

Oral Argument Not Yet Scheduled

No. 15-1156

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN POSTAL WORKERS UNION AFL-CIO,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent.

and

U.S. POSTAL SERVICE,
Intervenor in Support of Respondent,

On Petition For Review of an Order
of the Postal Regulatory Commission

PETITIONER'S OPENING BRIEF

Michael T. Anderson
Lorrie E. Bradley
Murphy Anderson PLLC
1701 K Street NW, Suite 210
Washington, DC 20006
(202) 223-2620
(202) 296-9600 (fax)
manderson@murphypllc.com
lbradley@murphypllc.com

Attorneys for Petitioner
American Postal Workers Union

**CERTIFICATE AS TO PARTIES, RULINGS
AND RELATED CASES**

A. Parties and Amici

In the proceedings before the Postal Regulatory Commission, the following entities were parties:

- 1) American Postal Workers Union, AFL-CIO - Complainant
- 2) U.S. Postal Service - Respondent

B. Ruling under Review

APWU seeks review of the Postal Regulatory Commission Order No. 2512, issued May 27, 2015, dismissing its Complaint in Docket No. C2013-10.

C. Related Cases

APWU is not aware of related cases under Rule 28(a)(1)(C).

/s Michael T. Anderson

Murphy Anderson PLLC
1701 K Street NW, Suite 210
Washington, DC 20006
(202) 223-2620
(202) 296-9600 (fax)

Attorneys for Petitioner

CORPORATE DISCLOSURE
[D.C. Circuit Rule 26.1]

Pursuant to D.C. Cir. R. 26.1, the undersigned certifies that American Postal Workers Union is an unincorporated labor organization with approximately 200,000 members working in the postal industry. It is affiliated with the American Federation of Labor - Congress of Industrial Organizations (AFL-CIO). The APWU has not issued shares, bonds or other securities, and has no parent companies, subsidiaries, or affiliates which have issued any shares or securities.

/s Michael T. Anderson

Murphy Anderson PLLC
1701 K Street NW, Suite 210
Washington, DC 20006
(202) 223-2620
(202) 296-9600 (fax)

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Table of Contents.....	i
Table of Authorities	v
Glossary of Terms and Abbreviations	viii
JURISDICTION	1
ISSUES PRESENTED	1
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
A. Initial Complaint.....	3
1. Allegations of the initial Complaint	3
2. Commission ruling: Union has standing, must provide more specific facts of service violations	4
B. Amended Complaint	5
1. Allegations of the Amended Complaint	5
• Union’s core theory: Postal Service closed mail facilities knowing it would cause widespread noncompliance with service standards	5
• Waco, Texas	6
• Altoona, Pennsylvania	6

•	Brooklyn, New York	7
•	New Brunswick, New Jersey	7
•	Colorado Springs, Colorado	8
•	Jacksonville, Florida	9
•	National test mailing	9
•	Request for discovery of EXFC data	10
2.	Dismissal of Amended Complaint: no Union standing	10
C.	Motion for Reconsideration	10
1.	Union motion	10
2.	The Commission grants reconsideration on standing, but holds service standards are unenforceable	11
	SUMMARY OF ARGUMENT	13
	STANDING	15
A.	The Commission's shifting rationales	15
B.	Consumer standing	16
C.	Statutory standing	17
1.	Express standing for interested persons	17
2.	The statute's protection of service standards is not confined to commercial interests	18

STANDARD OF REVIEW	20
A. <i>Chevron</i> Step One	20
B. <i>Chevron</i> Step Two	21
C. Review of an agency’s shifting rationales	22
ARGUMENT	23
I. The Commission Rewrote the Statute	23
A. Congress mandated enforceable service standards	23
1. Section 3691 established service standards as formal regulations	23
2. Publication in the Code of Federal Regulations defines service standards as enforceable rules	24
3. Section 3662 mandates enforcement by private complaint	26
4. Congress mandated APA judicial review, which does not apply to unenforceable agency guidelines	28
B. The Commission conflated service standards with operational “performance goals”	30
1. The Act treats “service standards” as distinct from “performance goals”	30
2. The Commission is contradicting its own rules	32
C. The Commission’s order fails <i>Chevron</i> ’s first step	35

II.	Annual Compliance Determinations May Not Preempt Service Complaints	36
A.	The Commission’s refusal to treat service standards as enforceable makes its ACDs meaningless	36
B.	Congress did not intend Annual Compliance Determinations to foreclose private complaints	39
1.	Section 3653(e) allows private complaints even when inconsistent with ACDs	39
2.	The Commission may not foreclose the Union’s complaint because it is “consistent” with the ACD	41
3.	The Commission may not prevent discovery of the EXFC data.....	43
C.	The Commission’s refusal to remedy acknowledged noncompliance requires remand: <i>Gamefly</i>	44
	Conclusion	46
	Certificate of Compliance	47
	Certificate of Service	48

TABLE OF AUTHORITIES

Authorities upon which we chiefly rely are marked with asterisks.

	Page
<i>Aid Ass’n for Lutherans v. U.S. Postal Service</i> , 321 F.3d 1166 (D.C. Cir. 2003)	36
<i>Alliance of Nonprofit Mailers v. Postal Regulatory Com’n</i> , 790 F.3d 186 (D.C. Cir. 2015)	3, 19, 35
<i>Ass’n of Data Processing Service Organization v. Camp</i> , 397 U.S. 150 (1970).....	19
* <i>American Radio Relay League, Inc. v. F.C.C.</i> , 524 F.3d 227 (D.C. Cir. 2008)	44
* <i>Brock v. Cathedral Bluffs Shale Oil Co.</i> , 796 F.2d 533, 539 (D.C. Cir. 1986)	25
* <i>Center for Auto Safety v. Nat’l Highway Traffic Safety Admin.</i> , 452 F.3d 798, 807-808 (D.C. Cir 2006)	28, 38
<i>Chevron, U.S.A. Inc. v. National Resources Defense Council</i> , 467 U.S. 837 (1984)	passim
<i>Clarke v. Securities Indus. Ass’n</i> , 479 U.S. 388 (1987).....	18
<i>Contintental Air Lines, Inc. v. Dep’t of Transp</i> , 843 F.2d 1444 (D.C. Cir. 1988).....	21
<i>Consumer Federation of America v. F.C.C.</i> 348 F.3d 1009 (D.C. Cir. 2003)	17
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	22
<i>Fogo De Chao (Holdings) Inc. v. U.S. Dept of Homeland Sec.</i> , 769 F.3d 1127, 1149 (D.C. Cir. 2014)	38

<i>Foster v. Pitney Bowes Corp.</i> ,	
549 Fed. Appx. 982 (Fed Cir. 2013)	29
<i>FPL Energy Marcus Hook, L.P. v. FERC</i> ,	
430 F.3d 441 (D.C. Cir. 2005)	22
* <i>GameFly, Inc. v. Postal Regulatory Comm'n</i> ,	
704 F.3d 145 (D.C. Cir. 2013)	15, 45
<i>Klein v. City of San Clemente</i> ,	
584 F.3d 1196 (9th Cir. 2009).....	20
<i>LeMay v. United States Postal Serv.</i> , 450 F.3d 797 (8th Cir. 2006).....	29
<i>Loving v. IRS</i> , 742 F.3d 1014 (D.C. Cir. 2014)	22
<i>Nat'l Treasury Employees Union v. King</i> ,	
961 F.2d 240 (D.C. Cir 1992).....	20
* <i>Natural Resources Defense Council v. E.P.A.</i> ,	
755 F.3d 1010 (D.C. Cir. 2014)	26, 35
<i>Nat'l Fed. of Indep. Bus v. Sebelius</i> , ___ U.S. ___,	
132 S.Ct. 2566 (2012).....	32
<i>Naskar v. United States</i> , 82 Fed. Cl. 319 (2008)	29
<i>New York Progress and Protection PAC v. Walsh</i> ,	
733 F.3d 483 (2d Cir. 2013).....	20
<i>Perez v. Mortgage Bankers Ass'n</i> ___ U.S. ___, 135 S.Ct. 1199 (2015)	25
<i>Recording Industry Ass'n of Am., Inc. v. Verizon Internet Servs.</i> ,	
351 F.3d 1229 (D.C. Cir. 2003)	32
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330 (1979).....	17

<i>Rowe v. Shake</i> , 196 F.3d 778 (7th Cir. 1999)	20
<i>Samuels v. District of Columbia</i> ,	
770 F.2d 184 (D.C. Cir. 1985)	27
<i>Shelby Res., Inc. United States Postal Serv.</i> ,	
619 F. Supp. 1546 (S.D.N.Y. 1985)	29
<i>U.S. Dept. of the Treasury v. FLRA</i> ,	
739 F.3d 13 (D.C. Cir. 2014)	29
<i>U.S. Telecom Ass’n v. F.C.C.</i> ,	
359 F.3d 554, 594 (D.C. Cir. 2008)	22
<i>Village of Barrington v. Surface Transportation Board</i> ,	
636 F.3d 650, 659-660 (D.C. Cir. 2011)	21

STATUTES AND REGULATIONS

39 U.S.C. § 101	18, 19
39 U.S.C § 2803	31
39 U.S.C. § 3653	1, 14, 27, 30-31, 38-39
39 U.S.C. § 3662	passim
39 U.S.C. § 3663	1, 13, 28, 38
39 U.S.C. § 3961	passim
Pub. L. 109-435, 2006, § 302 (120 Stat. 3198) (Dec. 20, 2006)	30
39 C.F.R. § 121.1-4	passim
39 C.F.R. § 3031.12	24, 33
<i>Service Performance Measurement</i> , 75 Fed.Reg. 38725 (July 6, 2010)	17, 33, 44
<i>Management Alert—Substantial Increase in Delayed Mail</i> ,	
(Office of Inspector General Report NO-MA-15-004) (August 13, 2015)	38

GLOSSARY OF TERMS AND ABBREVIATIONS

Term	Definition
Act	The Postal Reorganization Act, as amended by the 2006 Postal Accountability and Enhancement Act, 39 U.S.C. §101 <i>et seq.</i>
Annual Compliance Determination (ACD)	The Postal Regulatory Commission's annual determination under 39 U.S.C. § 3653 whether postal rates or fees were in compliance and any service standards in effect during such year were not met
APWU	American Postal Workers Union
EXFC	EXFC (External First Class) measurement system used by the Postal Service to document service performance
Market-dominant products	Products over which the Postal Service enjoys either a statutory or practical monopoly (such as first-class mail and periodicals)
PRC	Postal Regulatory Commission

JURISDICTION

The American Postal Workers Union (“APWU” or “Union”) filed this Petition for Review on May 29, 2015. The Union seeks review of the Postal Regulatory Commission’s (“PRC’s” or “Commission’s”) Order No. 2512 issued May 27, 2015, dismissing its Complaint in PRC Docket No. C2013-10. Joint Appendix (“JA”) 142-165. The Union’s administrative complaint alleged that the U.S. Postal Service is in systemwide violation of service standards promulgated under 39 U.S.C. § 3691 and 39 C.F.R. § 121.1. JA 85-106. The Commission had jurisdiction over this complaint under 39 U.S.C. § 3662.

This Court has jurisdiction to review the Commission’s decision under 39 U.S.C. § 3663, which incorporates 5 U.S.C. § 706 and 28 U.S.C. § 2118.

ISSUES PRESENTED

1. The Postal Service is subject to service standards promulgated under 39 U.S.C. §§ 3653 and 3691 and 39 C.F.R. § 121.1. Are these service standards unenforceable “expectations,” as the Commission ruled here, or enforceable requirements under 39 U.S.C. §§ 3662-63 and 3691(d)?

2. The Commission held that the Union’s allegations of nationwide noncompliance with service standards were consistent with the Commission’s own Annual Compliance Determinations. The Commission held that this

foreclosed further action on the Union's Complaint. May the Commission refuse to process meritorious § 3691(d) service complaints, on the ground that they allege violations proven by the Commission's own findings?

3. May the Commission refuse a remedy for service complaints, on the ground that its Annual Compliance Determination has encouraged the Postal Service to improve without further sanctions?

STATUTES AND REGULATIONS

The text of all pertinent statutes and regulations is set forth in the Addendum to this Brief.

STATEMENT OF THE CASE

The Union filed its initial complaint on September 5, 2013, alleging that the Postal Service was systematically violating service standards. JA 4-22. The Union amended its complaint on December 13, 2013. JA 85-106.

The Commission dismissed the complaint for lack of standing on February 27, 2014. JA 119-126. The Commission subsequently granted the Union's motion for reconsideration on May 27, 2015, vacating its dismissal for lack of standing. JA 142-150. However, the Commission granted the Postal Service's Motion to Dismiss on the merits, holding that service standards promulgated under 39 C.F.R. § 121.1 are unenforceable "expectations" which

cannot be violated, rather than legal requirements that may be enforced by complaint and remedial order. JA 150-153. The Commission also held that, because the Union's allegations were consistent with the Commission's Annual Compliance Determinations, there was no point in considering the Union's request for a remedial order. JA 154-162.

The Union filed a timely petition for review of the Commission's Order No. 2512 on May 29, 2015.

STATEMENT OF FACTS

A. Initial Complaint

1. Allegations of the initial Complaint

The Postal Service is subject to service standards defining the delivery times for various classes of "market dominant"¹ products like First Class Mail, 39 C.F.R. § 121.1-.4. On May 25, 2012, the Postal Service published a final rule revising the service standards for market dominant mail products, amending 39 C.F.R. § 121.1 First-Class Mail, Effective July 1, 2012. 77 Fed.Reg. No. 102, at 31190 (May 25, 2012). JA 9.

¹"Market-dominant" products are products over which the Postal Service enjoys either a statutory or practical monopoly (such as first-class mail and periodicals) under 39 U.S.C. § 3622(d)(1)(A). *Alliance of Nonprofit Mailers v. Postal Regulatory Com'n*, 790 F.3d 186, 189 (D.C. Cir. 2015)

The Union filed its original complaint on September 5, 2013, alleging that the Postal Service's reduced service standards were inadequate under 39 U.S.C. § 3691(b)(1)(B). JA 4. It also alleged that the Postal Service deprived the Union and its locals of the level of service they were entitled to, even under the existing service standards, in violation of 39 U.S.C. § 3691(d). The Union also alleged that the failure to comply discriminated against individuals, small businesses, and rural mailers, in violation of 39 U.S.C. § 403(c), and that the Postal Service adopted a reduced mail distribution system without first seeking an advisory opinion from the Commission, in violation of 39 U.S.C. § 3661(a).

2. Commission ruling: Union has standing, must provide more specific facts of service violations.

On November 27, 2013, the Postal Regulatory Commission issued Order 1892. JA 68-84. The Commission rejected the Postal Service's argument that the Union lacked standing: "As a mailer who sends and receives mail to and from postal districts in every state and territory, the APWU has a direct stake in and may be aggrieved if the allegations in the Complaint are true. It has also identified a number of different geographic areas in which mail is allegedly not being delivered in accordance with service standards." JA 76.

The Commission dismissed the Complaint as to discrimination under §

403(c), the lack of an advisory opinion under § 3661(a), and the adequacy of service standards under § 3691(b)((1)(B)).² JA 76-80. As to the allegation under § 3691(d) that the Postal Service was violating existing service standards, the Commission directed the Union to “[c]learly identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements” and “[s]tate the nature of the evidentiary support that the complainant has or expects to obtain during discovery” JA 82-83.

B. Amended Complaint

1. Allegations of the Amended Complaint

The Union filed an Amended Complaint on December 13, 2013, providing the more specific allegations the Commission required.³ JA 85-106.

- **Union’s core theory: Postal Service closed mail facilities knowing it would cause widespread noncompliance with service standards.**

The Union’s main allegation is not simply that the Postal Service occasionally fails to meet service standards. The Union’s central theory is that the Postal Service’s noncompliance has been the proximate result of closures of

²Those dismissals are not at issue in this Petition for Review.

³The Amended Complaint deleted the allegations of discrimination under § 403(c), promulgating standards without an advisory opinion under § 3661(a), and inadequacy of service standards under § 3691(b)(1)(B).

mail processing facilities. JA 92. The Union alleges that the Postal Service knew or should have known that those closures would result in the systemic noncompliance with First Class Mail service standards. *Id.*

The Union's Amended Complaint identifies six illustrative examples: Waco, Texas; Altoona, Pennsylvania; Brooklyn, New York, New Brunswick, New Jersey; Colorado Springs, Colorado; and Jacksonville, Florida. JA 93-102. In all six locations, First Class mail to and from addresses within the same locality area is subject to a one-day service standard. *Id.*

- **Waco, Texas**

In Waco, Texas, the closure of processing operations resulted in First Class Mail originating in Waco being transported to Coppell or Austin, Texas for processing. JA 94. After processing, the mail is transported back to Waco. APWU Local 739 in Waco regularly mails First Class letters to its members that originate in Waco and are delivered in Waco. JA 94. Local 739's members regularly receive their mail up to four or five days after they should have received them under the one-day service standards. JA 94.

- **Altoona, Pennsylvania**

In the Altoona, Pennsylvania area, the Postal Service now requires 108 Associate Postal Offices to transfer their mail to the facility in Altoona, where

it is transferred to another facility in Johnstown for processing. JA 95. The Johnstown facility does not have the capacity to process all of the mail it receives in a timely fashion, resulting in regular delays of First Class Mail. JA 96. APWU Local 776 in Altoona mails First Class letters, and election ballots to its members in Altoona. JA 95. Local 776 members report that mail from their Local regularly fails to arrive within one-day service standards. JA 96.

- **Brooklyn, New York**

As part of its Network Consolidation Plan, the Postal Service moved originating mail processing from Brooklyn, New York to Manhattan. JA 96. First Class Mail from Brooklyn is transported to Manhattan for processing even if it will eventually be delivered to a Brooklyn address. JA 96. APWU Local 251 in Brooklyn uses First Class Mail to send materials to its members within Brooklyn. JA 97. The delay caused by consolidation and the movement of mail processing means that mail sent by the Local from Brooklyn to its members in Brooklyn no longer meets the service standards. JA 97.

- **New Brunswick, New Jersey**

In the New Brunswick, New Jersey area, the consolidation of the Postal Service's processing facilities means that all First Class mail must be transported to a postal facility in Kilmer, New Jersey. JA 98. When the mail

arrives at Kilmer, it is then transported to a second facility in Kearny, New Jersey, approximately 35-40 miles away, for processing. JA 98. The mail is then delivered from the Kearny facility to various destinating facilities. JA 98. Clerks at these destinating facilities regularly report receiving the mail from the Kearny processing facility late, meaning that the mail cannot be processed for the mail carriers in time, and must wait for the next day to be delivered. JA 98. APWU Local 149 in New Brunswick uses First Class Mail to send letters to its members within the Brunswick, New Jersey area. JA 97, 99. After the consolidation of processing facilities, Local 149 members regularly report not receiving their mail from the Local within the time required under the service standards. JA 98-99.

- **Colorado Springs, Colorado**

In Colorado Springs, Colorado, as a result of the consolidation of processing facilities, First Class Mail originating in Colorado Springs must be transported to Denver, 80 miles away, and then transported back to one of the ten Colorado Springs postal stations. JA 100. As a result, APWU Local 247 in Colorado Springs sends mail to its members in Colorado Springs that encounters delays of one to several days beyond the service standards. Local 247 members have reported receiving mail from the Local days late since the

implementation of the consolidation. JA 100.

- **Jacksonville, Florida**

In Jacksonville, Florida, the mail processing facility has taken on additional processing work after the consolidation plan resulted in the closure of processing facilities in Gainesville as well as Waycross, Savannah and Macon, Georgia. JA 101-02. Due to the added demand at the processing facility, mail at the Jacksonville processing facility must often wait until the day after it arrives for processing. JA 102. APWU Local 138 in Jacksonville sends materials by First Class Mail once a month to its members. JA 101. Local 138 members reported receiving mail from the Local days late after implementation of the consolidation. JA 102.

- **National test mailing**

To quantify the degree of service violation, the Union conducted a test mailing on December 5, 2013 of forty letters from its national headquarters in Washington, DC to APWU members at specified locations across the country. The letters entered the mail stream before the Critical Entry Time on December 5, 2013. Twenty-five percent of these letters were not delivered within the time required by the service standards, under 39 C.F.R. § 121.1. JA 103-104.

- **Request for discovery of EXFC data**

The Union pointed out that the EXFC (External First Class) measurement system used by the Postal Service would corroborate the Union's allegations. The Union sought discovery into the EXFC data to analyze the effect of consolidation on compliance. JA 105.

2. Dismissal of Amended Complaint: no Union standing

On February 27, 2014, the Commission issued Order No. 2000, granting the Postal Service's motion to dismiss. Reversing course from its prior Order No. 1892, the Commission held that the Union did not suffer cognizable harm to have standing to complain about the service standard violations. JA 119-126.

C. Motion for Reconsideration

1. Union motion

Following the Commission's Order, the Union filed a motion for reconsideration on March 14, 2014. JA 127-135. The motion for reconsideration explained that the Union's complaints were not for "random or occasional" service failures, but instead were based on the Postal Service's systematic failure to meet the standards "because it has reconfigured its mail processing network in a way that makes it impossible for it to meet its service standards." JA 129-130. The Union argued that "the inability of the Postal

Service to deliver its mail in a timely manner is a harm in and of itself. . .

The APWU and other users of the mail are mailing time sensitive documents in reliance on the Postal Service's service standards and, because of the nationwide failures by the Postal Service to deliver its mail in a timely manner, those documents are not being delivered in the time period prescribed in the service standards." JA 134.⁴

2. The Commission grants reconsideration on standing, but holds service standards are unenforceable.

Fourteen months later, the Commission issued Order No. 2512 on May 27, 2015, granting the Union's motion to reconsider, and vacating the Commission's prior orders dismissing the amended complaint on standing grounds. JA 146-149. The Commission concluded, contrary to its Order No. 2000, that the Commission's rules do not require a showing of harm as a condition of standing. *Id.*

Nevertheless, the Commission granted the Postal Service's motion to dismiss the complaint on the merits. JA 149-165. Contrary to its Order Nos.

⁴The Union also filed a protective Petition for Review in this Court on March 20, 2014. *American Postal Workers Union v. Postal Regulatory Commission*, D.C. Cir. No. 14-1035. This Court dismissed this petition without prejudice on August 7, 2014, on the ground that the pending motion for reconsideration before the agency rendered review premature. JA 145.

1892 and 2000 (in which it held that service standards could be enforced by parties with a specific showing of violation and harm), the Commission now concluded that the service standards in 39 C.F.R. § 121.1 are unenforceable “expectations,” which cannot be violated at all. JA 150-153. The Commission also held that the Union’s test mailing (proving service standard violations across the country) was consistent with the External First Class (EXFC) Measurement data to which the Commission was privy. JA 154-162. The Commission held that it had adequately addressed this issue in past Annual Compliance Determinations, where it had encouraged the Postal Service to take remedial action. *Id.*

Commissioner Goldway dissented. Commissioner Goldway found the Union’s allegations “credible” and noted that there had been a “precipitous” decline in many aspects of service quality in the first two quarters of fiscal year 2015. JA 163. According to Commissioner Goldway, Annual Compliance Determinations containing language encouraging the Postal Service to improve cannot bar the Union from seeking a more meaningful remedy through the complaint process: “The proceeding has been prematurely foreclosed. The Commission should not assume that the [Annual Compliance Determination] will suffice as the sole component of the regulatory system. The [Act]

anticipates a robust Complaint mechanism. . . In light of the documented recent declines in service, this complaint should be heard.” JA 165.

SUMMARY OF ARGUMENT

Congress mandated fixed service standards, as formal regulations binding the Postal Service. 39 U.S.C. § 3691 and 39 C.F.R. § 121.1-.4. This is an essential boundary on a government monopoly subject to statutory price caps. Without a means of ensuring maintenance of service levels, the Postal Service can circumvent price caps by delivering steadily deteriorating service for the same postage. JA 163.

This is why Congress provided for private complaints about service standard violations, 39 U.S.C. § 3662, and judicial review and injunction against noncompliance. 39 U.S.C. § 3663-64. The Union brought this complaint under those provisions, alleging that the Postal Service is systematically violating existing service standards as a result of plant closures.

To avoid addressing this complaint, the Postal Regulatory Commission now holds that service regulations are unenforceable. JA 150-153. Contrary to all past pronouncements, the Commission now declares that service standards cannot be “violated” in any legally meaningful sense. *Id.* It concludes that the regulations at 39 C.F.R. § 121.1-.4 are only aspirational “performance goals,”

borrowing a related term from the legislation.

In Part I of the Argument, below, we show that this is an unauthorized revision of the statute. The Act treats “service standards” as distinct from “performance goals.” 39 U.S.C. § 3653(b)-(c) (describing “service standards”) with § 3653(d) (describing “performance goals”). If service standards are not legally enforceable, Congress’ enactment of § 3691 and its mandated service regulations was empty rhetoric. The Commission is not entitled to *Chevron* deference on this point, because its nullification of the statute fails at *Chevron*’s first step.

In Part II of the Argument, we address the Commission’s alternative rationale: that it already knows about widespread noncompliance from the Postal Service’s External First-Class (EXFC) measurement system, and has already “directed” improvement in its Annual Compliance Determinations. JA 154-162. But the Commission’s declaration that service regulations are unenforceable makes this alternative rationale equally invalid. Until the Commission’s rule of unenforceability is corrected, its “directions” to improve service are nothing more than pleas for cooperation. By the Commission’s own reasoning, its “directions” can never ripen into a coercive order against the Postal Service, no matter how severe its noncompliance becomes.

Congress did not intend Annual Compliance Determinations to foreclose private complaints. *See* 39 U.S.C. § 3653(e). This is especially true here, where the Commission's annual reports are content merely to note the overall national level of noncompliance. This ignores the Union's more particular allegation. The Union is not simply alleging a general fact of noncompliance nationwide. It is alleging that noncompliance is especially severe in localities whose mail processing facilities have been closed. The Union further alleges that the Postal Service knew these closures would make compliance with its regulations impossible. If this is proven, the Commission has a mandatory duty to remedy that is not satisfied by hortatory language in its annual reports. This Court has already held the Commission may not refuse to remedy acknowledged violations when they are proven by private complaint. *See GameFly, Inc. v. Postal Regulatory Comm'n*, 704 F.3d 145, 149 (D.C. Cir. 2013). The Court should grant review here for the same reason.

STANDING

A. The Commission's shifting rationales

The Commission's view of the Union's standing shifted through its three successive orders. In its first Order No. 1892, the Commission found the Union had standing simply because it is a large mailer affected by service violations:

“As a mailer who sends and receives mail to and from postal districts in every state and territory, the APWU has a direct stake in and may be aggrieved if the allegations in the Complaint are true.” JA 76. In Order No. 2000, the Commission changed its mind to hold that APWU lacked standing because it did not quantify consequential monetary harm from the service delays. JA 125-126. By its Order No. 2512, the Commission changed its mind yet again to hold that the Union had statutory standing regardless of harm. JA 146-149.

The Commission was right the first time. The Union has standing under Article III and the statute, because it is not getting the product it paid for, and because service violations impede communications with its members. This establishes standing under Article III and the statute.

B. Consumer standing

First, the Union has standing because it is paying First Class postage for a level of postal service that it does not receive.

The Union and its locals pay to send millions of pieces of mail per year. JA 91. Because (as the Commission acknowledges) a significant percentage of that mail is not delivered within the time defined in postal regulations, the Union suffers harm. When it promulgated its service measurement rules, the Commission itself recognized that violations of service standards amount to *de*

facto rate increases: “[A] reduction in service without a reduction in price may imply that customers are getting less for their money, i.e., experiencing a *de facto* rate increase.” *Service Performance Measurement*, 75 Fed.Reg. 38725-01, 38735 (July 6, 2010).

When a consumer fails to get goods and services on the terms she is entitled to, the consumer suffers a cognizable injury. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 340 (1979). Consumers suffer Article III injury-in-fact “even if they could ameliorate the injury by purchasing some alternative product.” *Consumer Federation of America v. F.C.C.*, 348 F.3d 1009, 1012 (D.C. Cir. 2003). A postal customer whose First Class postage fails to obtain timely delivery suffers harm, even if the consumer can get its mail delivered faster by paying more for Express Mail or UPS shipping. *See id.*

C. Statutory standing

1. Express standing for interested persons

The Union’s standing is confirmed by the statute. Congress specifically intended that noncompliance with service standards would be remediable, 39 U.S.C. § 3691(d), and gave “any interested person” the right to claim a remedy from the Commission. *Id.*, incorporating § 3662(a).

This establishes prudential standing. Under the Administrative Procedure

Act, 5 U.S.C. § 702, a petitioner can establish prudential standing by showing that its interests are “arguably within the zone of interests to be protected or regulated by the statute . . . in question.” *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 396 (1987) This “test is not meant to be especially demanding.” *Id.*, 479 U.S. at 399. A would-be plaintiff is outside the statute’s “zone of interests” only “if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” *Id.*

Under this standard, the Union’s interest is plainly protected by the Act.

2. The statute’s protection of service standards is not confined to commercial interests.

The Postal Reorganization Act does not limit standing to commercial mailers. The Act protects commercial and noncommercial mailers equally: “The United States Postal Service shall be operated as a basic and fundamental service provided to the peopleThe Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities.” 39 U.S.C. § 101(a).

See Alliance of Nonprofit Mailers v. Postal Regulatory Com'n, 790 F.3d 186, 189 (D.C. Cir. 2015) (quoting § 101(a)).

The Commission may not disqualify postal patrons from a remedy just because they do not claim injury to a business. Congress treated all of the “personal, educational, literary, and business correspondence of the people” as equally valuable under the law. 39 U.S.C. § 101(a). Non-profit organizations whose newsletters are delayed, like residential patrons who can no longer rely on the Postal Service to deliver birthday cards in time, are within the zone of interests protected by the Act. “Thus the Administrative Procedure Act grants standing to a person ‘aggrieved by agency action within the meaning of a relevant statute.’ That interest . . . may reflect ‘aesthetic, conservational, and recreational’ as well as economic values. A person or a family may have a spiritual stake in First Amendment values sufficient to give standing . . . We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury . . .” *Ass’n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153-154 (1970).

The Union has a clear First Amendment interest in timely communication with its members. This Court recognizes that delay in a union’s communication to its members is cognizable harm. *See National Treasury*

Employees Union v. King, 961 F.2d 240, 244 (D.C. Cir. 1992). Mail delays impose actionable harm even for incarcerated prisoners. *See, e.g., Rowe v. Shake*, 196 F.3d 778, 783 (7th Cir. 1999). Where free citizens engage in associational speech, this interest is all the stronger. “[T]iming is of the essence in politics and a delay of even a day or two may be intolerable.” *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) citing *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). It follows that the Union has Article III standing to bring this petition for review.

STANDARD OF REVIEW

This case is governed by the two-step standard of *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

A. *Chevron* Step One

Under *Chevron*, the Court must first determine whether “the intent of Congress is clear,” for if “Congress has directly spoken to the precise question at issue” then the Court must give effect to Congress’ clear intent. *Chevron*, 467 U.S. at 842. “At this first step of the *Chevron* analysis we ‘employ[] traditional tools of statutory construction,’ *id.* at 843 n. 9, to determine whether Congress has ‘unambiguously foreclosed the agency’s statutory interpretation.’” *Village of Barrington v. Surface Transportation Board*, 636

F.3d 650, 659-660 (D.C. Cir. 2011), *quoting Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009).

At *Chevron*'s first step, the Court does not defer to the agency's construction of the statute. "Because at *Chevron* step one we alone are tasked with determining Congress's unambiguous intent, we answer both inquiries without showing the agency any special deference. And if the agency has either violated Congress's precise instructions or exceeded the statute's clear boundaries then, as *Chevron* puts it, 'that is the end of the matter'—the agency's interpretation is unlawful. *Chevron*, 467 U.S. at 842." *Village of Barrington*, 636 F.3d at 659-660.

B. *Chevron* Step Two

At *Chevron*'s second step, if "Congress has not directly addressed the precise question at issue," and the agency has acted pursuant to an express or implied delegation of authority, the agency's statutory interpretation is entitled to deference, as long as it is reasonable. *Chevron*, 467 U.S. at 843-44. If the Court reaches *Chevron*'s second step, the Court 'must reject administrative constructions of [a] statute ... that frustrate the policy that Congress sought to implement.'" *Continental Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1453 (D.C. Cir.1988) (*quoting FEC v. Democratic Senatorial Campaign*

Comm., 454 U.S. 27, 32 (1981)). Even under the deferential *Chevron* second step, an agency cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term. *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 592 (D.C. Cir. 2008).

C. Review of an agency's shifting rationales

When an agency's position shifts repeatedly over the course of a single proceeding, the Court may regard it as a failure to engage in reasoned decisionmaking. *See FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 448 (D.C. Cir. 2005).

An agency may change its position, but it must "provide reasoned explanation for its action," which normally requires "that it display awareness that it is changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Where the agency adopts a position contrary to what it has long maintained about the meaning of its statute, without explanation, the Court may treat the departure as *ad hoc* decisionmaking rather than a reasoned change in position. *See Loving v. IRS*, 742 F.3d 1014, 1021 (D.C. Cir. 2014).

ARGUMENT

I. THE COMMISSION REWROTE THE STATUTE.

There may be good policy arguments for treating service standards as aspirational goals rather than legal requirements. But that is not the choice Congress made. By declaring service standards to be unenforceable, the Commission rejected Congress' choice and substituted its own.

A. Congress mandated enforceable service standards.

1. Section 3691 establishes service standards as formal regulations.

The Postal Reorganization Act, as amended by the 2006 Postal Accountability and Enhancement Act, requires the Postal Service to comply with service standards promulgated under 39 U.S.C. § 3691 and 39 C.F.R. § 121.1-.4.

Section 3691(a) makes the establishment of service standards, by regulation, mandatory:

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.

These service standards are codified at 39 C.F.R. § 121.1-.4. They define the

number of days for mail delivery from one zip code to the next. They do not dictate the design of the Postal Service's delivery network, nor do they specify what operational decisions the Postal Service must make to meet the standards.

Section 3691(d) provides that violations of service standards must be subject to private complaint:

The regulations promulgated pursuant to this section (and any revisions thereto), and any violations thereof, shall be subject to review upon complaint under sections 3662 and 3663.

The Commission's own regulations recognize that noncompliance with service standards is grounds for a complaint. *See* 39 C.F.R. § 3031.12 "Treatment as a complaint" ("If the Commission receives a volume of rate or service inquiries on the same or similar issue such that there may be cause to warrant treatment as a complaint, it may appoint an investigator to review the matter under § 3030.21 of this chapter or appoint a public representative representing the interests of the general public to pursue the matter.")

2. Publication in the Code of Federal Regulations defines service standards as enforceable rules.

By mandating service standards as formal regulations published in the Code of Federal Regulations, Congress refused to allow the Postal Service to treat them as discretionary guidelines.

Non-binding statements of agency policy are not eligible for publication in the Code of Federal Regulations. *See Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.) (“the real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which statut[ory] [law] authorizes to contain only documents ‘having general applicability and legal effect,’ 44 U.S.C. § 1510, and which the governing regulations provide shall contain only ‘each Federal regulation of general applicability and current or future effect,’ 1 C.F.R. § 8.1 (1986).”) Rules issued through the notice-and-comment process, as the service standards of 39 C.F.R. § 121.1-.4 are, have the status of “legislative rules” because they have the “force and effect of law.” *Perez v. Mortgage Bankers Ass’n*, ___ U.S. ___, 135 S.Ct. 1199, 1203 (2015), *quoting Chrysler Corp. v. Brown*, 441 U.S. 281, 302–303 (1979). If service standards were only advisory goals, Congress would not have defined them as formal regulations in § 3691(a).

The Commission does not have the authority to exempt the Postal Service from enforcement of service regulations commanded by the statute. When Congress provides that an agency shall enforce regulations on a specific subject, the agency has no discretion to exempt it on grounds that the

regulation would be hard to administer. *See Natural Resources Defense Council v. E.P.A.*, 755 F.3d 1010, 1019 (D.C. Cir. 2014). That is what the Commission did here.

3. Section 3662 mandates enforcement by private complaint.

Processing service complaints is not a discretionary function. Section 3662 charges the Commission with a mandatory duty to act on any meritorious complaints. Section 3662(a) 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), 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.

Under § 3691(d), the private complaint procedure of § 3662 encompasses noncompliance with the service-standard regulations.

Section 3662(b)(1) requires the Commission to rule within 90 days whether the complaint raises material issues of law or fact to begin proceedings. If the Commission begins proceedings, its Rules allow discovery through interrogatories and document requests. 39 C.F.R. § 3001.25-27. If the complaint is found to have merit, § 3662(c) requires the Commission to take

remedial action:

Action required if complaint found to be justified.--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.

The statute's provision for Annual Compliance Determinations, 39 U.S.C. § 3653(b)-(c), presumes that noncompliance with service standards is remediable by private complaint under § 3662. Section 3653(b)(2) requires the Commission to determine whether service standards have been met, and if not, section 3653(c) requires the Commission must act as though a meritorious complaint had been filed:

Noncompliance with regard to rates or services.--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).

These provisions are a dead letter if service standards cannot be enforced in the first place. Congress' creation of a private enforcement mechanism in mandatory language means that it intended aggrieved parties to have enforceable rights. *See Samuels v. District of Columbia*, 770 F.2d 184, 197 (D.C. Cir. 1985). The Commission's decision to the contrary cannot be squared

with the statute.

4. Congress mandated APA judicial review, which does not apply to unenforceable agency guidelines.

Section 3663 gives aggrieved persons the right to petition this Court for review in accordance with the Administrative Procedure Act, 5 U.S.C. § 706.

Section 3664 provides that Commission orders may be enforced through district court injunctions. These provisions are meaningless if service-standard regulations are only aspirational “performance goals.”

If service standards were not enforceable, there could be no APA jurisdiction to review them at all. If the Commission is right that Congress intended service standards to be non-binding “performance goals,” then Congress could never have authorized APA review. *Cf. Center for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 807-808 (D.C. Cir. 2006) (no APA jurisdiction to review agency guidelines that were only general statements of policy, rather than binding rules). So when, as here, Congress expressly provides for APA review, Congress expects that service standards will be treated as enforceable rules, not advisory guidelines.

Ironically, the Postal Service relies on the Commission’s enforcement power when it wins dismissal of service-related claims under other laws.

Courts have consistently dismissed lawsuits against the Postal Service alleging deficient service, as preempted by the Commission's enforcement power. "The language of section 3662 makes clear that a postal customer's remedy for unsatisfactory service lies with the Postal Rate Commission." *LeMay v. United States Postal Serv.*, 450 F.3d 797, 800 (8th Cir. 2006), *quoting Bovard v. United States Post Office*, 47 F.3d 1178, 1995 WL 74678 (10th Cir. 1995); *Foster v. Pitney Bowes Corp.*, 549 Fed.Appx. 982, 985-986 (Fed. Cir. 2013) (Congress intended Commission enforcement to be the exclusive remedy for service complaints); *Naskar v. United States*, 82 Fed. Cl. 319, 322 n.1 (2008) (same); *Shelby Res., Inc. v. United States Postal Serv.*, 619 F.Supp. 1546, 1548-49 (S.D.N.Y.1985) (same).

Yet the Commission now declares that patrons do not have meaningful recourse through its agency after all: their complaints about service cannot be remedied, because service standards are not legally enforceable. This defies Congress. "The agency's policy preferences cannot trump the words of the statute." *U.S. Dept. of the Treasury v. FLRA*, 739 F.3d 13, 21 (D.C. Cir. 2014) *quoting National Treasury Employees Union v. Chertoff*, 452 F.3d 839, 865 (D.C. Cir. 2006).

B. The Commission conflated service standards with operational “performance goals.”

The Commission justified its dismissal by equating service standards under 39 C.F.R. § 121.1-.4, with “performance goals.” The Commission cited an uncodified section of the Act, Pub. L. 109-435, 2006, § 302 (120 Stat. 3198) (Dec. 20, 2006) instructing the Postal Service to develop “performance goals” involving changes to “the Postal Service’s processing, transportation, delivery, and retail networks.” JA 151. The Commission reasoned: “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.” JA 153.

The Commission’s equation of the two terms is contrary to the statute.

1. The Act treats “service standards” as distinct from “performance goals.”

The term “performance goal” appears in the statute, with a related but distinct meaning from “service standards.”

The distinction between the two terms is made in 39 U.S.C. § 3653(b)-

(c) (describing “service standards”) with § 3653(d) (describing “performance goals.”) The Commission is required to document noncompliance with service standards under § 3653(b)(2). Section 3653(c) provides that noncompliance with service standards is subject to private complaint and to coercive order under § 3662. This makes clear that the “service standards” defined by the statute, § 3691(a), and promulgated as regulations, 39 C.F.R. § 121.1-.4, are enforceable rules subject to complaint and order.

Section 3653(d) then refers to “performance goals” in addition to service standards: “(d) Review of performance goals.— The Postal Regulatory Commission shall also evaluate annually whether the Postal Service has met the goals established under sections 2803 and 2804, and may provide recommendations.” (Emphasis added.)

Sections 2803 and 2804, in turn, are provisions for the Postal Service to develop operational plans “covering each program activity set forth in the Postal Service budget.” These provisions deal with the design of Postal Service operations – how it plans to structure its operations to meet its statutory obligations. *See id.* The statute does not give private parties a right to dictate about the operational methods the Postal Service employs - *e.g.*, whether it invests in trucks, trains or drones to meet its delivery obligations. But the

Commission ignores the statute in declaring that the objective timelines of the service regulations are therefore the same as operational “performance goals” that cannot be enforced.

Congress used the terms “service standards” and “performance goals” to describe distinct things. *Compare* § 3653(b)-(c) with § 3653(d). Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally. *See Nat’l Fed. of Indep. Bus. v. Sebelius*, ___ U.S. ___, 132 S.Ct. 2566, 2583 (2012) (*citing Russello v. United States*, 464 U.S. 16, 23 (1983)). Here the two terms are juxtaposed and contrasted in the same section, § 3653(b)-(d). “[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms have different meanings.” *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs.*, 351 F.3d 1229, 1235 (D.C. Cir. 2003) *quoting Transbrasil S.A. Linhas Aereas v. Dep’t of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986). The Commission’s attempt to conflate the two terms violates the plain meaning of the statute.

2. The Commission is contradicting its own rules.

The Commission’s present Order No. 2512 contradicts everything the Commission has said until now.

The Commission's regulations assume that service noncompliance is a basis for a complaint. *See* 39 C.F.R. § 3031.12 (“If the Commission receives a volume of rate or service inquiries on the same or similar issue such that there may be cause to warrant treatment as a complaint, it may appoint . . . a public representative representing the interests of the general public to pursue the matter.”) When it promulgated its service measurement rules, the Commission was clear that noncompliance would be the basis for multiple overlapping forms of enforcement, including private complaint: “In some instances, [a Commission-initiated proceeding] parallels a customer's ability to file a complaint pursuant to 39 U.S.C. § 3662, request a proceeding pursuant to 39 U.S.C. § 3652(e)(2), or provide comment pursuant to 39 U.S.C. § 3653(a). In some instances, it parallels the Postal Service's obligation to file a nature of service case pursuant to 39 U.S.C. § 3661. However, the Commission's intent is to make a preliminary determination of whether or not a proceeding is warranted within the 30-day notification period, and notify the Postal Service immediately of any determinations to initiate a proceeding.” *Service Performance Measurement*, 75 Fed.Reg. 38725-01, 38735 (July 6, 2010).

In its initial Order No. 1892, the Commission properly distinguished between complaints about the operational design of the standards and

complaints that existing standards were being violated. JA 81-82. It dismissed the Union's complaint to the extent it "related to the objectives of how service standards are to be designed, not how they should be enforced." JA 81.

However, the Commission's initial Order No. 1892 recognized that the Union could present a viable complaint that existing service standards were being violated: "Section 3691(d) specifically authorizes complaints based on violations of existing service standards. To that extent, the Complaint satisfies, in part, 39 C.F.R. § 3030.10(a)(2), which requires a complainant to '[c]learly identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements . . .'" JA 82.

In the present Order No. 2512, however, the Commission did an about-face. JA 150-152. In circular reasoning, the Commission now declares that service standards are matters of operational design, because their sole function is to aid in "designing a postal network capable of meeting these expectations." JA 151. The Commission therefore concluded that all § 3691(d) complaints are nonjusticiable complaints about the design of postal operations. JA 151. This is not consistent with the statute or the Commission's own regulations. The Court should reject this *ad hoc* basis for dismissing the Union's complaint.

D. The Commission's order fails *Chevron's* first step.

The Commission implicitly justifies its Order on policy grounds. It suggests that the Postal Service should have leeway to underperform, and that service regulations make more sense as goals rather than rules. These policy arguments may have merit, but they are arguments against the legislative decisions Congress made.

Commissioner Goldway explained why service standards matter to the legislative purpose: “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.” JA 163. The Act imposes strict price caps limiting the Postal Service’s ability to raise postage rates. *See Alliance of Nonprofit Mailers v. Postal Regulatory Com'n*, 790 F.3d 186, 189 (D.C. Cir. 2015). But if the Postal Service has no enforceable limits against the degradation of service, it can grant itself *de facto* price increases simply by reducing the service for which customers pay First Class postage.

This is not what Congress legislated. The Commission’s current Order fails at *Chevron* Step One, just like the EPA’s exemption of certain fuels from mandatory regulation, *Natural Resources Defense Council v. E.P.A.*, 755 F.3d 1010, 1019 (D.C. Cir. 2014), or the Postal Service’s denial of nonprofits’

statutory right to reduced postage, *see Aid Ass'n for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1178 (D.C. Cir. 2003). The Commission's holding that service standards are not enforceable fails for the same reason.

II. ANNUAL COMPLIANCE DETERMINATIONS MAY NOT PREEMPT SERVICE COMPLAINTS.

As an alternative ground for dismissal, the Commission held that the Union's allegations were consistent with the Commission's own Annual Compliance Determinations (ACDs). JA 157. The Commission held that its Annual Compliance Determinations foreclosed further action on the Union's complaint, because the Commission already knows about noncompliance and has already "directed" the Postal Service to improve. JA 158-160.

A. The Commission's refusal to treat service standards as enforceable makes its ACDs meaningless.

The Commission's reliance on its Annual Complaint Determination is not a genuine alternative ground. So long as it maintains that service standards are not legally enforceable, JA 149-152, its annual exhortations for the Postal Service to improve service are legally ineffective.

The Commission's stern tone does not put any teeth in its directives. The Commission quoted its FY 2013 Annual Compliance Determination: "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.’ The Commission found that providing the Postal Service with the above mandate was the appropriate action to be taken in light of the circumstances.” JA 159, *quoting* JA 478 (FY 2013 ACD). Similarly in 2014, after service continued to deteriorate, the Commission quoted its Determination: “The Commission expects service performance to improve in FY 2015.” JA 160, *quoting* JA 273. The Commission gave this example: “This is the fourth consecutive year that First-Class Mail Flats did not meet service performance targets. . . The Commission directs the Postal Service to improve service for First-Class Mail Flats in FY 2015 or to provide an explanation . . .” JA 160, *quoting* JA 273.

The Commission describes this language as a “mandate,” but the rest of its Order discredits that description. As long as the Commission refuses to treat noncompliance as a violation of a legal duty, its “directives” are nothing more than empty pleas for improvement. As Commissioner Goldway wrote: “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.” JA 163.

As Postal Service noncompliance continues,⁵ the Commission’s current rationale would prevent it from issuing any coercive order against the Postal Service under § 3653(c). The Postal Service’s failure to comply would only be a failure to meet an aspirational target. The unenforceability of the regulations would likewise preclude any judicial action under §§ 3663-64. The Postal Service would have a complete defense to any enforcement action, since violations of nonbinding agency guidelines cannot form the basis of a final order under the APA. *Cf. Center for Auto Safety*, 452 F.3d at 807.

As a result, the Commission’s error in its first ground for dismissal also infects its alternative ground. *See Fogo De Chao (Holdings) Inc. v. U.S. Dept of Homeland Sec.*, 769 F.3d 1127, 1149 (D.C. Cir. 2014) (where erroneous analysis permeates each alternative rationale, court must remand for correction of the error). Until the Commission’s underlying rule of unenforceability is

⁵This continued noncompliance is not speculative. Commissioner Goldway’s dissent cites a “precipitous decline in many aspects of service quality in the first two quarters of FY 2015.” JA 163. This is confirmed by the Office of the Inspector General’s August 13, 2015 *Management Alert—Substantial Increase in Delayed Mail* (Report Number NO-MA-15-004) finding a 48% increase in mail delivery delays in violation of service standards in the first six months of 2015 compared to the same period in 2014. *See* <https://uspsoid.gov/sites/default/files/document-library-files/2015/no-ma-15-004.pdf>.

corrected, the “mandate” the Commission relies on in its alternative rationale will not be legally adequate.

B. Congress did not intend Annual Compliance Determinations to foreclose private complaints.

1. Section 3653(e) allows private complaints even when inconsistent with ACDs.

Congress was aware that Annual Compliance Determinations cover the same subject matter as private complaints. It provided that the Commission’s annual review did not foreclose private complaints on the same subjects.

In 39 U.S.C. § 3653(e), Congress allowed the Postal Service to claim a presumption of compliance from the Commission’s Annual Compliance Determination. But Congress made that presumption rebuttable: “Rebuttable presumption.— A timely written determination described in the last sentence of subsection (b) shall, for purposes of any proceeding under section 3662, create a rebuttable presumption of compliance by the Postal Service (with regard to the matters described under paragraphs (1) and (2) of subsection (b)) during the year to which such determination relates.” § 3653(e).

Prior to this Order, the Commission had been clear that Annual Compliance Determinations do not moot private complaints. In her dissent, Commissioner Goldway quoted from the Commission’s *Order Establishing*

Rules for Complaints and Rate or Service Inquiries (March 24, 2009): “[I]t would not give full effect to the statutory scheme if complaints could be rendered moot by the issuance of an annual compliance determination . . . 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.” JA 164 (Commissioner Goldway, dissenting), *quoting* Docket No. RM2008-3, Order No. 195, JA 338-340. Commissioner Goldway correctly concluded: “The Commission should not assume that the ACD will suffice as the sole component of the regulatory system. The [Act] 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 [Act], are important, intertwined, and designed to work together in concert.” JA 165.

Commissioner Goldway was right. This is not a matter of administrative policy left to the Commission’s discretion. This turns on the plain meaning of the statute, over which the Commission enjoys no deference.

2. The Commission may not foreclose the Union's complaint because it is "consistent" with the ACD.

The Commission did not reject the Union's complaint because it was factually groundless. On the contrary, the Commission dismissed the Union's complaint because its allegations were supported by the nationwide EXFC (External First Class) measurement system.⁶ JA 155-157. The Commission reasoned that, because it already knows about nationwide noncompliance, there would be no point in entertaining the Union's complaint. *Id.*

This misrepresents the Union's theory. The Union does not allege that the aggregate nationwide EXFC figures are false. Its complaint is more specific: noncompliance with service standards is disproportionately acute in communities whose mail processing facilities have been closed. *See* JA 92-103. Therefore, even if the overall national figures show 11% noncompliance for 3/4/5 day mail, the Union alleges that the rate of noncompliance is distinctly higher in those communities who have lost their local processing facilities, like Waco, Altoona, New Brunswick, Brooklyn, Colorado Springs, and

⁶The Union's test mailing showed noncompliance in 25% of cases, JA 103-104, not the 11% the Commission cited from nationwide Postal Service data for 3/4/5 day mail. JA 157. While the Union's test mailing involved a smaller sample size, the Union alleged more pervasive noncompliance in the critical localities than the national numbers indicate.

Jacksonville. The Union seeks discovery of the EXFC data, not simply to prove the obvious fact of noncompliance nationwide, but to prove that plant consolidation has been the proximate cause of service violations in communities like Brooklyn whose local facilities have closed.

The Union also alleges that the Postal Service acted knowingly – that it “knew or should have known that those closures would result in the regular and systemic violation of First Class Mail service standard regulations.” JA 92. The Union alleges that the Postal Service gave the Commission assurances that it would be able to meet the revised service standards after consolidation, knowing that closures would make compliance impossible. JA 90-91.

The Commission may not ignore this allegation. Congress contemplated the possibility of deliberate Postal Service noncompliance, and provided special remedies where this is proven. *See* § 3662(d). The Union’s allegation is not fanciful. As Commissioner Goldway wrote: “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 claims brought by APWU in its complaint are colorable and the concerns raised are credible.” JA 163. The Commission had no authority to refuse to address this allegation.

2. The Commission may not prevent discovery of the EXFC data.

The Commission reasoned that the Union's complaint could not add anything to the agency's knowledge, because the Commission already has access to the Postal Service's External First Class (EXFC) database. JA 157. The Commission reprinted a chart of aggregate nationwide results. *Id.*, reproducing chart at JA 265.

The Commission's rationale is a formula for refusing any service complaints at all. In theory, all violations of service standards are documented on the EXFC database. As a result, any private complaint would only raise facts already "known" to the Commission. Under the Commission's rationale, this would justify dismissal of any service complaint, since the Commission's past action (or inaction) on those known violations would bar further relief.

This prevents private complainants from proving particular allegations about service violations. For example, the Annual Compliance Determination provides national and regional breakdowns, *see* JA 265-268, but it does not isolate the effect on localities whose mail processing facilities have closed. This is the breakdown the Union proposes to analyze. Yet the Union does not have the access to the underlying EXFC data it seeks. The Commission does

not require the Postal Service to make the EXFC database public. *Service Performance Measurement*, 75 Fed.Reg. 38725-01, 38733 (July 6, 2010) (“The Commission is not asking that the Postal Service’s raw databases be made publicly available.”); *id.*, 75 Fed. Reg. at 38738 (rejecting mailers’ request for access to the Postal Service’s aggregate raw data). Without allowing discovery of this underlying data, the Commission is administering the statute in a way that prevents private input.

This is exactly what Congress wanted to prevent. *Cf. American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 237 (D.C. Cir. 2008) (“It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of . . . data that, [to a] critical degree, is known only to the agency.”) Commissioner Goldway dissented on this basis: “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.” JA 165.

C. The Commission’s refusal to remedy acknowledged noncompliance requires remand: *Gamefly*

Section § 3662(c) places a mandatory duty on the Commission to remedy violations when complaints are found to be justified.

The Commission has no authority to refuse a remedy once it finds a violation. *See GameFly, Inc. v. Postal Regulatory Comm'n*, 704 F.3d 145, 149 (D.C. Cir. 2013). In *GameFly*, this Court held the Commission was arbitrary and capricious to decline a remedy for discrimination that the agency acknowledged. “When, as in this case, the Commission properly finds that discrimination has occurred, it is obligated to remedy that discrimination, even if it concludes that none of the parties’ proposed remedies is appropriate. Here, even if the Commission’s rejection of GameFly’s proposed remedies was reasonable, its order is still arbitrary and capricious because it left discrimination in place without reasonable explanation. Therefore, we must vacate the Commission’s order and remand this case for an adequate remedy.” *GameFly*, 704 F.3d at 149.

In this case, the Commission’s only purported remedies for service noncompliance are passages in its ACDs urging the Postal Service to improve. If these statements were enforceable through agency order and court injunction, they might satisfy the Commission’s duty. But here, the Commission’s new rationale is that service standards are not enforceable to begin with. If that is the Commission’s policy, its repeated directives for the Postal Service to improve service have no legal effect.

Once the Court determines that this does not satisfy the Commission's statutory duty, it should grant review and remand for compliance with the Act.

CONCLUSION

The Court should grant review of the Commission's order. The Court should remand to the Commission to modify its rule consistent with the Act.

September 14, 2015

/s Michael T. Anderson

Michael T. Anderson
Lorrie E. Bradley
Murphy Anderson PLLC
1701 K Street NW, Suite 210
Washington, DC 20006
(202) 223-2620
(202) 296-9600 (fax)
manderson@murphypllc.com
lbradley@murphypllc.com

Attorneys for Petitioner
American Postal Workers Union

CERTIFICATE OF COMPLIANCE

Pursuant to and in accordance with the provisions of D.C. Cir. Rule 28(d) and 32(a)(3)(B)(I), I, Michael T. Anderson hereby certify the attached Petitioner's Opening Brief in Case No. 15-1156 is in 14 point, proportionally spaced, roman type face and contains less than 10,834 words excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7) (B)(iii), on the basis of a word count made by Murphy Anderson's WordPerfect version 12.0 word processing software that counts words in both text and footnotes. This brief has been prepared in a proportionally spaced typeface in 14 point, Times New Roman type style.

/s Michael T. Anderson

Michael T. Anderson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing BRIEF OF PETITIONER was filed on September 14, 2015, using the CM/ECF system, which will automatically send electronic notification of filing to all counsel of record

/s Michael T. Anderson

Michael T. Anderson

ADDENDUM**STATUTES AND REGULATIONS**

39 U.S.C. § 101	Addendum 2-3
39 U.S.C. §§ 2803-04	Addendum 3-5
39 U.S.C. § 3653	Addendum 6-7
39 U.S.C. §§ 3661-64	Addendum 7-8
39 U.S.C. § 3691	Addendum 9-10
39 C.F.R. § 121.1-.4	Addendum 11-20
39 C.F.R. § 3031.10-.12	Addendum 20-21

§ 101. Postal policy

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.

(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of

the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

§ 2803. Performance plans

(a) The Postal Service shall prepare an annual performance plan covering each program activity set forth in the Postal Service budget, which shall be included in the comprehensive statement presented under section 2401(e) of this title. Such plan shall—

(1) establish performance goals to define the level of performance to be achieved by a program activity;

(2) express such goals in an objective, quantifiable, and measurable form unless an alternative form is used under subsection (b);

(3) briefly describe the operational processes, skills and technology, and the human, capital, information, or other resources required to meet the performance goals;

(4) establish performance indicators to be used in measuring or assessing the relevant outputs, service levels, and outcomes of each program activity;

(5) provide a basis for comparing actual program results with the established performance goals; and

(6) describe the means to be used to verify and validate measured values.

(b) If the Postal Service determines that it is not feasible to express the performance goals for a particular program activity in an objective, quantifiable,

and measurable form, the Postal Service may use an alternative form. Such alternative form shall—

(1) include separate descriptive statements of--

(A) a minimally effective program, and

(B) a successful program, with sufficient precision and in such terms that would allow for an accurate, independent determination of whether the program activity's performance meets the criteria of either description; or

(2) state why it is infeasible or impractical to express a performance goal in any form for the program activity.

(c) In preparing a comprehensive and informative plan under this section, the Postal Service may aggregate, disaggregate, or consolidate program activities, except that any aggregation or consolidation may not omit or minimize the significance of any program activity constituting a major function or operation.

(d) The Postal Service may prepare a non-public annex to its plan covering program activities or parts of program activities relating to--

(1) the avoidance of interference with criminal prosecution; or

(2) matters otherwise exempt from public disclosure under section 410(c) of this title.

§ 2804. Program performance reports

(a) The Postal Service shall prepare a report on program performance for each fiscal year, which shall be included in the annual comprehensive statement presented under section 2401(e) of this title.

(b) (1) The program performance report shall set forth the performance indicators established in the Postal Service performance plan, along with the actual program performance achieved compared with the performance goals expressed in the plan for that fiscal year.

(2) If performance goals are specified by descriptive statements of a minimally effective program activity and a successful program activity, the results of such program shall be described in relationship to those categories, including whether the performance failed to meet the criteria of either category.

(c) The report for fiscal year 2000 shall include actual results for the preceding fiscal year, the report for fiscal year 2001 shall include actual results for the two preceding fiscal years, and the report for fiscal year 2002 and all subsequent reports shall include actual results for the three preceding fiscal years.

(d) Each report shall--

(1) review the success of achieving the performance goals of the fiscal year;

(2) evaluate the performance plan for the current fiscal year relative to the performance achieved towards the performance goals in the fiscal year covered by the report;

(3) explain and describe, where a performance goal has not been met (including when a program activity's performance is determined not to have met the criteria of a successful program activity under section 2803(b)(2))--

(A) why the goal was not met;

(B) those plans and schedules for achieving the established performance goal; and

(C) if the performance goal is impractical or infeasible, why that is the case and what action is recommended; and

(4) include the summary findings of those program evaluations completed during the fiscal year covered by the report.

§ 3653. Annual determination of compliance

(a) Opportunity for public comment.--After receiving the reports required under section 3652 for any year, the Postal Regulatory Commission shall promptly provide an opportunity for comment on such reports by users of the mails, affected parties, and an officer of the Commission who shall be required to represent the interests of the general public.

(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--

(1) whether any rates or fees in effect during such year (for products individually or collectively) were not in compliance with applicable provisions of this chapter (or regulations promulgated thereunder); or

(2) whether any service standards in effect during such year were not met. If, with respect to a year, no instance of noncompliance is found under this subsection to have occurred in such year, the written determination shall be to that effect.

(c) Noncompliance with regard to rates or services.--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).

(d) Review of performance goals.--The Postal Regulatory Commission shall also evaluate annually whether the Postal Service has met the goals established under sections 2803 and 2804, and may provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in this title.

(e) Rebuttable presumption.--A timely written determination described in the last sentence of subsection (b) shall, for purposes of any proceeding under section 3662, create a rebuttable presumption of compliance by the Postal Service (with regard to the matters described under paragraphs (1) and (2) of subsection (b)) during the year to which such determination relates.

§ 3661. Postal services

(a) The Postal Service shall develop and promote adequate and efficient postal services.

(b) When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.

(c) The Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title.

§ 3662. Rate and service complaints

(a) In general.--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), 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.

(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.

(2) Treatment of complaints not timely acted on.--For purposes of section 3663, any complaint under subsection (a) on which the Commission fails to act in the time and manner required by paragraph (1) shall be treated in the same way as if it had been dismissed pursuant to an order issued by the Commission on the last day allowable for the issuance of such order under paragraph (1).

(c) Action required if complaint found to be justified.--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 (such as ordering unlawful rates to be adjusted to lawful levels, ordering the cancellation of market tests, ordering the Postal Service to discontinue providing loss-making products, or requiring the Postal Service to make up for revenue shortfalls in competitive products).

(d) Authority to order fines in cases of deliberate noncompliance.--In addition, in cases of deliberate noncompliance by the Postal Service with the requirements of this title, the Postal Regulatory Commission may order, based on the nature, circumstances, extent, and seriousness of the noncompliance, a fine (in the amount specified by the Commission in its order) for each incidence of noncompliance. Fines resulting from the provision of competitive products shall be paid from the Competitive Products Fund established in section 2011. All receipts from fines imposed under this subsection shall be deposited in the general fund of the Treasury of the United States.

§ 3663. Appellate review

A person, including the Postal Service, adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may, within 30 days after such order or decision becomes final, institute proceedings for review thereof by filing a petition in the United States Court of Appeals for the District of Columbia. The court shall review the order or decision in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, on the basis of the record before the Commission.

§ 3664. Enforcement of orders

The several district courts have jurisdiction specifically to enforce, and to enjoin and restrain the Postal Service from violating, any order issued by the Postal Regulatory Commission.

§ 3691. Establishment of modern service standards

(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.

(b) Objectives.--

(1) In general.--Such standards shall be designed to achieve the following objectives:

(A) To enhance the value of postal services to both senders and recipients.

(B) To preserve regular and effective access to postal services in all communities, including those in rural areas or where post offices are not self-sustaining.

(C) To reasonably assure Postal Service customers delivery reliability, speed and frequency consistent with reasonable rates and best business practices.

(D) To provide a system of objective external performance measurements for each market-dominant product as a basis for measurement of Postal Service performance.

(2) Implementation of performance measurements.--With respect to paragraph (1)(D), with the approval of the Postal Regulatory Commission an internal measurement system may be implemented instead of an external measurement system.

(c) Factors.--In establishing or revising such standards, the Postal Service shall take into account--

(1) the actual level of service that Postal Service customers receive under any service guidelines previously established by the Postal Service or service standards established under this section;

(2) the degree of customer satisfaction with Postal Service performance in the acceptance, processing and delivery of mail;

(3) the needs of Postal Service customers, including those with physical impairments;

(4) mail volume and revenues projected for future years;

(5) the projected growth in the number of addresses the Postal Service will be required to serve in future years;

(6) the current and projected future cost of serving Postal Service customers;

(7) the effect of changes in technology, demographics, and population distribution on the efficient and reliable operation of the postal delivery system; and

(8) the policies of this title and such other factors as the Postal Service determines appropriate.

(d) Review.--The regulations promulgated pursuant to this section (and any revisions thereto), and any violations thereof, shall be subject to review upon complaint under sections 3662 and 3663.

39 C.F.R. § 121.1-.4

Part 121. Service Standards for Market-Dominant Mail Products

§ 121.1 First-Class Mail.

(a) (1) Until January 5, 2015, a 1-day (overnight) service standard is applied to intra-Sectional Center Facility (SCF) domestic First-Class Mail® pieces properly accepted before the day-zero Critical Entry Time (CET), except for mail between Puerto Rico and the U.S. Virgin Islands, mail between American Samoa and Hawaii, and mail destined to the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

(2) On and after January 5, 2015, a 1-day (overnight) service standard is applied to intra-SCF domestic Presort First-Class Mail pieces properly accepted at the SCF before the day-zero CET, except for mail between Puerto Rico and the U.S. Virgin Islands, and mail destined to American Samoa and the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

(b) (1) Until January 5, 2015, a 2-day service standard is applied to inter-SCF domestic First-Class Mail pieces properly accepted before the day-zero CET if the drive time between the origin Processing & Distribution Center or Facility (P & DC/F) and destination Area Distribution Center (ADC) is 6 hours or less; or if the origin and destination are separately in Puerto Rico and the U.S. Virgin Islands; or if the origin or destination is in American Samoa or one of the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

(2) On and after January 5, 2015, a 2-day service standard is applied to intra-SCF single piece domestic First-Class Mail properly accepted before the day-zero CET, inter-SCF domestic First-Class Mail pieces properly accepted before the day-zero CET if the drive time between the origin P & DC/F and destination SCF is 6 hours or less, Presort First-Class Mail properly accepted before the day-zero CET with an origin and destination that are separately in Puerto Rico and the U.S. Virgin Islands, and intra-SCF Presort First-Class Mail properly accepted before the day-zero CET with an origin or destination that is in American Samoa or one of the following 3-digit ZIP Code areas in Alaska (or

designated portions thereof): 995 (5–digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

(c) A 3–day service standard is applied to domestic First–Class Mail pieces properly accepted before the day-zero CET, if the 1–day and 2–day service standards do not apply, and:

(1) Both the origin and the destination are within the contiguous 48 states;

(2) The origin is in the contiguous 48 states, and the destination is in any of the following: the city of Anchorage, Alaska (5–digit ZIP Codes 99501 through 99539); the 968 3–digit ZIP Code area in Hawaii; or the 006, 007, or 009 3–digit ZIP Code areas in Puerto Rico;

(3) The origin is in the 006, 007, or 009 3–digit ZIP Code areas in Puerto Rico, and the destination is in the contiguous 48 states;

(4) The origin is in Hawaii, and the destination is in Guam, or vice versa;

(5) The origin is in Hawaii, and the destination is in American Samoa, or vice versa; or

(6) Both the origin and destination are within Alaska.

(d) A 4–day service standard is applied to domestic First–Class Mail pieces properly accepted before the day-zero CET, if the 1–day, 2–day, and 3–day service standards do not apply, and:

(1) The origin is in the contiguous 48 states and the destination is in any of the following: any portion of Alaska other than the city of Anchorage (5–digit ZIP Codes 99501 through 99539); any portion of Hawaii other than the 968 3–digit ZIP Code area; or the U.S. Virgin Islands;

(2) The destination is in the contiguous 48 states and the origin is in Alaska, Hawaii, or the U.S. Virgin Islands; or

(3) The origin and destination are in different non-contiguous states or territories, excluding mail to and from Guam and mail between Puerto

Rico and the U.S. Virgin Islands.

(e) A 5-day service standard is applied to all remaining domestic First-Class Mail pieces properly accepted before the day-zero CET.

(f) The service standard for Outbound Single-Piece First-Class Mail InternationalTM; pieces properly accepted before the day-zero CET is equivalent to the service standard for domestic First-Class Mail pieces originating from the same 3-digit ZIP Code area and destined to the 3-digit ZIP Code area in which the designated International Service Center is located.

(g) The service standard for Inbound Single-Piece First-Class Mail International pieces properly accepted before the day-zero CET is equivalent to the service standard for domestic First-Class Mail pieces destined to the same 3-digit ZIP Code area and originating from the 3-digit ZIP Code area in which the designated International Service Center is located.

§ 121.2 Periodicals.

(a) End-to-End.

(1)(i) Until January 5, 2015, a 2- to 4-day service standard is applied to Periodicals pieces properly accepted before the day-zero Critical Entry Time (CET) and merged with First-Class Mail pieces for surface transportation (as per the Domestic Mail Manual (DMM)), with the standard specifically equaling the sum of 1 day plus the applicable First-Class Mail service standard;

(ii) On and after January 5, 2015, a 3- to 4-day service standard is applied to Periodicals pieces properly accepted before the day-zero CET and merged with First-Class Mail pieces for surface transportation (as per the DMM), with the standard specifically equaling the sum of 1 day plus the applicable First-Class Mail service standard.

(2) A 3-day service standard is applied to Periodicals pieces properly accepted before the day-zero CET if: the origin and destination are separately in Puerto Rico and the U.S. Virgin Islands; or if the origin is in Alaska, the service standards set forth in paragraphs (a)(1)(i) and (ii) do not apply, and the destination is in the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

(3) A 4-day service standard is applied to Periodicals pieces properly accepted before the day-zero CET if: the origin and destination are separately in Hawaii and Guam; or the origin and destination are separately in Hawaii and American Samoa.

(4) (i) A 5- to 8-day service standard is applied to Periodicals pieces properly accepted before the day-zero CET if they originate and destinate within the contiguous 48 states, they are not merged with First-Class Mail pieces for surface transportation (as per the DMM), and the Area Distribution Center (ADC) and Sectional Center Facility (SCF) are co-located, with the standard specifically equaling the sum of 4 days plus the number of additional days (from 1 to 4) required for surface transportation between the applicable 3-digit ZIP Code origin-destination pairs;

(ii) A 6- to 9-day service standard is applied to Periodicals pieces properly accepted before the day-zero CET if they originate and destinate within the contiguous 48 states, they are not merged with First-Class Mail pieces for surface transportation (as per the DMM), and the ADC and SCF are not co-located, with the standard specifically equaling the sum of 5 days plus the number of additional days (from 1 to 4) required for surface transportation between the applicable 3-digit ZIP Code origin-destination pairs;

(5) A 12- to 26-day service standard is applied to all remaining Periodicals pieces properly accepted before the day-zero CET, with the standard specifically equaling the sum of 5 days plus the number of additional days (from 7 to 21) required for intermodal (highway, boat, air-taxi) transportation outside the contiguous 48 states for the applicable 3-digit ZIP Code origin-destination pairs.

(b) Destination Entry.

(1) Destination Delivery Unit (DDU) Entered Mail. A 1-day (overnight) service standard is applied to Periodicals pieces that qualify for a DDU rate and are properly accepted before the day-zero CET at the designated DDU.

(2) Destination Sectional Center Facility (DSCF) Entered Mail.

(i) A 1-day (overnight) service standard is applied to Periodicals pieces that qualify for a DSCF rate and are properly accepted before

the day-zero CET at the designated DSCF, except for mail entered at the SCF in Puerto Rico and destined to the U.S. Virgin Islands, mail entered at the SCF in Hawaii and destined to American Samoa, and mail destined to the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999;

(ii) A 3-day service standard is applied to Periodicals pieces that qualify for a DSCF rate and are properly accepted before the day-zero CET at the designated DSCF, if they are entered at the DSCF in Puerto Rico and destined to the U.S. Virgin Islands, entered at the DSCF in Hawaii and destined to American Samoa, or destined to the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

(3) Destination Area Distribution Center (DADC) Entered Mail.

(i) A 1-day (overnight) service standard is applied to Periodicals pieces that qualify for a DADC rate and are properly accepted before the day-zero CET at the designated DADC, if the DADC and DSCF are co-located;

(ii) A 2-day service standard is applied to Periodicals pieces that qualify for a DADC rate and are properly accepted before the day-zero CET at the designated DADC, if the DADC and DSCF are not co-located, unless the mail is entered at a DADC within the contiguous 48 states and destined outside the contiguous 48 states, or entered at the DADC in Puerto Rico and destined to the U.S. Virgin Islands, or destined to either American Samoa or the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999;

(iii) A 4-day service standard is applied to Periodicals pieces that qualify for a DADC rate and are properly accepted before the day-zero CET at the designated DADC, if they are entered at the DADC in Puerto Rico and destined to the U.S. Virgin Islands, or if they are destined to American Samoa or the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999;

(iv) An 11-day service standard is applied to Periodicals pieces that qualify for a DADC rate, are properly accepted before the day-zero CET at the designated DADC in the contiguous 48 states, and are destined to the 998 or 999 3-digit ZIP Code areas in Alaska.

(4) Destination Network Distribution Center (DNDC)/Auxiliary Service Facility (ASF) Entered Mail.

(i) A 2–day service standard is applied to Periodicals pieces that qualify for a DADC containerized rate, are properly accepted before the day-zero CET at the designated DNDC or ASF in the contiguous 48 states, and are destined within the contiguous 48 states, if the DADC and DSCF are co-located;

(ii) A 3–day service standard is applied to Periodicals pieces that qualify for a DADC containerized rate, are properly accepted before the day-zero CET at the designated DNDC or ASF in the contiguous 48 states, and are destined within the contiguous 48 states, if the DADC and DSCF are not co-located;

(iii) An 8- to 10–day service standard is applied to Periodicals pieces that qualify for a DADC containerized rate, are properly accepted before the day-zero CET at the designated DNDC or ASF in the contiguous 48 states, and are destined outside the contiguous 48 states, if the DADC and DSCF are co-located, with the specific standard being based on the number of days required for transportation outside the contiguous 48 states;

(iv) A 9- to 11–day service standard is applied to Periodicals pieces that qualify for a DADC containerized rate, are properly accepted before the day-zero CET at the designated DNDC or ASF in the contiguous 48 states, and are destined outside the contiguous 48 states, if the DADC and DSCF are not co-located, with the specific standard being based on the number of days required for transportation outside the contiguous 48 states.

§ 121.3 Standard Mail.

(a) End-to–End.

(1) The service standard for Sectional Center Facility (SCF) turnaround Standard Mail® pieces accepted at origin before the day-zero Critical Entry Time is 3 days when the origin Processing & Distribution Center/Facility (OPD&C/F) and the SCF are the same building, except for mail between the territories of Puerto Rico and the U.S. Virgin Islands.

(2) The service standard for Area Distribution Center (ADC)

turnaround Standard Mail pieces accepted at origin before the day-zero Critical Entry Time is 4 days when the OPD&C/F and the ADC are the same building, unless the ADC is in the contiguous 48 states and the delivery address is not, or the mail is between Puerto Rico and the U.S. Virgin Islands, or the mail is between Hawaii and American Samoa.

(3) The service standard for intra–Network Distribution Center (NDC) Standard Mail pieces accepted at origin before the day-zero Critical Entry Time is 5 days for each remaining 3–digit ZIP Code origin-destination pair within the same Network Distribution Center service area if the origin and destination are within the contiguous 48 states; the same standard applies to mail that is intra–Alaska or between the state of Hawaii and the territory of Guam or American Samoa.

(4) For each remaining 3–digit ZIP Code origin-destination pair within the contiguous 48 states, the service standard for Standard Mail pieces accepted at origin before the day-zero Critical Entry Time is the sum of 5 or 6 days plus the number of additional days (from 1 to 4) required for surface transportation between each 3–digit ZIP Code origin-destination pair.

(5) For each remaining 3–digit ZIP Code origin-destination pair, the service standard for Standard Mail pieces accepted at origin before the day-zero Critical Entry Time is the sum of 5 or 6 days plus the number of additional days (from 7 to 21) required for intermodal (highway, boat, air-taxi) transportation outside the contiguous 48 states for each 3–digit ZIP Code origin-destination pair.

(b) Destination Entry.

(1) Standard Mail pieces that qualify for a Destination Delivery Unit (DDU) rate and that are accepted before the day-zero Critical Entry Time at the proper DDU have a 2–day service standard.

(2) Standard Mail pieces that qualify for a DSCF rate and that are accepted before the day-zero Critical Entry Time at the proper DSCF have a 3–day service standard when accepted on Sunday through Thursday and a 4–day service standard when accepted on Friday or Saturday, except for mail dropped at the SCF in the territory of Puerto Rico and destined to the territory of the U.S. Virgin Islands, or mail destined to American Samoa.

(3) Standard Mail pieces that qualify for a Destination Sectional Center Facility (DSCF) rate and that are accepted before the day zero Critical Entry Time at the SCF in the territory of Puerto Rico and destined for the territory of the U.S. Virgin Islands, or are destined to American Samoa, have a 4–day service standard when accepted on Sunday through Thursday and a 5–day service standard when accepted on Friday or Saturday.

(4) Standard Mail pieces that qualify for a Destination Network Distribution Center (DNDC) rate, and that are accepted before the day-zero Critical Entry Time at the proper DNDC have a 5–day service standard, if both the origin and the destination are in the contiguous 48 states.

(5) Standard Mail pieces that qualify for a Destination Network Distribution Center (DNDC) rate, and that are accepted before the day-zero Critical Entry Time at the proper DNDC in the contiguous 48 states for delivery to addresses in the states of Alaska or Hawaii or the territories of Guam, American Samoa, Puerto Rico, or the U.S. Virgin Islands, have a service standard of 12–14 days, depending on the 3–digit origin-destination ZIP Code pair. For each such pair, the applicable day within the range is based on the number of days required for transportation outside the contiguous 48 states.

§ 121.4 Package Services.

(a) End-to–End.

(1) The service standard for Sectional Center Facility (SCF) turnaround Package Services mail accepted at the origin SCF before the day-zero Critical Entry Time is 2 days when the origin Processing & Distribution Center/Facility and the SCF are the same building, except for mail between the territories of Puerto Rico and the U.S. Virgin Islands, and mail destined to American Samoa.

(2) The service standard for intra–Network Distribution Center (NDC) Package Services mail accepted at origin before the day-zero Critical Entry Time is 3 days, for each remaining (non-intra–SCF) 3–digit ZIP Code origin-destination pair within a Network Distribution Center service area, where the origin and destination is within the contiguous 48 states and is not served by an Auxiliary Service Facility; and for mail between the territories of Puerto Rico and the U.S. Virgin Islands, and for mail destined to American Samoa.

(3) The service standard for intra–Network Distribution Center (NDC) Package Services mail accepted at origin before the day-zero Critical Entry Time is 4 days for each remaining 3–digit ZIP Code origin-destination pair within a Network Distribution Center service area, where the destination delivery address is served by an Auxiliary Service Facility; the same standard applies to all remaining intra–Alaska mail and mail between the state of Hawaii and the territory of Guam, and mail destined to American Samoa.

(4) For each remaining 3–digit ZIP Code origin-destination pair within the contiguous 48 states, the service standard for Package Services mail accepted at origin before the day-zero Critical Entry Time is between 5 and 8 days. For each such 3–digit ZIP Code origin-destination pair, this is the sum of 4 days, plus the number of additional days (from 1 to 4) required for surface transportation between each 3–digit ZIP Code origin-destination pair, plus an additional day if the destination delivery address is served by an Auxiliary Service Facility.

(5) For each remaining 3–digit ZIP Code origin-destination pair for which either the origin or the destination is outside the contiguous 48 states, the service standard for Package Services mail accepted at origin before the day-zero Critical Entry Time is between 10 and 26 days. For each such 3–digit ZIP Code origin-destination pair, this represents the sum of 3 to 4 days, plus the number of days (ranging from 7 to 22) required for intermodal (highway, boat, air-taxi) transportation between each 3–digit ZIP Code origin-destination pair.

(6) The service standard for Inbound Surface Parcel Post® pieces (subject to Universal Postal Union rates) is the same as the service standard for domestic Package Services mail from the 3–digit ZIP Code area in which the International Network Distribution Center is located in the 3–digit ZIP Code in which the delivery address is located.

(b) Destination Entry.

(1) Package Services mail that qualifies for a Destination Delivery Unit (DDU) rate, and that is accepted before the day-zero Critical Entry Time at the proper DDU, has a 1–day (overnight) service standard.

(2) Package Services mail that qualifies for a Destination Sectional Center Facility (DSCF) rate, and that is accepted before the day-zero Critical Entry Time at the proper DSCF, has a 2–day service standard, except for mail dropped at the SCF in the territory of Puerto Rico and destined to the territory of the U.S.

Virgin Islands, and mail destined to American Samoa.

(3) Package Services mail that qualifies for a Destination Sectional Center Facility (DSCF) discount, is accepted before the day-zero Critical Entry Time at the SCF, and is destined to either American Samoa or the U.S. Virgin Islands, has a 3–day service standard.

(4) Package Services mail that qualifies for a Destination Network Distribution Center (DNDC) rate, and is accepted before the day-zero Critical Entry Time at the proper DNDC or Destination Auxiliary Service Facility, and originates and destines in the contiguous 48 states, has a 3–day service standard.

(5) Package Services mail that qualifies for a Destination Network Distribution Center (DNDC) rate, and that is accepted before the day-zero Critical Entry Time at the proper DNDC in the contiguous 48 states for delivery to addresses in the states of Alaska or Hawaii, or the territories of Guam, American Samoa, Puerto Rico, or the U.S. Virgin Islands has a service standard of either 11 or 12 days, depending on the 3–digit ZIP Code origin-destination pair. For each such pair, the applicable day within the range is based on the number of days required for transportation outside the contiguous 48 states.

§ 3031.10 Rate or service inquiry contents.

(a) A rate or service inquiry shall be in writing and should contain:

- (1) The name, address, and telephone number of the inquiring party;
- (2) Details regarding the Postal Service's action or inaction;
- (3) A statement of facts supporting the inquiring party's allegations;
- and(4) The specific relief being sought, if any.

(b) The Commission may waive any of the requirements listed in paragraph (a) of this section to serve the interests of justice.

§ 3031.11 Rate or service inquiry procedures.

(a) The Commission will forward rate or service inquiries to the Postal Service for investigation. The Postal Service will, within 45 days of receipt of

such inquiry, advise the Commission in writing, with a copy to the inquiring party, of its resolution of the inquiry or its refusal or inability to do so.

(b) The Commission will monitor all rate or service inquiries to determine if Commission action under § 3031.12 is appropriate.

(c) Where there are clear indications from the Postal Service's report or from other communications between the parties that the inquiry has been resolved, the Commission may, in its discretion, consider such proceeding to be resolved, without response to the inquiring party.

§ 3031.12 Treatment as a complaint.

If the Commission receives a volume of rate or service inquiries on the same or similar issue such that there may be cause to warrant treatment as a complaint, it may appoint an investigator to review the matter under § 3030.21 of this chapter or appoint a public representative representing the interests of the general public to pursue the matter.