended Complaint.¹¹ In the Response, the Postal Service contends that APWU failed to satisfy the Commission's instructions in Order No. 1892. Response at 2-3. It contends that the Amended Complaint fails to identify any facts that, if proven, would establish service standard violations. *Id.* at 5-9. It also asserts that APWU fails to identify any harm resulting from the alleged service standard violations. *Id.* at 3-5. The Postal Service also renewed its claims that APWU lacks standing to bring a complaint. *Id.* at 9-10.

On February 27, 2014, the Commission issued an order dismissing the Amended Complaint.¹² With respect to the alleged service standard violations, the Commission stated that "harm or injury is an essential element" of a claim involving violations of section 3691(d). *Id.* at 7. Without harm or injury, the Commission indicated, there is "no controversy for the Commission to hear under section 3662." *Id.* Because APWU failed to identify how it or its members are harmed or injured by the alleged service standard violations, the Commission granted the Motion to Dismiss. *Id.* The Commission did not need to address the Postal Service's alternative basis for granting the Motion to Dismiss, *i.e.*, that APWU failed to allege facts that would establish a service standard violation.

C. The Motion for Reconsideration

On March 7, 2014, APWU filed a Motion for Reconsideration.¹³ In it, APWU contends that Order No. 2000 does not address the "gravamen of APWU's complaints,"

¹¹ United States Postal Service Response in Further Support of its Motion to Dismiss, December 20, 2013 (Response).

¹² Order No. 2000. Because the Amended Complaint arises from the same nucleus of fact and law, on reconsideration, the Commission will treat the Amended Complaint as having superseded the original Complaint, rather than as two distinct complaints.

¹³ APWU subsequently filed a Petition for Review of Order Nos. 1892 and 2000 with the United States Court of Appeals for the District of Columbia Circuit. Petition for Review, *American Postal Workers Union, AFL-CIO v. Postal Regulatory Commission*, No. 14-1035 (D.C. Cir. March 20, 2014). The Court dismissed the Petition for Review because "a party may not simultaneously seek agency rehearing and judicial review of the same agency order." Order, *American Postal Workers Union, AFL-CIO v. Postal Regulatory Commission*, No. 14-1035 (D.C. Cir. August 7, 2014).

which it characterizes as “not merely that the Postal Service is regularly failing to meet its Section 121.1 service standards,” but that it “cannot meet those service standards because it has reconfigured its mail processing network in a way that makes it impossible for it to meet its service standards.” Motion for Reconsideration at 3-4. It contends that the alleged service standard violations in both the Complaint and the Amended Complaint show that the Postal Service is “consistently unable to meet the required service standards because of the consolidation of its processing operations.” *Id.* at 8. With respect to the issue of harm, APWU contends that the Postal Service’s alleged inability to deliver mail in a timely manner is “harm in and of itself.” *Id.* APWU asks that the Commission reconsider Order No. 2000 and begin proceedings under section 3662. *Id.* at 8-9.

On March 14, 2014, the Postal Service filed an opposition to the Motion for Reconsideration, asking the Commission to deny the Motion. See Opposition. It argues that the Motion for Reconsideration provides no new factual or legal arguments to justify a different outcome. *Id.* at 3. It contends that “APWU still fails to identify any harm or injury resulting from the alleged service standard violations to constitute a controversy for the Commission to hear pursuant to section 3662.” *Id.* It asserts that the alleged service standard violations cannot constitute harm in and of themselves and that such claims are “insufficient to constitute the harm necessary to create a controversy.” *Id.* at 5.

III. COMMISSION ANALYSIS OF MOTION FOR RECONSIDERATION

On reconsideration, for the reasons set out below, the Commission concludes that a complainant need not allege harm or injury in order to survive a motion to dismiss under 39 C.F.R. § 3030.12(b).

Section 3662 provides:

Any interested person (including an officer of the Postal Regulatory Commission representing the interests of the general public) who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 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.

39 U.S.C. § 3662(a). The Commission's rules prescribe the form and manner of complaints in detail. 39 C.F.R. § 3030.10. The rules require that the complaint, *inter alia*, "[s]et forth the facts and circumstances that give rise to the complaint," and that it "[c]learly identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements." 39 C.F.R. § 3030.10(a)(1-2). In response, the Postal Service must either answer the complaint or file a dispositive or procedural motion. 39 C.F.R. § 3030.12.

Within 90 days of receiving the complaint, the Commission is then required to either make "a finding that such complaint raises material issues of fact or law [and] begin proceedings on such complaint" or issue an order dismissing the complaint. 39 U.S.C. § 3662(b)(1); *see also* 39 C.F.R. § 3030.30(a).

The Postal Service, relying on federal case law applying the doctrine of standing, has argued that the term "interested person" in section 3662(a) should be construed to require a "threshold showing of particularized injury." Motion to Dismiss at 8. It has contended that because APWU failed to show how the alleged service standard violations result in a concrete and particularized injury, it lacks standing to bring a complaint. *Id.* at 8-9.

The Commission declined to adopt the Postal Service's proposal to dismiss the original Complaint on the basis of standing. It reasoned that APWU, as a mailer "who sends and receives mail to and from postal districts in every state and territory," has a "direct stake" in the alleged conduct. Order No. 1892 at 9. The Commission concluded that APWU is an "interested person" for purposes of filing the Complaint and thus has standing to pursue its claims. *Id.*

Nonetheless, in providing APWU an opportunity to supplement its Complaint with additional information, the Commission required APWU to "identify the specific standards it believes are being violated, *the harm alleged to be caused to it by those*

violations,” and to “allege facts it intends to elicit that, if proven, would constitute violations of those regulations.” *Id.* at 16 (emphasis added). Because APWU, in its Amended Complaint, failed to identify how it or its members are harmed by the alleged service standard violations, the Commission granted the motion to dismiss the claims brought pursuant to 39 C.F.R. § 121.1 and 39 U.S.C. § 3691(d). The Commission reasoned that “harm or injury is an essential element” of a claim involving violations of section 3691(d) and that without harm or injury, claims involving the alleged service standard violations presented “no controversy for the Commission to hear under section 3662.” Order No. 2000 at 7.

On reconsideration, the Commission concludes that the showing of harm or injury that it required in Order No. 2000 is inconsistent with its rejection in Order No. 1892 of standing as a basis for dismissing the Complaint. For this reason, Order No. 2000 is vacated.

By virtue of Article III of the Constitution, which limits the federal judicial power to certain categories of “cases” and “controversies,” a plaintiff must have a personal stake in the outcome of a case brought in federal court. To satisfy Article III standing requirements, a plaintiff must establish: (1) an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3) that the injury is likely to be redressed by a favorable judicial decree.¹⁴

Because agencies, even quasi-judicial ones, are not Article III courts, they are not subject to constitutional standing requirements.¹⁵ In this case, the legal provisions that dictate who may bring a complaint before the Commission are 39 U.S.C. § 3662 and 39 C.F.R. part 3030. Those provisions do not contain an express requirement that a complainant show harm. The mandate in Order No. 2000 that a complainant show

¹⁴ *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 179 (2000).

¹⁵ Wright & Koch, *Federal Practice and Procedure: Judicial Review* § 8208 (2006).

harm or injury may, in practice, impose a *de facto* standing requirement, which the Commission already rejected in Order No. 1892.

After reconsidering the harm requirement that it imposed by Order No. 2000, and based on the foregoing analysis, the Commission vacates Order No. 2000.

IV. COMMISSION ANALYSIS DISMISSING THE COMPLAINT

The standard for whether or not the Commission will hear a complaint is set forth in 39 U.S.C. § 3662(b)(1).

(b) Prompt response required.—

(1) In general.—The Postal Regulatory Commission shall, within 90 days after receiving a complaint under subsection (a)—

(A) either—

(i) upon a finding that such complaint raises material issues of fact or law, begin proceedings on such complaint; or

(ii) issue an order dismissing the complaint; and

(B) with respect to any action taken under subparagraph (A)(i) or (ii), issue a written statement setting forth the bases of its determination.

39 U.S.C. § 3662(b)(1).

The Amended Complaint fails to raise material issues of either fact or law and is therefore dismissed. First, as a matter of law, the service standards set forth under 39 C.F.R. § 121.1 that APWU alleges to have been violated represent service “expectations,” which are not guaranteed, nor can they be “violated,” *per se*, as the term is used by APWU. As explained in detail below, whether or not the Postal Service is compliant with applicable statutory and regulatory requirements is instead evaluated in reference to separately published service performance “goals” (also referred to as “targets”) that use the service standards as guideposts.

Second, even assuming that APWU had intended to allege that the service performances goals are not being met, the Amended Complaint does not raise new material issues of fact for the Commission to consider. Such allegation would instead

be consistent with findings in past annual compliance determinations issued by the Commission. APWU is not disputing the Commission's determinations from those annual compliance determinations.

Third, the Commission already has addressed this matter by directing the Postal Service to take remedial action in the context of past annual compliance determinations. Moreover, the remedies available to the Commission to address service performance issues are the same regardless whether those performance issues are brought to the attention of the Commission by complaint or instead through the annual compliance determination process. *Compare* 39 U.S.C. § 3662(c), *with* 39 U.S.C. § 3653(c).

The remainder of the Commission's analysis examines each of these issues in detail.

- A. Published service standards represent service expectations. They are not requirements, nor can they be violated, as the term is used by APWU.

The gravamen of APWU's Amended Complaint is that "[t]he Postal Service is regularly failing to comply with the service standards set by 39 C.F.R. § 121.1 in violation of 39 U.S.C. § 3691(b)(1)(A)(C) [sic]." Amended Complaint ¶ 20. For First-Class Mail, APWU adds that "[t]he Postal Service has External First Class ("EXFC") performance information that shows that the Postal Service has failed to meet its service standard pursuant to 39 C.F.R. § 121.1(a)(b) [sic]." *Id.* ¶ 22. APWU then proceeds to identify various occasions or circumstances in which it alleges that mail has not been delivered within the amount of time contemplated by the service standards set forth at 39 C.F.R. § 121.1.

The service standards set forth by the Postal Service in 39 C.F.R. § 121.1 are service "expectations," and not service "requirements."¹⁶ As explained below, there is a system in place that evaluates how expectations are, or are not, being met in relation to

¹⁶ The rulemaking establishing service standards explains that a service standard represents the expected day of delivery after entry of the mail. It also explains that a number of pieces will not be delivered within the service standard and that a measurement system is being put into place to measure and report on late delivered mail (tail-of-the-mail measurement). See 72 FR 72216 (December 19, 2007).

published “goals.” This system is consistent with the directives of the Postal Accountability and Enhancement Act (PAEA). Thus, the premise that a complaint lies based on failing to provide service in conformance with an expectation is misplaced.

Service standards play an important role, even though they do not act as legal requirements. They provide information to the customer on what service level is to be expected for various postal products. They also provide a starting point by which actual service performance can be evaluated. This provides the impetus for the Postal Service to meet customer expectations, including designing a postal network capable of meeting these expectations.

The PAEA directs the Postal Service to establish service standards, in consultation with the Commission, for all market dominant products.

(a) Authority Generally.—Not later than 12 months after the date of enactment of this section, the Postal Service shall, in consultation with the Postal Regulatory Commission, by regulation establish (and may from time to time thereafter by regulation revise) a set of service standards for market-dominant products.

39 U.S.C. § 3691(a).

The Postal Service developed service standards with both an understanding of customer requirements and an understanding of what services were feasible for the Postal Service to provide.¹⁷ The service standards themselves provide no guarantee of actual service. They provide a description of the expected number of days that it takes for various mail products to be delivered, essentially relative to the distance that the mail product has to travel to reach its destination. See 39 C.F.R. part 121.

The Postal Service established service standards by publishing as a final rule Modern Service Standards for Market Dominant Products, December 19, 2007.¹⁸ Subsequently, as part of its network rationalization initiative, the Postal Service revised

¹⁷ In addition to consultations with the Commission, the Postal Service considered the needs of various mailers’ groups. See Mailers Technical Advisory Committee (MTAC) Workgroup # 114, Establish Service Standards and Measurement, Final Recommendations Report, September 20, 2007.

¹⁸ 72 FR 72216 (December 19, 2007) (later codified as 39 C.F.R. parts 121 and 122).

its service standards by publishing as a final rule Revised Service Standards of Market-Dominant Mail Products, May 25, 2012.¹⁹

The distinction between a service expectation and a legally enforceable requirement is made apparent in the un-codified sections of Pub. L. 109-435, Title III, § 302, (120 Stat. 3219) December 20, 2006. Therein, the Postal Service is required to “establish performance goals” (or targets) for meeting service standards.

(a) In general.—Within 6 months after the establishment of the service standards under section 3691 of title 39, United States Code, as added by this Act, the Postal Service shall, in consultation with the Postal Regulatory Commission, develop and submit to Congress a plan for meeting those standards.

(b) Contents.—The plan under this section shall—

- (1) establish performance goals;
- (2) describe any changes to the Postal Service’s processing, transportation, delivery, and retail networks necessary to allow the Postal Service to meet the performance goals;
- (3) describe any changes to planning and performance management documents previously submitted to Congress to reflect new performance goals; and
- (4) describe the long-term vision of the Postal Service for rationalizing its infrastructure and workforce, and how the Postal Service intends to implement that vision.

* * * * *

Pub. L. 109-435, 2006 § 302 (120 Stat. 3198) December 20, 2006.

The Postal Service first published goals for FY 2009 on its Rapid Information Bulletin Board System (RIBBS) webpage.²⁰ From time-to-time, the goals have changed; generally by increasing the percentage of times that a mailpiece should meet

¹⁹ 77 FR 31190 (May 25, 2012). Note that there have been subsequent changes predominantly concerning implementation dates.

²⁰ See http://ribbs.usps.gov/targets/documents/tech_guides/Targets.pdf. Although the Postal Service establishes its own goals, the Commission reserves the right to intervene if the goals are contrary to the objectives of title 39, or significantly change the nature of a postal product. Thus far, the Commission has found no instance of this occurring.

service performance expectations.²¹ Current performance goals are available on the Postal Service's website.

The conclusion that the Commission draws from the two-part system specified by Congress is that service standards represent service performance expectations. Whether or not the expectations are being met is evaluated in reference to the goals established by the Postal Service. Hence, the service standards are not requirements, and any other interpretation would invalidate the purpose of separately establishing goals.

APWU also alleges that because the Postal Service is not providing First-Class Mail service in conformance with its regulations, it is in violation of 39 U.S.C. § 3691(b)(1)(A) and (C). This allegation is without merit.

Section 3691(b)(1) specifies certain objectives that service standards are designed to achieve. In addition, 39 U.S.C. § 3691(c) specifies certain factors that must be considered when establishing or revising service standards. These factors and objectives are applicable to the design or revision of the service standards themselves. The design or revision of service standards may be challenged by not taking the factors and objectives into consideration. The design factors and objective cannot be violated, *per se*, when service performance does not achieve service standards.²²

²¹ The Postal Service is required to notify the Commission prior to the implementation of any change in goals. See 39 C.F.R. § 3055.5. The Postal Service also makes this information available through other means, such as the Postal Service's annual compliance reports, and the RIBBS website.

²² This applies regardless of the reason for not living up to service standards, such as design issues with the postal network.

- B. The APWU Complaint does not raise new material issues of fact for the Commission to consider.

Notwithstanding APWU's characterization of service standards as a requirement, the Commission also considers the Complaint as the Postal Service not meeting published service goals.²³

A brief description of the relevant aspects of the existing service performance measurement system is necessary to understand how service performance is evaluated. By statute, the Postal Service is required to annually report measures of the quality of service provided for each market dominant product. This report encompasses service performance. See 39 U.S.C. § 3652(a)(2)(B)(i).

(a) Costs, revenues, rates, and service.—Except as provided in subsection (c), the Postal Service shall, no later than 90 days after the end of each year, prepare and submit to the Postal Regulatory Commission a report (together with such nonpublic annex to the report as the Commission may require under subsection (e))—

* * * * *

(2) which shall, for each market-dominant product provided in such year, provide—

* * * * *

(B) measures of the quality of service afforded by the Postal Service in connection with such product, including—

(i) the level of service (described in terms of speed of delivery and reliability) provided; and

* * * * *

39 U.S.C. § 3652(a).

The Commission has promulgated regulations concerning the form and content of annual service performance reporting. See 39 C.F.R. part 3055, subpart A. Regulations have also been promulgated for quarterly service performance reporting.

²³ Without this consideration, the Commission's inquiry into this matter would be at an end. There would be no legal basis for the Complaint.

See 39 C.F.R. part 3055, subpart B. The ensuing reports are made public by posting to the Commission's website.

The Commission is required to make an annual determination of compliance in regard to service performance based on the annual service performance reports provided by the Postal Service.

(b) Determination of compliance or noncompliance.—Not later than 90 days after receiving the submissions required under section 3652 with respect to a year, the Postal Regulatory Commission shall make a written determination as to—

* * * * *

(2) whether any service standards in effect during such year were not met.

* * * * *

39 U.S.C. § 3653(b). As previously discussed, whether or not service standards are being met is evaluated in reference to the service goals published by the Postal Service.

Thus, consistent with the directive of Congress, a system is in place for reporting service performance. The system requires the Commission to evaluate service performance for each market dominant product relative to service performance goals. Service standards are the guidepost for this system. They are not requirements.

The mail product most closely associated with the Complaint (and the test mailpieces sent by APWU) is the First-Class Mail, Single-Piece Letters/Postcards product.²⁴ Therefore, for purposes of this analysis, the Commission narrows the focus of the discussion to the First-Class Mail, Single-Piece Letters/Postcards product.

Service performance for the First-Class Mail, Single-Piece Letters/Postcards product is measured by a system known as the External First-Class (EXFC) measurement system. EXFC is a measurement system based on sending and

²⁴ Market dominant products are grouped into five classes: First-Class Mail, Standard Mail, Periodicals, Package Services, and Special Services. Each class includes multiple products. The First-Class Mail products are: Single-Piece Letters/Postcards, Presorted Letters/Postcards, Flats, Parcels, Outbound Single-Piece First-Class Mail International, and Inbound Letter Post.

receiving sample mailpieces between 892 three-digit ZIP Code areas. The system is managed for the Postal Service by an independent contractor.

EXFC data are the basis of the Postal Service's First-Class Mail, Single-Piece Letters/Postcards reports to the Commission. On a quarterly basis, the Postal Service reports First-Class Mail, Single-Piece Letters/Postcards service performance disaggregated by overnight, 2-day and 3/4/5-day service standards.²⁵ Information is provided at the District, Postal Administrative, and National levels. The Postal Service also reports service variance using these same desegregations. Service variance is a measure of mail delivery within +1 day, +2 days, or +3 days of the applicable service standard.

EXFC provides a statistically sound and representative measurement of service performance for all areas where domestic Single-Piece First-Class Mail originates and destines. For FY 2014, the reported maximum statistical error for performance estimates of First-Class Mail Letters/postcards was plus or minus 2 percent with a 95 percent confidence level at the district and service standard level for each quarter. The majority of districts had margins of error of plus or minus 1.5 percent or lower for all service standards each quarter.²⁶

EXFC data for First-Class Mail, Single-Piece Letters/Postcards in FY 2014 are replicated in the Commission's FY2014 Annual Compliance Determination. For annual compliance report purposes, the Postal Service provides an annual nationwide First-Class Mail, Single-Piece Letters/Postcards service performance measurement disaggregated by overnight, 2-day and 3/4/5-day service standards. As noted above, the Postal Service reports EXFC data down to the District level on a quarterly basis. There is no need to examine District level data at this time because APWU's Amended

²⁵ The 4/5-day service standards are generally applicable to areas outside the contiguous 48 states. The mail volume for which these service standards are applicable is relatively low. Thus, the impact on service performance measurement of including the 4/5-day service standards with the 3-day service standard for reporting purposes is also relatively low.

²⁶ Docket No. ACR2014, Library Reference USPS-FY14-29, Service Performance ACR FY2014 December 29, 2014, at 6.

Complaint is premised on allegations of “nationwide or substantially nationwide” violations,²⁷ and because the data at the annual national level clearly show instances of service performance for First-Class Mail, Single-Piece Letters/Postcards falling below service performance goals.

Annual data from the previous 3 years appear below. Underlined service performance results indicate instances of where service performance falls below established service goals.

| Product | FY 2014 | | FY 2013 | | FY 2012 | |
|---|---------|-------------|---------|-------------|---------|-----------|
| | Target | % On-Time | Target | % On-Time | Target | % On-Time |
| First-Class Mail, Single-Piece Letters/Postcards | | | | | | |
| Overnight | 96.80 | <u>96.7</u> | 96.70 | 96.8 | 96.65 | 97.0 |
| 2-Day | 96.50 | <u>95.7</u> | 95.10 | 96.0 | 94.15 | 95.6 |
| 3/4/5-Day | 95.25 | <u>88.6</u> | 95.00 | <u>92.5</u> | 92.85 | 93.2 |

Docket No. ACR2014, Annual Compliance Determination Report, March 27, 2015, at 96 (FY 2014 ACD).

APWU has not challenged the validity of data produced by the Postal Service’s service performance measurement systems. Nor has APWU made a representation that the 40 mailpieces it sent in its test provides a statistically accurate (or superior to EXFC) indication of First-Class Mail, Single-Piece Letters/Postcards service performance. In fact, APWU has requested access to EXFC data to further its Complaint.²⁸

The Commission observes that the publicly available EXFC data are generally in agreement with the limited service performance test performed by APWU. This shows that the Postal Service does not always meet established service performance goals for certain products. The limited test performed by APWU does not add any new information that is not already publicly known, reported on, and addressed by the

²⁷ See Amended Complaint at 9.

²⁸ Amended Complaint ¶ 97.

Commission for service performance. There is no further material issue of fact for the Commission to consider.²⁹ See 39 U.S.C. § 3662(b)(1)(A)(i).

- C. The Commission previously directed the Postal Service to take remedial action on this matter in annual compliance determinations.

The Commission directed the Postal Service to take action that the Commission found appropriate where the Postal Service has not met First-Class Mail, Single-Piece Letters/Postcards service performance goals.³⁰ This Complaint raises no new issues of law or fact that would cause the Commission to reconsider its previous directions to the Postal Service.

The FY 2013 Annual Compliance Determination reported that the 3/4/5-day service performance goal for First-Class Mail, Single-Piece Letters/Postcards was not

²⁹ The remaining section examines how the Commission has reported and directed action on service performance.

³⁰ In addition to considering service performance issues within past annual compliance determinations, the Commission also considered the effect of the Postal Service's Mail Processing Network Rationalization proposals on service performance. See Docket No. N2012-1, Advisory Opinion on Mail Processing Network Rationalization Service Changes, September 28, 2012. Prior to issuing its opinion, the Commission provided an opportunity for a hearing on the record to consider all relevant views. 39 U.S.C. § 3661(c). In its opinion, the Commission reviewed the Postal Service's operational proposals and their impact on compliance with title 39. There was no indication, at that time, that the proposed operational changes would prevent the provision of postal services in compliance with title 39. There was recognition, however, that the proposals would be implemented over a period of time, and that the Postal Service would have the opportunity to make adjustments based on lessons learned during implementation. Note that advisory opinions by law are advisory in nature and nonbinding upon the Postal Service.

In this Docket, APWU asks the Commission to consider the operational remedy of ordering the Postal Service to cease and desist from making changes in its mail processing network that will cause it to violate service standards. Amended Complaint at 22. In advisory opinions and other Commission directives, there is recognition of the overlap in responsibilities between the Commission and the Postal Service. Whereas the Commission has primary responsibility for evaluating compliance with title 39, the Postal Service has primary responsibility for developing postal operations that meet that requirement. As a practical matter, the Commission may direct the Postal Service to comply with the requirements of title 39 (which may require the Postal Service to make operational changes), but it is normally within the purview of the Postal Service to develop the specific operational changes necessary to achieve that goal.

met.³¹ This finding triggered further examination by the Commission for the purpose of determining what remedial action by the Postal Service would be appropriate.

The Commission considered the implementation of the Postal Service's Mail Processing Network Rationalization initiative. FY 2013 ACD at 99. This initiative shifted much of the volume of mail previously subject to the overnight service standard to either the 2-day or 3/4/5-day service standard. It also shifted much of the volume of mail previously subject to the 2-day service standard to the 3/4/5-day service standard. *Id.* at 105. The Commission also considered that the Postal Service had increased its 3/4/5-day service goal from 92.85 percent on-time performance to 95.00 percent on-time performance. *Id.* at 100.

After considering the factors that might affect evaluation of 3/4/5-day service performance, the Commission provided the Postal Service with the following mandate.

...The Postal Service must improve performance for products that did not meet the annual targets. The Postal Service should take appropriate action to improve performance for these products.

Id. at 107. The Commission found that providing the Postal Service with the above mandate was the appropriate action to be taken in light of the circumstances.

The FY 2014 Annual Compliance Determination reported that the Overnight, 2-day, and 3/4/5-day service performance goals for First-Class Mail, Single-Piece Letters/Postcards were not met. The 3/4/5-day service performance goal underachieved by greater than 6 percent. FY 2014 ACD at 96, Table V-4.

The Commission considered that the Postal Service had again increased service performance goals. It also considered the Postal Service's explanation that weather played a part in not meeting service performance goals, especially for 3/4/5-day service standard mail that travels a greater distance to its destination. *Id.* at 88, 95-99.

The Postal Service alleged that the 2013-2014 winter was especially bad, and this accounts for the degradation in service performance subject to the 3/4/5-day First-

³¹ Docket No. ACR2013, Annual Compliance Determination Report, March 27, 2014, at 104, Table V-2 (FY 2014 ACD).

Class Mail service standard. The Commission examined quarterly service performance data which showed a decline in service performance for the winter period, with improvements when the weather recovered. This led the Commission to conclude that weather was at least a plausible explanation for degraded service performance results. *Id.* at 88.

Under these circumstances, the Commission found that the appropriate action was to reiterate the Postal Service's responsibility to meet service performance goals. "The Commission expects service performance to improve in FY 2015." *Id.* at 104.

This Commission provided even more specific direction to the Postal Service in regard to the First-Class Mail, Flats product. This product has consistently not met service performance goals.

This is the fourth consecutive year that First-Class Mail Flats did not meet service performance targets. In addition, service performance has not improved since FY 2011. The Commission directs the Postal Service to improve service for First-Class Mail Flats in FY 2015 or to provide an explanation in the FY 2015 ACR for why efforts to improve service performance results for First-Class Mail Flats have been ineffective and detail what changes it plans to make to improve service performance.

Id.

The Commission views its primary responsibility in the area of service performance as enhancing transparency into actual service performance. When service performance goals are not being met, the Commission directs that corrective action be taken. When results are not forthcoming, the Commission historically has increased the reporting requirements on the Postal Service to improve transparency. Other actions may be considered in the future. In regard to the First-Class Mail, Single-Piece Letters/Postcard product, the Commission has taken the action that it considers appropriate at this time to address issues of service performance.

As a final matter, the Commission interprets the statutory provisions of the PAEA as allowing service performance issues to be brought to the attention of the Commission through either the complaint process or during an annual compliance review. The approaches are not mutually exclusive. However, after an issue has been

considered under one approach, in most instances reconsidering the same issue using the alternative approach is not a necessary or efficient use of resources. The remedies that the Commission may direct are the same no matter the approach.

In the case of a complaint:

If the Postal Regulatory Commission finds the complaint to be justified, it shall order that the Postal Service take such action as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance....

39 U.S.C. § 3662(c). In the case of an annual compliance determination, the statute refers to the actions that may be taken when a complaint is justified.

If, for a year, a timely written determination of noncompliance is made under subsection (b), the Postal Regulatory Commission shall take appropriate action in accordance with subsections (c) and (e) of section 3662 (as if a complaint averring such noncompliance had been duly filed and found under such section to be justified).

39 U.S.C. § 3653(c).

A finding in an annual compliance determination that the Postal Service is in compliance with a requirement only creates a rebuttable presumption of compliance. See 39 U.S.C. § 3653(e). Therefore, a finding of compliance may be challenged through the complaint process.

APWU does not challenge a rebuttable presumption of compliance. APWU's allegation (in essence) is consistent with the Commission's reporting in past annual compliance determinations that service performance goals are not always met.

In conclusion, the Amended Complaint, in alleging a failure to comply with the service standards set forth in 39 C.F.R. § 121.1, does not plead a violation of an applicable legal requirement. In the alternative, construing APWU's submission as an allegation that the Postal Service is not meeting its service performance goals, the Commission concludes that the Amended Complaint does not raise new material issues of fact for the Commission to consider. The Commission previously found that the Postal Service has not met specific service performance goals, and directed the Postal

Service to take remedial action. Without a material issue of fact or law, the Amended Complaint must be dismissed.

V. ORDERING PARAGRAPHS

It is ordered:

1. The Motion for Reconsideration of the Dismissal of APWU's Complaints Regarding Violations of 39 C.F.R. § 121.1, filed March 7, 2014, is granted.
2. Order No. 2000 is vacated.
3. The Postal Service's Motion to Dismiss the Complaint is granted for the reasons stated in this Order.

By the Commission.

Shoshana M.Grove
Secretary

Commissioner Goldway dissenting.

DISSENTING OPINION OF COMMISSIONER GOLDWAY

I would not dismiss this complaint before it has been heard; particularly where the Commission has itself recognized aspects of the activity comprising the complaint.

As the majority opinion describes, the Commission has consistently expressed concern in its Annual Compliance Determinations about the Postal Service's inability to maintain the service standards it sets for itself and promises the public.

Declines in service quality were observed soon after the USPS began its network realignment program. As network consolidation has proceeded, the quality and speed of service has deteriorated at an ever-expanding pace. The mail that has been affected most is First-Class Mail, where service levels have gone from overnight to 2 days and from 2 days to 3 days, with over 30 percent of 3-day mail actually delivered in 4 or 5 days. The claims brought by APWU in its complaint are colorable and the concerns raised are credible.

For example, there was a precipitous decline in many aspects of service quality in the first two quarters of FY 2015.¹ It is widely recognized in the economic literature that in a price cap rate regulation system, service quality is prone to slippage, unless there is a means of ensuring maintenance of service levels. The Commission's oversight responsibilities require constant attention to, and public review of, service performance.

The existence of ongoing hortatory language in the Commission's Annual Compliance Determination (ACD), urging the Postal Service to raise service quality, should not serve to foreclose complaints about service. The fact that the Commission has repeatedly recognized service quality problems in the ACD should not be used as a bar to legitimate complaints. The Commission has recognized and responded to similar concerns in the preamble to its rulemaking on the Complaint process.

¹ See, e.g., U.S. Postal Service delivery times lag more than expected, by Henry J. Cordes, Omaha World-Herald, May 18, 2015. Viewed at http://www.omaha.com/news/metro/u-s-postal-service-delivery-times-lag-more-than-expected/article_3d184144-3097-591c-801f-0f2026fcdc35.html.

In the Commission's Rulemaking establishing Rules for Complaints, the Newspaper Association of America (NAA) expressed a pair of concerns: "that a Commission finding of compliance or noncompliance in an annual compliance determination could moot a pending complaint on the same issue."²

The Commission in its Rulemaking directly addressed only one of the duo of concerns, limiting its discussion to instances of a complaint over a matter for which there had been a finding of compliance. Order No. 195 at 21-23. The Commission prologue did not settle the issue raised in the instant complaint docket: how an ACD finding that suggests non-compliance, with an accompanying remedy, would impact a complaint raising similar facts. Instead, the Commission found that a timely written determination of compliance creates rebuttable presumption of compliance by the Postal Service for those issues during the applicable year. *Id.* at 22.

Nevertheless, the Commission agreed with NAA in the broad sense that it "would not give full effect to the statutory scheme if complaints could be rendered moot by the issuance of an annual compliance determination." *Id.* The Commission also observed that "Congress recognized that annual compliance determination proceedings are completed in a very short, fixed timeframe and are not subject to the same opportunities for contesting evidence as exist in an adversarial proceeding. These rules contemplate full complaint proceedings to provide thorough, in-depth review of any particular subject matter in the context of a complaint." *Id.* at 23. The Commission concluded by stating that: "Commission findings in an annual compliance determination are relevant to a pending complaint proceeding, but are not necessarily dispositive of those issues." *Id.*

² Docket No. RM2008-3, Order No. 195, Order Establishing Rules for Complaints and Rate or Service Inquiries March 24, 2009, at 21 (Order No. 195). See also Docket No. RM2008-3, Comments of the Newspaper Association of America on Notice and Order of Proposed Rulemaking Establishing Rules for Complaints October 6, 2008, at 2, 9-11 (the Commission... "Should ensure that the annual compliance review process does not eviscerate the complaint process.")

The APWU may or may not ultimately be able to prove their case. But APWU has not had that opportunity. The Postal Service, a government monopoly, holds nearly all of the relevant information. There has not been a fair opportunity for discovery to elicit the information needed for a full record. The proceeding has been prematurely foreclosed.

The Commission should not assume that the ACD will suffice as the sole component of the regulatory system. The PAEA anticipates a robust Complaint mechanism and granted the Commission broad remedial authority. The statutory language makes it clear that the ACD and the section 3662 Complaint mechanism, both major aspects of the PAEA, are important, intertwined, and designed to work together in concert.

In light of the documented recent declines in service, this complaint should be heard.

Ruth Y. Goldway