

No. 15-1156

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

AMERICAN POSTAL WORKERS UNION AFL-CIO,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

U.S. POSTAL SERVICE,
Intervenor for Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE POSTAL REGULATORY COMMISSION

**BRIEF FOR RESPONDENT
POSTAL REGULATORY COMMISSION**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

The petitioner is the American Postal Workers Union AFL-CIO. The respondent is the Postal Regulatory Commission. The U.S. Postal Service is an intervenor supporting the Commission in this Court. Counsel are not aware of any other parties that have participated in this case.

B. Rulings Under Review.

Petitioner seeks review of Order No. 2512 of the Commission, which was issued in Docket No. C2013-10 on May 27, 2015. The Order is reproduced in the Joint Appendix at JA 142-65.

C. Related Cases.

Petitioner previously filed a petition for review of an earlier Commission order issued in the same administrative docket. This Court dismissed that petition as incurably premature. *See American Postal Workers Union v. Postal Regulatory Comm'n*, No. 14-1035 (D.C. Cir. Aug. 7, 2014) (unpublished). Counsel for the Commission are not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Respectfully submitted,

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GLOSSARY

Commission	Postal Regulatory Commission
EXFC	External First-Class (a measurement system used by the Postal Service to document the service performance of single-piece First-Class Mail)
FY	Fiscal Year
PAEA	Postal Accountability and Enhancement Act of 2006
Pet. Br.	Brief of Petitioner American Postal Workers Union AFL-CIO (filed Sept. 14, 2015)
Postal Service	United States Postal Service
Union	American Postal Workers Union AFL-CIO

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BRIEF FOR RESPONDENT POSTAL REGULATORY COMMISSION

STATEMENT OF JURISDICTION

Petitioner American Postal Workers Union AFL-CIO (the “Union”) filed an administrative complaint against the United States Postal Service (“Postal Service”) with the Postal Regulatory Commission (“Commission”), which the Commission dismissed by order of May 27, 2015. JA 142-65. The Union invokes this Court’s jurisdiction under 39 U.S.C. § 3663, which provides that “[a] person . . . 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 this Court. The Union timely filed this petition for review on May 29, 2015. *Cf.* Fed. R. App. P. 15(a)(1).

STATEMENT OF THE ISSUES

The Union filed an administrative complaint with the Postal Regulatory Commission alleging that the Postal Service was violating its regulations on a nationwide basis by failing to deliver mail on time in accordance with published service standards. The Commission agreed that the Postal Service was not in compliance with those regulations, because the Postal Service's rates of nationwide on-time delivery had fallen below applicable targets. But the Commission explained that it had already established this noncompliance in a prior proceeding, and had already taken the remedial action against the Postal Service that the Commission deemed appropriate. The Commission therefore dismissed the Union's complaint for failure to raise any "material issue[] of fact or law" in accordance with 39 U.S.C. § 3662(b)(1)(A)(i)-(ii). The questions presented are:

1. Whether the Commission reasonably determined that the Postal Service's compliance with regulatory service standards depends on whether the Postal Service's actual delivery performance meets its target rates for on-time delivery.
2. Whether the Commission reasonably dismissed the Union's administrative complaint because it failed to raise a material issue of fact or law warranting further consideration by the Commission.

STATUTES AND REGULATIONS

Pertinent authorities are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

In 2006, Congress enacted the Postal Accountability and Enhancement Act (“PAEA”), which substantially reformed existing laws governing the Postal Service. *See* Pub. L. No. 109-435, 120 Stat. 3198 (2006). The PAEA also created the Postal Regulatory Commission, an independent agency empowered to perform certain regulatory and oversight functions with respect to the Postal Service’s operations. 39 U.S.C. § 501. This case involves several aspects of this statutory regime.

1. Service Standards and Performance Targets.

Among other reforms, the PAEA requires the Postal Service to establish a “set of service standards for market-dominant products,” including First-Class Mail. 39 U.S.C. § 3691(a). These service standards must be established “by regulation” and “in consultation with the Postal Regulatory Commission.” *Id.* The Postal Service may “from time to time thereafter by regulation revise” these standards. *Id.*

The statute instructs the Postal Service to “design[]” its service standards so as to achieve certain general objectives. For example, service standards should be designed so as “[t]o reasonably assure Postal Service customers delivery reliability, speed and frequency consistent with reasonable rates and best business practices.” 39 U.S.C. § 3691(b)(1)(C). The statute also contemplates that the Postal Service should provide “a system of objective external performance measurements . . . as a basis for measurement of Postal Service performance.” *Id.* § 3691(b)(1)(D). The statute

further directs the Postal Service to develop a “plan for meeting those [service] standards,” within which it must “establish performance goals” for its delivery performance. PAEA § 302(a), (b)(1), 120 Stat. at 3219; *see also* JA 152.

The Postal Service promulgated its initial service standards in 2007. *See* 72 Fed. Reg. 72,216 (Dec. 19, 2007). As designed by the Postal Service, the standards specify the amount of time within which a customer may ordinarily expect that a particular piece of mail will be delivered, in accordance with a detailed set of “business rules.” *Id.* at 72,220. For instance, for First-Class Mail, the 2007 standards specified that “[o]vernight delivery” would apply to all mail sent within the “intra-Sectional Center Facility (SCF) area,” generally including all addresses sharing the same 3-digit zip-code prefix. *Id.* at 72,225. A two-day delivery standard generally applied to other mail for which the driving time between the origin and destination processing centers was “within 12 hours.” *Id.* And a three-day delivery standard applied to all other mail transiting within the “48 contiguous states.” *Id.* Additional rules applied to mail sent to, from, or within outlying areas, such as Alaska and Hawaii. *Id.*

As required by § 302 of the statute, the Postal Service also prepared a plan for meeting its service standards. *See* U.S. Postal Service, Postal Accountability and Enhancement Act § 302 Network Plan (2008).¹ Among other things, the Postal Service announced that it would develop a set of “performance targets” to track its

¹ Available at <https://about.usps.com/postal-act-2006/postal-service-networkplan.pdf>.

success in attaining the service standards discussed above. *Id.* at 7-8. For example, for Fiscal Year (“FY”) 2008, the Postal Service established target on-time delivery rates of 96.0%, 92.8%, and 90.5% for mail subject to overnight, two-day, and three-day standards, respectively. U.S. Postal Regulatory Comm’n, Annual Compliance Determination, at 42 (Mar. 30, 2009) (report for FY 2008).² The Postal Service has since updated these targets annually, and gradually increased them over time. *See, e.g.*, JA 265 (chart listing targets for FYs 2014, 2013, 2012, and 2011).

The Postal Service employs various systems for measuring the timeliness of delivery, depending on the mail product at issue. For First-Class Mail, Single-Piece Letters/Postcards, the Postal Service currently uses the External First-Class measurement system (EXFC). This contractor-managed system involves physically “sending and receiving sample mailpieces between 892 three-digit ZIP Code areas.” JA 155-56. Test mailers record the time that they place the piece in a collection box or lobby chute, and test receivers record the time that the piece is delivered to their mailboxes. JA 260, 472. The actual transit time is then compared against the applicable First-Class Mail service standards. *Cf.* 39 C.F.R. § 121.1.

2. Complaint Procedures.

The PAEA also establishes a mechanism by which persons may file complaints with the Postal Regulatory Commission. The statute provides that “[a]ny interested

² Available at http://www.prc.gov/docs/62/62784/ACD%20Report_2008_FINAL.pdf.

person . . . who believes the Postal Service is not operating in conformance with the requirements” of specified provisions of Title 39 “may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.” 39 U.S.C. § 3662(a). Among these provisions are 39 U.S.C. § 101(d), which requires the Postal Service to “apportion the costs of all postal operations to all users of the mail on a fair and equitable basis,” and 39 U.S.C. § 403(c), which prohibits “mak[ing] any undue or unreasonable discrimination among users of the mails.” *See id.* § 3662(a). The statute also provides that service-standard regulations promulgated under section 3691(a)—as well as “any revisions thereto” and “any violations thereof”—may be the subject of a complaint proceeding under section 3662. *See id.* § 3691(d).

Upon receiving a complaint, the Commission must undertake a threshold assessment within 90 days. 39 U.S.C. § 3662(b)(1). If the Commission “find[s] that such complaint raises material issues of fact or law,” the Commission may “bring proceedings on such complaint.” *Id.* § 3662(b)(1)(A)(i). Otherwise, the Commission may “issue an order dismissing the complaint.” *Id.* § 3662(b)(1)(A)(ii).³ If the Commission elects to begin proceedings, the complaint proceeds to discovery and plenary adjudication, including robust hearing-type procedures. *See* 39 C.F.R. pt.

³ If the Commission fails to act within 90 days, the complaint is deemed dismissed. *See* 39 U.S.C. § 3662(b)(2).

3001, subpt. A (establishing “rules of general applicability” governing Commission proceedings); 39 C.F.R. § 3030.1(a) (providing that “Part 3001, subpart A” applies to complaint proceedings brought under 39 U.S.C. § 3662); *id.* § 3030.1(b) (forbidding discovery “unless and until the Commission makes a finding . . . that the complaint raises material issues of fact or law”).

If the Commission ultimately “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).” 39 U.S.C. § 3662(c). In cases of “deliberate noncompliance,” the Commission may order the Postal Service to pay a fine. *Id.* § 3662(d). And if the Postal Service fails to comply with any Commission order, the Commission may seek enforcement of its order in federal district court. *Id.* § 3664.

3. Annual Compliance Determinations.

The statute also establishes a mandatory oversight scheme through which the Commission conducts an annual assessment of Postal Service operations, including its service performance. Under 39 U.S.C. § 3652, the Postal Service must annually

submit to the Commission a report that “analyze[s] costs, revenues, rates, and quality of service . . . in sufficient detail to demonstrate that all products during such year complied with all applicable requirements of [Title 39].” 39 U.S.C. § 3652(a)(1). The Postal Service must provide detailed information about, among other things, the “quality of service afforded by the Postal Service in connection with [each market dominant] product, including . . . the level of service (described in terms of speed of delivery and reliability) provided,” during the prior fiscal year. *Id.* § 3652(a)(2)(B)(i). Upon receipt of this report, the Commission commences a proceeding during which “users of the mails” and other “affected parties” are provided an opportunity to comment. *See id.* § 3653(a). The proceeding culminates in a written report by the Commission, known as the annual compliance determination. *See, e.g.*, JA 369-525 (annual compliance determination for FY 2013); JA 166-314 (same for FY 2014).

As part of this process, the statute requires the Commission to “make a written determination” as to “whether any service standards in effect during [the preceding] year were not met.” 39 U.S.C. § 3653(b)(2). If “no instance of noncompliance is found,” the “written determination shall be to that effect.” *Id.* If, however, a “determination of noncompliance is made,” then the “Commission shall take appropriate action” to impose a remedy. *Id.* § 3653(c). The remedies available to the Commission are identical to the remedies available in the complaint process described above. *See id.* (specifying that if the annual determination results in a finding of

noncompliance, the Commission shall act “as if a complaint averring such noncompliance had been duly filed and found under [section 3662] to be justified”). The statute also provides that if the Commission makes a “timely written determination” of compliance, that determination “shall, for purposes of any [complaint] proceeding under section 3662, create a rebuttal presumption of compliance by the Postal Service . . . during the year to which such determination relates.” *Id.* § 3653(e).

The statute does not mandate a particular methodology for the Commission’s annual assessment “whether any service standards . . . were not met.” 39 U.S.C. § 3653(b)(2). The Commission has consistently conducted this analysis by comparing the Postal Service’s actual on-time delivery performance against the Postal Service’s previously announced targets, which are described as “service goals” in the Commission’s regulations.⁴ See 39 C.F.R. § 3055.20 (requiring reporting of “on-time service performance” data for First-Class Mail); *id.* § 3055.2(d) (requiring reporting of “applicable service goal(s) for each product”). Thus, in years when the Postal Service succeeds in meeting its target, the Commission determines that the Postal Service has complied with its service standards. Conversely, if actual performance falls materially

⁴ The Postal Service and Commission use various terms to refer to the Postal Service’s target rates of on-time performance. *See, e.g.*, JA 149 (“service performance ‘goals’” are “also referred to as ‘targets’”). For clarity and consistency, this brief generally uses the term “target” to refer to this concept.

below the announced targets, the Commission has generally determined that the “service standards in effect during such year were not met.” 39 U.S.C. § 3653(b)(2).⁵

To ensure that the targets adopted by the Postal Service are reasonable, the Commission’s rules require the Postal Service to provide advance notice of changes to the targets. *See* 39 C.F.R. § 3055.5 (requiring notice of “all changes” to “service goals”). The Commission reserves the right not to accept the proposed targets if to do so would be “contrary to the objectives of title 39, or significantly change the nature of a postal product.” JA 152 n.20; *see also* 39 C.F.R. § 3055.5 (empowering Commission to “initiate a proceeding at any time to consider . . . changes” to targets if the changes “might have a material impact on the characteristics of the underlying product”); JA 794, 805-06. To date, the Commission has found the Postal Service’s targets—which have steadily increased over time—to be appropriate benchmarks for the Commission’s compliance analysis. *See* JA 475 n.15 (noting, as of 2014, that “the Postal Service has increased the annual service performance targets for each domestic First-Class Mail product since FY 2011”); JA 265 (as to First-Class Mail, Single-Piece

⁵ In addition to this legal compliance determination under section 3653(b), the statute also instructs the Commission to “evaluate annually whether the Postal Service has met” certain other performance goals established under 39 U.S.C. §§ 2803 and 2804, and to “provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in this title.” 39 U.S.C. § 3653(d). These distinct, advisory functions are not at issue here.

Letters/Postcards, noting FY 2014 targets of 96.8%, 96.5%, and 95.25% for overnight, two-day, and three-to-five-day standards, respectively).

B. The Postal Service’s Network Rationalization Initiative

1. In 1970, Congress abolished the Post Office Department and created the Postal Service as an “independent establishment of the executive branch of the Government of the United States.” 39 U.S.C. § 201. Among the specific powers granted to the Postal Service was the operational authority to “determine the need for post offices, postal and training facilities[,] and equipment, and to provide such offices, facilities, and equipment as it determines are needed.” *Id.* § 404(a)(3).

As mail volumes increased, the Postal Service gradually added new mail-processing facilities to its operations. With the advent of the Internet, however, mailing volumes eventually peaked and then began rapidly to decrease. *See, e.g.*, 76 Fed. Reg. 77,942, 77,942 (Dec. 15, 2011) (noting that First-Class Mail volumes peaked in 2001).

By 2006, Congress found that “the Postal Service [had] more facilities than it needs.” PAEA § 302(c)(1)(B), 120 Stat. at 3219. Accordingly, Congress directed the Postal Service to prepare a plan for “the long-term vision of the Postal Service for rationalizing its infrastructure and workforce,” *id.* § 302(c)(2), including “a strategy for how the Postal Service intends to rationalize the postal facilities network and remove excess processing capacity and space from the network, including estimated

timeframes, criteria, and processes to be used for making changes to the facilities network,” *id.* § 302(c)(3)(A). Congress also directed the Postal Service to provide annual updates on “actions taken to identify any excess capacity within its processing, transportation, and distribution networks and [to] implement savings through realignment or consolidation of facilities.” *Id.* § 302(c)(4)(B); *see also* 76 Fed. Reg. 58,433, 58,434 (Sept. 21, 2011); JA 152.

2. In the years following enactment of the PAEA, mail volumes continued to decline substantially, and the Postal Service began to “experience[] significant financial losses.” 76 Fed. Reg. at 58,434. The Postal Service determined that its “processing and transportation networks exhibit[ed] more excess capacity in relation to current and projected mail volumes than previously anticipated.” *Id.*; *see also* 76 Fed. Reg. at 77,943 (noting 29% drop in First-Class Mail volume “over the last decade,” and projecting further 47% decline by 2020). The Postal Service determined that “further network consolidations (beyond those that have already been performed or are currently under study)” would be “necessary to align the Postal Service’s infrastructure with current and projected mail volumes and to bring operating costs in line with revenues.” 76 Fed. Reg. at 58,434.

The Postal Service concluded, however, that this consolidation of its mail-processing network would “for the most part be unachievable” under then-existing service standards. 76 Fed. Reg. at 58,434. In particular, the Postal Service found that

the overnight standard applicable to local mail, *see supra* p. 4, forced it to continue operating many more processing facilities than mail volumes justified. The Postal Service concluded that “[b]y eliminating overnight service standards for First-Class Mail,” it could operate with fewer processing facilities, thereby resulting in “lower facilities costs” and “significant labor workhour savings.” 76 Fed. Reg. at 58,435.

3. The Postal Service then initiated a rulemaking to revise its regulatory service standards. *See* 76 Fed. Reg. 58,433 (Sept. 21, 2011) (advanced notice of proposed rulemaking); 76 Fed. Reg. 77,942 (Dec. 15, 2011) (notice of proposed rulemaking); JA 69-70 (describing rulemaking history). Among other things, the Postal Service proposed to “eliminate the overnight service standard for First-Class Mail, narrow the product’s two-day delivery range, and enlarge its three-day delivery range.” 76 Fed. Reg. at 77,942. The Postal Service predicted that it would ultimately “achieve the same rates of success in meeting the new service standards” as it had “achiev[ed] in meeting the existing service standards.” *Id.* at 77,944.

After considering public comments, the Postal Service promulgated a final rule that generally adopted its prior proposal, but provided for implementation in two phases. *See* 77 Fed. Reg. 31,190 (May 25, 2012). Under the first phase of “Network Rationalization,” planned for 2012 and 2013, an “interim” set of service standards would govern, under which overnight delivery for local First-Class Mail would generally be retained. *Id.* at 31,191-31,192. Under the second phase, planned for

2014, further changes to the service standards would take effect, which would eliminate overnight delivery for all but a small category of presorted local mail. *Id.* at 31,194-31,195. The final rule also made adjustments to the service standards applicable to long-distance mail. *Id.*; *see infra* pp. 15-16.

4. At the same time as it undertook this rulemaking, the Postal Service commenced a parallel proceeding before the Commission. The Postal Service did so pursuant to a provision of the statute requiring that “[w]hen 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 . . . to the Postal Regulatory Commission requesting an advisory opinion on the change.” 39 U.S.C. § 3661(b). The Commission accepted the Postal Service’s request and undertook extensive consideration of the network-rationalization proposal. *See JA 535-36, 544-52* (describing procedural history of this process).

The Commission issued its advisory opinion in September 2012. *See JA 526-765.* In its opinion, the Commission “encourage[d] the Postal Service to make every attempt to retain overnight delivery,” JA 537, and suggested that the Postal Service could “realize substantial cost savings while preserving most current service levels,” JA 576. The Commission nonetheless stated that it “view[ed] positively the network rationalization actions planned by the Postal Service through January 31, 2014,” JA

536, and concluded that the Postal Service’s “decision to use a phased approach” was a “prudent and practical one.” JA 596. The Commission specifically warned that network rationalization “may [have] impacts on the ability of the Postal Service to meet its service standards,” particularly in “distant service areas.” JA 602. The Commission advised that “[s]ervice performance scores should be monitored closely for signs of such impacts.” JA 603.

5. After amending its service standards, the Postal Service moved forward with the first phase of network rationalization. In 2012 through early 2013, the Postal Service closed numerous mail-processing plants. JA 71-72, 597.

In January 2015, the Postal Service commenced the second phase of network rationalization, and its final service standards took effect.⁶ *See* 39 C.F.R. § 121.1 (2015). As relevant here, under the revised service standards, an overnight standard is applied only to local First-Class Mail that is presorted and promptly delivered to the local mail-processing facility. *Id.* § 121.1(a)(2). A two-day standard is applied to other local mail, plus mail for which the driving time between the respective processing facilities is six hours or less. *Id.* § 121.1(b)(2). A three-day standard generally applies to all other mail where “[b]oth the origin and the destination are within the

⁶ The Postal Service had originally planned to commence the second phase in February 2014, but it later delayed that implementation date. *See* 79 Fed. Reg. 4079 (Jan. 24, 2014) (postponing phase-two implementation); 79 Fed. Reg. 44,700 (Aug. 1, 2014) (announcing phase-two implementation effective January 5, 2015).

contiguous 48 states.” *Id.* § 121.1(c)(1). Four- or five-day standards apply to certain other mail. *Id.* § 121.1(d), (e).

As of the filing of this brief, the Postal Service’s network-consolidation efforts remain ongoing. In May 2015, the Postal Service announced that it would “defer most of the plant consolidations that were scheduled to take place” in summer 2015. U.S. Postal Service, *Industry Alert: Network Rationalization Initiative* (May 27, 2015).⁷ The Postal Service explained that “[t]he decision to defer the next phase of the initiative was based upon operational considerations, and was made to ensure that the Postal Service will continue to provide prompt, reliable and predictable service consistent with the published service standards.” *Id.* The Postal Service stated that it intends for “planned consolidation activities [to] resume in 2016.” *Id.*

C. The Commission’s Annual Compliance Determinations

In the meantime, the Commission continued to monitor the Postal Service’s service performance through the annual-compliance-determination process mandated by 39 U.S.C. §§ 3652-3653. *See supra* pp. 7-9.

1. In its annual compliance determination issued in March 2014, the Commission reviewed the Postal Service’s service performance during FY 2013. With respect to First-Class Mail, Single-Piece Letters/Postcards, the Commission found that the Postal Service had “met or exceeded [its] service performance goals” for mail

⁷ Available at https://ribbs.usps.gov/industryoutreach/documents/tech_guides/IndustryAlertArchives/2015IndustryAlerts/.

subject to an overnight or two-day standard, but had failed to reach its “service performance target” for mail subject to a three-day standard. JA 476; *see* JA 475 (chart comparing actual results to targets). The Commission announced that the Postal Service “must improve performance for products that did not meet the annual targets” and directed the Postal Service to “take appropriate action to improve performance for these products.” JA 478.⁸

2. In March 2015, the Commission issued its annual compliance determination for FY 2014. The Commission found that, as to First-Class Mail, Single-Piece Letters/Postcards, “[t]he Postal Service did not meet its service performance targets”—“one of the few times since passage of the PAEA” that this product had failed to achieve compliance. JA 265. For example, although the Postal Service had set a target of 95.25% on-time delivery for mail subject to a three-, four-, or five-day service standard, it timely delivered this mail only 88.6% of the time. *Id.*

The Commission noted the Postal Service’s explanation that “these results [were] primarily due to adverse effects of large winter storms occurring in the first and second quarters of FY 2014,” JA 264, a claim that the Commission found “[was], on its face, reasonable.” JA 273. But the Commission emphasized that “weather cannot

⁸ The Commission also cautioned that “service performance must be viewed in light of service standard changes associated with the Mail Processing Network Rationalization initiative,” which had “shift[ed] much of the volume of mail previously subject to the overnight service standard to either the 2-day or 3-5-day service standard.” JA 476; *see also* JA 470-71 (describing interim service standards).

consistently be employed as a catchall excuse for failing to meet performance standards,” and made clear that “[t]he Commission expects service performance to improve in FY 2015.” *Id.*; *see also* JA 258-59 (noting Commission’s agreement with other criticisms of Postal Service’s performance).⁹

D. Procedural History

1. Petitioner American Postal Workers Union AFL-CIO (the “Union”) is a labor organization that “represents approximately 200,000 employees of the Postal Service.” JA 93. The Union is “party to multiple collective bargaining agreements” with the Postal Service. *Id.* The Union, its local affiliates, and its health plan also “collectively mail millions of pieces of paper each year.” *Id.*

The Union has participated in several Commission proceedings in its capacity as a user of the mails. Among other things, the Union submitted testimony and briefing as part of the Commission’s advisory opinion on network rationalization, *see JA 540, 695, 701-02, 705, 707-08*, and it also submitted comments about service performance during the Commission’s FY 2014 annual compliance determination.

See JA 258 & n.156, 309 (noting Union’s comments). In addition, in 2012 and 2013,

⁹ The Commission also took remedial action with respect to a First-Class Mail product known as “Flats.” The Commission noted that FY 2014 was “the fourth consecutive year that First-Class Mail Flats did not meet service performance targets.” JA 273. The Commission “direct[ed] the Postal Service to improve service for First-Class Mail Flats in FY 2015,” or to “provide an explanation” in the Postal Service’s next report “why efforts to improve service performance results for First-Class Mail Flats have been ineffective,” along with “detail[s]” about “what changes [the Postal Service] plan[ned] to make to improve service performance.” *Id.*; *see also* JA 302.

the Union and seven of its local affiliates filed a series of administrative complaints with the Commission under 39 U.S.C. § 3662 challenging the implementation of the Postal Service’s network-rationalization initiative. The Commission ultimately dismissed each of those proceedings, concluding that the Union and its affiliates had no entitlement to prevent network rationalization from proceeding. *See* JA 70-71, 72 (noting disposition of earlier complaints).

2. In September 2013, the Union filed a further administrative complaint with the Commission. In this complaint, the Union alleged that, as a result of network rationalization, the Postal Service was “regularly failing to comply with [its] Service Standards” on a “nationwide or substantially nationwide basis,” JA 12, 15, and had thereby violated 39 U.S.C. §§ 403(c), 3661, 3691(b)(1)(B), and 3691(d). *See* JA 12-13, 21. The Union requested, among other things, that the Commission “[h]old that the Postal Service has violated its Service Standard Regulations” and “[o]rder the Postal Service to take necessary steps to come promptly into compliance.” JA 21.

In November 2013, the Commission granted in part and denied in part the Postal Service’s motion to dismiss. *See* JA 68-84. The Commission rejected the Postal Service’s threshold standing, ripeness, and claim-preclusion arguments, but dismissed the Union’s claims on the merits insofar as they alleged violations of 39 U.S.C. §§ 403(c), 3661, and 3691(b)(1)(B). JA 78-81. As to the Union’s claim under section 3691(d), the Commission deferred a definitive ruling, instead inviting the Union to file

“supplemental information” that would “identify the specific standards it believes are being violated, the harm alleged to be caused to it by those violations, and [the] facts it intends to elicit that, if proven, would constitute violations of those regulations.” JA 83; *cf.* 39 C.F.R. § 3030.20 (allowing Commission to request “additional information” necessary to “evaluate whether the complaint raises material issues of fact or law”).

3. In lieu of providing this additional information, the Union filed an amended complaint in December 2013. JA 85-106. In its amended complaint, the Union continued to assert that the Postal Service was “regularly failing to comply with [its] service standards” in violation of 39 U.S.C. § 3691 and 39 C.F.R. § 121.1. JA 92. The Union alleged that the Postal Service’s performance shortcomings were “the result of its decision to implement the consolidation and closures of mail processing facilit[ies]” through its network-rationalization initiative. *Id.*

In support of its claim that the Postal Service was “violating service standards on a nationwide or substantially nationwide basis,” JA 93, the Union’s amended complaint offered six examples of communities where the closure of mail-processing facilities had allegedly contributed to service delays. JA 93-102. The Union also reported that it had conducted a “test mailing” of forty pieces to various locations around the United States, and that ten of these forty pieces had not arrived on time. JA 103-04. The Union again requested that the Commission “[h]old that the Postal

Service has violated its Service Standard regulations” and “[o]rder the Postal Service to take necessary steps to come promptly into compliance.” JA 106.

In February 2014, the Commission dismissed the amended complaint, concluding that the Union had failed to identify “how it or its members [were] harmed or injured by the alleged service standard violations.” JA 125. The Union filed a motion for reconsideration, JA 127-35, which the Commission granted in May 2015. JA 142-65.¹⁰ The Commission concluded that its dismissal had effectively “impose[d] a *de facto* standing requirement,” which the Commission concluded was inconsistent with its conclusion that the Union was an “interested person” within the meaning of 39 U.S.C. § 3662. JA 145-49. The Commission nonetheless dismissed the amended complaint on other grounds.

The Commission noted that the Union was incorrect in assuming that the service standards set forth in 39 C.F.R. § 121.1 were “guarantee[s]” of on-time delivery, such that any instance of late delivery would constitute a violation of the law. The Commission explained that “whether or not the Postal Service is compliant with applicable statutory and regulatory requirements is instead evaluated in reference to separately published service performance ‘goals.’” JA 149. The Commission then

¹⁰ While its reconsideration motion remained pending, the Union filed a petition for review of the Commission’s February 2014 order under 39 U.S.C. § 3663. This Court granted the Commission’s motion to dismiss the petition as “incurably premature.” *See American Postal Workers Union v. Postal Regulatory Comm’n*, No. 14-1035, 2014 U.S. App. LEXIS 15247, at *1 (D.C. Cir. Aug. 7, 2014) (unpublished).

construed the Union’s amended complaint as alleging that the Postal Service had violated the law because it had not “me[t] [its] published service goals.” JA 154.

So construing the Union’s claims, the Commission determined that they failed to raise “material issues of either fact or law.” JA 149; *see* JA 154-58. Noting that the amended complaint was “premised on allegations of ‘nationwide or substantially nationwide’ violations,” JA 156-57, the Commission explained that it had already considered the Postal Service’s nationwide service performance and found that it had “fall[en] below established service goals.” JA 157. The Commission also noted that the Union’s complaint did not allege any “new information,” but instead proposed to prove the Postal Service’s noncompliance by relying on the same nationwide data that the Commission had already considered. *See* JA 156-57. Finally, the Commission explained that it had already imposed an appropriate remedy for the Postal Service’s violations, *see* JA 158-61, and that nothing in the Union’s complaint “would cause the Commission to reconsider its previous directions to the Postal Service.” JA 158.

One member of the Commission dissented from the order. JA 163-65. The dissenting commissioner noted that the Commission had “consistently expressed concern in its Annual Compliance Determinations about the Postal Service’s inability to maintain [its] service standards.” JA 163. She also urged that declines in the Postal Service’s delivery performance in the “first two quarters of FY 2015”—periods not addressed in the Union’s complaint—warranted further consideration. JA 163, 165.

SUMMARY OF ARGUMENT

In response to shrinking mail volumes and significant financial losses, the Postal Service commenced a “network rationalization” initiative to eliminate excess capacity in its mail-processing network by closing various facilities. In response, the American Postal Workers Union filed this administrative complaint with the Postal Regulatory Commission under 39 U.S.C. § 3662, alleging that the closure of these mail-processing facilities had caused “systemic” delays in the mail, thereby leading the Postal Service to “violat[e]” its service standards “on a nationwide or substantially nationwide basis.” JA 15, 92-93. The Union requested the Commission to make a finding that the Postal Service was not in compliance with its regulatory service standards and to order the Postal Service to return to compliance.

The Commission properly exercised its discretion in dismissing this complaint. As the Commission explained, it had already determined that the Postal Service was not in compliance with its service standards, and it had already imposed the remedial measures against the Postal Service that the Commission deemed appropriate. Because the Union’s complaint neither brought any new matters to the Commission’s attention, nor offered any basis for revisiting its earlier remedial determination, the Commission reasonably dismissed the complaint for failure to raise any “material issue[] of fact or law.” 39 U.S.C. § 3662(b)(1)(A)(i).

The Union’s arguments reflect a fundamental misunderstanding of the Commission’s decision. The Commission did not hold that “service standards are unenforceable.” Petitioner’s Brief (“Pet. Br.”) at 11. Rather, the Commission clearly explained that those standards *are* enforceable “in reference to the goals established by the Postal Service.” JA 153. When the Postal Service’s actual performance falls below its established targets, the Commission concludes that the “service standards in effect . . . were not met.” 39 U.S.C. § 3653(b)(2). The Commission ultimately dismissed the Union’s complaint not because of any “rule of unenforceability,” Pet. Br. 14, 38, but because the Commission had already adjudicated and resolved the matters underlying the Union’s claim that the Postal Service was violating its service standards on a “nationwide or substantially nationwide basis.” JA 93; *see* JA 154-62.

The Union’s other arguments similarly lack merit. The Union theorizes that the Commission is under a “mandatory duty” to conduct full-scale proceedings on every “meritorious” complaint. Pet. Br. 26. But nothing in the statute requires the Commission to expend its limited resources to repeatedly re-adjudicate the same question, particularly where a complaint fails to allege anything that the Commission has not already considered and addressed. Here, the Commission reasonably explained that plenary consideration of the Union’s complaint, including discovery and a formal hearing, would not lead the Commission to alter its existing remedial judgments. The Union’s petition for review should therefore be denied.

STANDARD OF REVIEW

The Commission's decision may be set aside only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* 39 U.S.C. § 3663. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In addition, the Commission's reasonable interpretation of the statute that it is charged with administering is entitled to *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984); *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 599 F.3d 705, 710 (D.C. Cir. 2010).

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF THE STATUTE IS REASONABLE.

A. The Commission Reasonably Assesses Compliance With Regulatory Service Standards By Comparing The Postal Service's Actual Performance To Its Target Rates Of On-Time Delivery.

1. Under the Postal Accountability and Enhancement Act, the Postal Service is required to promulgate "regulation[s]" that "establish . . . a set of service standards for market-dominant products." 39 U.S.C. § 3691(a). The standards must, among other things, be designed so as to facilitate "a system of objective external performance measurements for each market-dominant product." *Id.* § 3691(b)(1)(D). The PAEA further directed the Postal Service to establish a "plan" for complying with the service

standards, including the “establish[ment]” of “performance goals.” PAEA § 302(a), (b)(1), 120 Stat. at 3219. And the statute requires the Postal Service, on an annual basis, to provide a report to the Commission containing “measures of the quality of service afforded by the Postal Service” for each market-dominant product, including “the level of service (described in terms of speed of delivery and reliability) provided.” 39 U.S.C. § 3652(a)(2)(B)(i).

Each year, the Commission considers the performance data furnished by the Postal Service and “make[s] a written determination” as to “whether any service standards in effect during such year were not met.” 39 U.S.C. § 3653(b)(2). The Commission is also empowered to entertain administrative complaints concerning alleged violations of the Postal Service’s service-standard regulations. *See id.* § 3691(d). If, in either setting, the Commission finds that the Postal Service has failed to comply with those regulations, the statute directs the Commission to order “such action as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance.” *Id.* § 3662(c). *See id.* § 3653(c) (incorporating remedial standard under section 3662(c)).

The statute does not, however, set forth any principles by which to distinguish compliance from noncompliance. Instead, Congress contemplates that the questions whether a “violation” has occurred, 39 U.S.C. § 3691(d), or “whether any service standards . . . [have] not [been] met,” *id.* § 3653(b)(2), are to be resolved through

Commission adjudication. The statute thus commits to the Commission’s discretion the task of developing the legal standards necessary for determining the Postal Service’s compliance. *See, e.g., National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“[A]mbiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.”) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865-66 (1984)); *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 785 F.3d 740, 751-52 (D.C. Cir. 2015) (holding that PAEA’s failure to define the phrase “changes in rates” left “a gap to be filled by the Commission pursuant to its delegated authority”).

2. The Union’s amended complaint alleges that “[t]he Postal Service is violating service standards on a nationwide or substantially nationwide basis.” JA 93. In deciding whether the Postal Service is in compliance with its service standards, the Commission has consistently inquired into the Postal Service’s rates of on-time delivery performance. Specifically, “whether or not the Postal Service is compliant with applicable statutory and regulatory requirements” is “evaluated in reference to [the Postal Service’s] separately published service performance ‘goals’ (also referred to as ‘targets’) that use the service standards as guideposts.” JA 149. A necessary corollary is that the Postal Service may achieve compliance in a given year even if it does not succeed in delivering every single piece of mail on time. Thus, evidence that a particular piece of mail has not arrived within the delivery window specified in 39

C.F.R. § 121.1 does not, in itself, prove that the Postal Service has violated the law.

See JA 149 (explaining that service standards, as applied to any particular piece of mail, are “not guaranteed” and thus cannot be “‘violated,’ *per se*, as the term is used by [the Union]”); JA 151 (service standards are not freestanding “legal requirements,” but instead “provide [the] starting point by which actual service performance can be evaluated”).

That interpretation is entirely reasonable. Nothing in the statute mandates the conclusion that the Postal Service violates the law every time any piece of mail does not arrive according to the applicable standard. Despite the Postal Service’s best efforts, “there will always be a small number of pieces that are not delivered within their service standard.” 72 Fed. Reg. at 72,220. This volume of late-delivered mail, known colloquially as the “tail of the mail,” *id.*; *see also* JA 150 n.16, results from the logistical impossibility of ensuring on-time delivery for every one of the 155.4 billion pieces of mail processed by the Postal Service each year. *See U.S. Postal Service, Postal Facts: Size and Scope* (2015).¹¹ Aware of this impossibility, the Commission has reasonably determined that assessing the Postal Service’s compliance with its service standards must be undertaken in reference to some external target.

¹¹ Available at <https://about.usps.com/who-we-are/postal-facts/size-scope.htm> (last visited Nov. 30, 2015).

The text of the statute underscores the reasonableness of the Commission's interpretation. The PAEA instructs the Postal Service to promulgate "a set of service standards," not service guarantees. 39 U.S.C. § 3691(a) (emphasis added). The statute also specifies that these standards should be "designed" to "reasonably assure Postal Service customers delivery reliability, speed and frequency." *Id.* § 3691(b)(1)(C) (emphasis added). To provide a customer with "reasonabl[e] assur[ance]" is merely to create an "expectation" of on-time delivery, JA 149, 151, without affording the customer any individually enforceable right.¹²

The legislative history confirms this point. In an earlier proposal considered by Congress, the language corresponding to section 3691(b)(1)(C) would have mandated that service standards be designed to "guarantee Postal Service customers delivery reliability, speed and frequency consistent with reasonable rates and best business practices." S. 2468, 108th Cong. § 301 (2004) (emphasis added). But later versions of the legislation replaced "guarantee" with "reasonably assure," S. 662, 109th Cong. § 301 (2005), thereby clarifying that service standards should not be regarded as establishing binding requirements of on-time delivery for every piece of mail. *See Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) ("We ordinarily will not

¹² Certain Postal Service products, including Priority Mail Express, include a money-back guarantee that delivery will be effectuated on time. *See* USPS, *Priority Mail Express*, <https://www.usps.com/ship/priority-mail-express.htm> (last visited Nov. 30, 2015). First-Class Mail, Single-Piece Letters/Postcards is not among these products.

assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language.”) (quotation marks omitted); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (deletion from draft bill “strongly militate[d] against a judgment that Congress intended a result that it expressly declined to enact”).

Other language in the statute similarly reflects Congress’s understanding that an assessment of the Postal Service’s compliance would occur in the aggregate, not on an envelope-by-envelope basis. The PAEA requires the Postal Service to furnish the Commission with a report that analyzes “quality of service . . . in sufficient detail to demonstrate that all products during such year complied with all applicable requirements of [Title 39],” 39 U.S.C. § 3652(a)(1), and that provides “measures of the quality of service afforded by the Postal Service” for each market-dominant product, including “the level of service (described in terms of speed of delivery and reliability) provided.” *Id.* § 3652(a)(2)(B)(i). But the statute does not require the Postal Service to furnish information about the delivery outcomes of every single piece of mail that the Postal Service handles.

Similarly, the Commission is directed to make a “written determination” as to “whether any service standards in effect during such year were not met.” 39 U.S.C. § 3653(b)(2). If service standards in themselves established binding legal requirements, however, it would be a foregone conclusion in every year that the Postal Service would have violated the statute, given the impossibility of delivering on time

every single piece of mail sent each year. Indeed, construing the statute in this manner would eliminate any meaningful distinction between “compliance” and “noncompliance,” thereby frustrating Congress’s intent that the Postal Service only be subject to remedial directives in years of “noncompliance.” *Id.* § 3653(c).

As the Commission explained in its decision, its interpretation is further bolstered by an uncodified provision of the PAEA. Section 302 of the law required the Postal Service, after promulgating its service standards, to ““develop and submit to Congress a plan for meeting those standards,”” and to ““establish performance goals”” as part of that plan. JA 152 (quoting PAEA § 302(a), (b)(1), 120 Stat. at 3219); *see also* JA 775; 151 Cong. Rec. 5327 (Mar. 17, 2005) (statement of Sen. Carper) (explaining that the “service standards” in the law “will be used by the Postal Service to establish performance goals”).¹³ The Commission correctly reasoned that if service standards themselves were binding “requirements,” there would have been no reason for Congress to direct the Postal Service to ““establish performance goals’ (or targets)

¹³ The Postal Service informed Congress in 2008 that it would fulfill its Section 302 mandate by, among other things, establishing ““percentage on-time’ targets [that] will be shared with the Commission and will serve as the basis for its annual review of [the Postal Service’s] service standards compliance.” *The Three R’s of the Postal Network Plan: Realignment, Right-Sizing, and Responsiveness, Hearing Before the Subcomm. on Federal Workforce, Postal Service, and Dist. of Columbia of the H. Comm. on Oversight and Gov’t Reform*, 110th Cong., at 47 (July 24, 2008) (statement of Patrick R. Donahoe, Deputy Postmaster General/Chief Operating Officer, U.S. Postal Service).

for meeting service standards.” JA 152; *see* JA 153 (“[A]ny other interpretation would invalidate the purpose of separately establishing goals.”).

The Commission has also acted reasonably in relying upon performance targets set by the Postal Service in lieu of establishing its own targets. The Commission has repeatedly acknowledged that it is not bound to adopt the Postal Service’s proposed targets as the test for legal compliance if those targets are unreasonable. *See* JA 152 n.20 (“reserv[ing] the right to intervene if the goals” are unreasonable); *see also* JA 794, 805-06. Nonetheless, the Commission has determined that the Postal Service’s announced performance targets—currently ranging from 94.0% to 96.8% on-time delivery across First-Class Mail products, *cf.* JA 265—have provided an appropriate benchmark for assessing the Postal Service’s compliance. Indeed, inasmuch as the Postal Service announces and publicizes its performance targets in advance, *see, e.g.*, JA 152 & n.20, holding the Postal Service accountable for meeting its own targets helps ensure the usefulness of those targets to private mailers, many of whom desire better information about the size of the “tail of the mail.” *See, e.g.*, JA 686, 815.

B. The Union’s Arguments Misapprehend The Commission’s Decision And The Statutory Scheme.

The arguments advanced by the Union reflect a fundamental misunderstanding of the Commission’s decision and the underlying statute.

1. The central premise of virtually all of the Union’s contentions is its assertion that the Commission held the Postal Service’s service-standard regulations to be

“unenforceable.” *See, e.g.*, Pet. Br. 3 (asserting that Commission held that service standards are not “legal requirements that may be enforced by complaint and remedial order”); *id.* at 13 (the “Commission now holds that service regulations are unenforceable”); *id.* at 25 (Commission has “exempt[ed] the Postal Service from enforcement of service regulations”); *id.* at 36 (“Commission’s refusal to treat service standards as enforceable makes its [annual compliance determinations] meaningless”). The Union urges this Court to reverse the “rule of unenforceability” that it mistakenly believes the Commission to have adopted. *Id.* at 14, 38.

The Union significantly misreads the Commission’s decision. The Commission did not hold that “service standards are not legally enforceable.” Pet. Br. 36. To the contrary, the Commission expressly held that “whether or not the Postal Service is compliant with applicable statutory and regulatory requirements”—*i.e.*, 39 U.S.C. § 3691(d) and 39 C.F.R. § 121.1—is “evaluated in reference to separately published service performance ‘goals’ (also referred to as ‘targets’),” which establish the legal benchmark for assessing the Postal Service’s performance. JA 149; *see also, e.g.*, JA 155 (“[W]hether or not service standards are being met is evaluated in reference to the service goals published by the Postal Service.”). Indeed, the Commission went on to explain that it conducts this very analysis in its annual compliance determination each year, and that where the Postal Service falls short of its targets, the Commission

invokes its legal authority under 39 U.S.C. §§ 3653(c) and 3662(c) to direct “the Postal Service to take remedial action.” JA 158-60.

The Commission thus agrees that service standards promulgated under 39 C.F.R. § 121.1 are enforceable by the Commission.¹⁴ Nothing in the Commission’s decision says otherwise. In light of this agreement, most of the arguments advanced in the Union’s brief are simply beside the point. *See, e.g.*, Pet. Br. 24-26 (addressing publication in Code of Federal Regulations); *id.* at 26-28 (noting availability of complaint proceedings under section 3662); *id.* at 28-29 (discussing judicial review).

2. The Union’s repeated criticism of the Commission’s references to service standards as “expectations,” Pet. Br. 1, 2, 12, 30, 34, similarly misapprehends the Commission’s reasoning. In the order under review, the Commission explained that service standards “provide no guarantee of actual service” as to any given piece of mail, but instead “provide a description of the expected number of days” that it should take for that item to be delivered. JA 151; *see also* JA 149. The Commission emphasized, however, that these “expectations” are legally enforceable in the

¹⁴ The Commission agrees that “if the Postal Service ha[d] no enforceable limits against the degradation of service, it c[ould] grant itself *de facto* price increases simply by reducing the service for which customers pay First Class postage.” Pet. Br. 35. *See, e.g.*, JA 806 (2010 Commission rulemaking) (“[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.”). It is precisely for that reason that Congress empowered the Commission to take remedial action if service performance falls below the applicable compliance threshold.

aggregate, and that the Postal Service violates its regulations if its actual performance falls below its established targets. *See JA 150-51, 153, 155.* Indeed, the Commission expressly construed the Union’s complaint as asserting just this claim. *See JA 161 (“construing APWU’s submission as an allegation that the Postal Service is not meeting its service performance goals”).*

The Union’s misapprehension of the Commission’s decision apparently stems from its assumption that service standards are enforceable on an envelope-by-envelope basis. For example, in its amended complaint, after alleging instances of mail not being delivered within the ranges provided under 39 C.F.R. § 121.1, the Union asserted that each of these instances amounted to a “violation of the rights” of mailers to the service to which those mailers were “entitled.” *See generally JA 94-101.*¹⁵ The Union repeats this error at points in its opening brief. *See, e.g., Pet. Br. 4 (“the Postal Service deprived the Union and its locals of the level of service *they were entitled to*”) (emphasis added); id. at 27 (contending that individual mailers have “enforceable rights” to on-time delivery).* As already explained, however, “service standards” are standards, not guarantees, *see supra* pp. 27-32, and do not create an individual entitlement to the on-time delivery of every piece of mail. Thus, the Commission

¹⁵ The Union’s amended complaint elsewhere correctly characterizes service standards as “expected delivery times,” not binding legal requirements. JA 87; *see id.* (Postal Service’s revised service standards “eliminat[ed] any expectation of one day delivery for First Class Mail” and “chang[ed] the expectation as to the percentage[s] of First Class mail” qualifying for two- and three-day delivery) (emphases added).

correctly explained that the “various occasions or circumstances in which [the Union] allege[d] that mail has not been delivered within the amount of time contemplated by the service standards” could not, in themselves, constitute proof of a violation of law. JA 150.

3. The Union’s assertion that the Commission “conflated” or “equat[ed]” service standards “with operational ‘performance goals,’” Pet. Br. 30-32, further underscores the extent of its misunderstanding. Under the PAEA, in addition to adjudicating the Postal Service’s legal compliance through annual compliance determinations and complaint proceedings, *see* 39 U.S.C. §§ 3653(b), 3662, the Commission also undertakes certain advisory functions that do not carry any legally binding effect. Among these is the provision under 39 U.S.C. § 3653(d) instructing the Commission to “evaluate annually whether the Postal Service has met the goals established under [39 U.S.C. §§] 2803 and 2804,” and to “provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in [Title 39].” *Id.* § 3653(d); *see also supra* p. 10, n.5. But this case in no way implicates those advisory functions. The “performance goals” at issue here are the binding service targets established by the Postal Service, and adopted by the Commission, for evaluating the Postal Service’s on-time performance under 39 U.S.C. § 3653(b)—not the Postal Service’s other, non-binding goals established under

sections 2803 and 2804. It is thus the Union, not the Commission, that has erroneously “conflated” disparate provisions of the statute.

Finally, the Union is incorrect in suggesting that the Commission’s decision “contradicts” its prior interpretations of the statute. Pet. Br. 22, 32. To the contrary, the Commission has consistently adhered to the principle that “whether or not service standards are being met is evaluated in reference to the service goals published by the Postal Service.” JA 155. For instance, in its annual compliance determinations for FY 2013 and FY 2014, the Commission explained that it “compare[d] the information in the Postal Service’s [annual report] against targets established by the Postal Service to evaluate annual service performance for each Market Dominant product.” JA 256 (FY 2014 report); *accord* JA 470 (FY 2013 report); *see also* JA 470 n.1 (“On an annual basis, the Commission compares a product’s on-time delivery with delivery goals established by the Postal Service.”).¹⁶ Since 2010, the Commission has expressly required the Postal Service to report annually not only its service standards, but also its “service goal(s)” (*i.e.*, targets), 39 C.F.R. § 3055.2(c)-(d), and to provide an “explanation of why the service standard [was] not met” as to “each product” for which actual performance fell below the targets. *Id.* § 3055.2(h); *see also* JA 795-96, 847 (2010 rulemaking) (describing these regulations); JA 813 (stating that Commission

¹⁶ The Commission’s prior annual compliance determinations follow the same analysis. These reports are available electronically at http://www.prc.gov/prc-reports?keys=&field_report_type_value=Annual+Compliance+Reports.

“compare[s]” Postal Service’s actual on-time performance “against the ‘Target’, which is the service goal”).

II. THE COMMISSION REASONABLY DISMISSED THE UNION’S COMPLAINT BECAUSE IT RAISED NO MATERIAL ISSUE OF FACT OR LAW WARRANTING FURTHER CONSIDERATION.

A. The Commission Had Already Analyzed And Adjudicated The Claim Of Nationwide Service Noncompliance Alleged In The Union’s Complaint.

1. “Any interested person . . . who believes the Postal Service is not operating in conformance” with certain statutory or regulatory requirements “may lodge a complaint with the Postal Regulatory Commission.” 39 U.S.C. § 3662. Among these requirements are the service standards established under 39 U.S.C. § 3691(a).

Nonetheless, section 3662 does not compel the Commission to allow discovery and conduct a formal hearing on every complaint. Instead, Congress provided that the Commission should only “begin proceedings on [a] complaint” if the complaint “raises material issues of fact or law.” 39 U.S.C. § 3662(b)(1)(A)(i). The statute therefore instructs the Commission, “within 90 days after receiving a complaint,” to either begin proceedings (if the complaint raises such material issues) or, alternatively, to “issue an order dismissing the complaint.” *Id.* § 3662(b)(1)(A)(i)-(ii).

The statute also provides that if a complaint is “justified,” the Commission shall order the Postal Service to “take such action as the *Commission considers appropriate*” to achieve compliance with the applicable requirements. 39 U.S.C.

§ 3662(c) (emphasis added). The statute therefore commits to the Commission’s reasoned discretion the determination of what remedy, if any, to impose. *See U.S. Postal Serv. v. Postal Regulatory Comm’n*, 747 F.3d 906, 910 (D.C. Cir. 2014) (“[T]he breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations—but rather to the fashioning of remedies and sanctions.”) (ellipsis and quotation marks omitted).

2. The Commission reasonably applied this framework in dismissing the Union’s complaint. The Union alleged that the “Postal Service is violating service standards on a nationwide or substantially nationwide basis,” JA 93, and contended that “[e]xamination of [EXFC] data” maintained by the Postal Service would “show that First-Class mail delivery standards [were] being violated,” JA 105. *Cf. supra* p. 5 (describing EXFC system). The Union requested that the Commission “[h]old that the Postal Service has violated its Service Standard regulations” and “[o]rder the Postal Service to take necessary steps to come promptly into compliance.” JA 106.

As its decision explains, the Commission had already undertaken this very same legal analysis. In its FY 2014 annual compliance determination, the Commission considered nationwide EXFC data supplied by the Postal Service and found that the Postal Service’s “service performance for First-Class Mail, Single-Piece Letters/Postcards” had uniformly failed to meet the applicable targets. JA 157. *See*

JA 265 (FY 2014 annual compliance determination) (finding that “[t]he Postal Service did not meet its service performance targets in FY 2014” for any service standard applicable to Single-Piece Letters/Postcards). And in its FY 2013 determination, the Commission found that “service performance for the 3-5 day category” had failed to meet both the “old FY 2012 service performance target of 92.85 percent [as well as] the new FY 2013 service performance target of 95.00 percent.” JA 476. The Commission noted that the Union not only did not “challenge[] the validity” of this nationwide EXFC data, but it affirmatively sought to rely on the same data to prove the Union’s own allegations. JA 157. The Union’s complaint thus “d[id] not add any new information that [was] not already publicly known, reported on, and addressed by the Commission” in its prior determination, and “[t]here [wa]s no further material issue of fact for the Commission to consider.” JA 157-58.

The Commission also explained that it had already “direct[ed] the Postal Service to take remedial action” to correct the nationwide noncompliance alleged in the Union’s complaint. JA 150, 158. The Commission noted that, in its FY 2013 determination, it “mandate[d]” that the ““Postal Service must improve performance for products that did not meet the annual targets”” and ““should take appropriate action to improve performance for these products.”” JA 159 (quoting JA 478). And in the FY 2014 determination, after considering the explanation offered by the Postal Service for its failure to achieve compliance, the Commission “found that the

appropriate action was to reiterate the Postal Service’s responsibility to meet service performance goals” by announcing that the “[t]he Commission expects service performance to improve in FY 2015.” JA 160 (quoting JA 273). The Commission explained that “[i]n regard to the First-Class Mail, Single-Piece Letters/Postcards product, the Commission has taken the action that it considers appropriate at this time to address issues of service performance.” JA 160; *see also* JA 158 (concluding that the Union had not “raise[d] [any] new issues of law or fact that would cause the Commission to reconsider its previous directions to the Postal Service”).

3. The Commission’s dismissal decision was entirely reasonable. Section 3662 does not oblige the Commission to conduct plenary proceedings on every complaint that is filed with the Commission. If a complaint does not “raise[] [any] material issues of fact or law,” the Commission may “issue an order dismissing the complaint.” 39 U.S.C. § 3662(b)(1)(A)(i)-(ii). Where, as here, the Commission has already resolved the central question raised in the complaint—whether the Postal Service has “violated its Service Standard regulations” on a “nationwide or substantially nationwide basis,” JA 93, 106—the Commission acts well within its discretion in concluding that the complaint does not raise any “material issues” warranting a further expenditure of its limited resources. *Cf. WildEarth Guardians v. U.S. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014) (“[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.”) (quoting

Massachusetts v. EPA, 549 U.S. 497, 527 (2008)); *Porter Cty. Chapter of Izaak Walton League of Am. v. Nuclear Regulatory Comm'n*, 606 F.2d 1363, 1369 (D.C. Cir. 1979) (“The agency is not bound to launch full-blown proceedings simply because a violation of the statute is claimed,” but may “determine whether the claim is substantial enough under the statute to warrant full proceedings.”).

The reasonableness of the Commission’s decision is underscored by the interconnected nature of the PAEA’s remedial provisions. As the Commission explained, “the remedies available to the Commission to address service performance issues are the same regardless whether those performance issues are brought to the attention of the Commission by complaint or instead through the annual compliance determination process.” JA 150; *cf.* 39 U.S.C. § 3653(c) (incorporating 39 U.S.C. § 3662(c)). In either case, the Commission must order the Postal Service to “take such action as the Commission considers appropriate.” 39 U.S.C. § 3662(c). Here, the Commission explained that it had already taken the action that it “consider[ed] appropriate” in order “to address issues of service performance” with respect to the First-Class Mail, Single-Piece Letters/Postcards product. JA 160. The filing of the Union’s complaint thus did nothing to change the Commission’s remedial calculus.

“When a federal court of appeals reviews an administrative agency’s choice of remedies to correct a violation of a law the agency is charged with enforcing, the scope of judicial review is particularly narrow.” *National Treasury Emps. Union v. Federal*

Labor Relations Auth., 910 F.2d 964, 966-67 (D.C. Cir. 1990) (en banc). This Court thus properly “defer[s] to the [Postal Regulatory] Commission’s remedial determination” concerning the “‘fashioning of remedies[] and sanctions’” for any noncompliance that the Commission has identified. *U.S. Postal Serv.*, 747 F.3d at 910 (ellipsis omitted); *see also, e.g.*, *Kornman v. SEC*, 592 F.3d 173, 186 (D.C. Cir. 2010) (“[W]here Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy[,] the relation of remedy to policy is peculiarly a matter for administrative competence.”) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112 (1946)).

B. The Union’s Challenges To The Commission’s Dismissal Lack Merit.

The Union advances various arguments in contesting the Commission’s dismissal of its complaint, none of which is persuasive.

1. First, the Union asserts that the Commission “may not refuse to remedy acknowledged violations when they are proven by private complaint.” Pet. Br. 15. The Union hypothesizes that whenever a complaint appears to be “meritorious,” the Commission is required to conduct full proceedings on that complaint and ultimately impose some form of relief. *Id.* at 26.

The Union’s argument misunderstands the nature and purpose of complaints under section 3691(d). Unlike other complaints subject to the Commission’s jurisdiction—such as claims of discrimination in violation of 39 U.S.C. § 403(c)—the

purpose of a complaint brought under section 3691(d) is generally not to afford individualized relief to the complainant. Instead, the reason for the complaint process is to facilitate the Commission’s regulation of the Postal Service by furnishing the Commission with relevant information about which it may not have previously been aware, which in turn may lead the Commission to impose additional or different remedies against the Postal Service. But if a complaint merely asserts a violation that the Commission has already addressed—such as, here, an allegation that the Postal Service is “violating service standards on a nationwide or substantially nationwide basis” by failing to deliver mail at or above its target rate of compliance, *see JA 93, 157-58*—“begin[ning] proceedings on [that] complaint” may not serve any useful purpose. 39 U.S.C. § 3662(b)(1)(A)(i). Nothing in the PAEA requires the Commission to conduct redundant proceedings at the behest of a mailer who correctly alleges that the Postal Service is not in compliance with the law, but who fails to identify any sound reason for the Commission to revisit its existing remedial determinations.

The Union’s reliance (Pet. Br. 15, 45) on *GameFly, Inc. v. Postal Regulatory Commission*, 704 F.3d 145 (D.C. Cir. 2013), highlights its misunderstanding of these principles. In that case, GameFly brought a complaint under 39 U.S.C. § 403(c) alleging that the Postal Service had engaged in “undue or unreasonable discrimination” by affording special mail-processing service to Netflix—a service that

the Postal Service had refused to provide to GameFly on the same terms. As a result of this preferential treatment, GameFly was forced to spend \$1.08 per piece of mail, whereas Netflix spent only \$0.44. *See* 704 F.3d at 147. The Commission found that this conduct was discrimination in violation of 39 U.S.C. § 403(c), but its initial remedy failed to fully redress the discrimination about which GameFly had complained. In vacating the Commission’s order, this Court explained that “[w]hen . . . 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.” 704 F.3d at 149.

This case does not resemble *GameFly* in any relevant respect. The Union has not alleged that the Postal Service engaged in unreasonable discrimination against the Union or its local affiliates, such as would require the crafting of individualized relief.¹⁷ Nor has the Union contended that the remedies adopted by the Commission in its FY 2013 and FY 2014 annual compliance determinations would fail to redress the Union’s complaint if, as the Commission directed, the Postal Service followed through by improving its service performance. To the contrary, the Union apparently agrees that these remedies “might satisfy the Commission’s duty” so long as such

¹⁷ The Union attempted to bring a discrimination claim in its original complaint, but the Commission dismissed that claim for failure to show that any “other mailers [we]re receiving unduly preferential treatment.” JA 78. The Union then omitted that claim from its amended complaint, *see* Pet. Br. 5 n.3, and has properly declined to contest its dismissal, *see id.* at 5 n.2.

remedies are “enforceable,” Pet. Br. 45—which, as explained above, they are. *See supra* pp. 32-36; *qf.* 39 U.S.C. § 3664 (allowing district court enforcement of Commission orders). In any event, where the claim being asserted is one that the Commission has already considered and addressed, nothing in *GameFly* or the statute requires the Commission to impose token relief simply because the Union filed a redundant, but technically “meritorious,” complaint. *See* 39 U.S.C. § 3662(c) (only requiring that the Commission impose the relief that “the Commission considers appropriate”).

2. Elsewhere in its brief, the Union categorically challenges the Commission’s reliance on findings made during its annual compliance determination, arguing that “Congress did not intend Annual Compliance Determinations to foreclose private complaints.” Pet. Br. 15, 39. Citing the views of a dissenting commissioner, the Union asserts that “[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.” *Id.* at 40 (quoting JA 164).

The Union’s criticism mischaracterizes the Commission’s decision. The Commission did not hold that a determination of compliance or noncompliance under section 3653(b) automatically precludes further consideration of the Postal Service’s performance in a complaint proceeding. To the contrary, the Commission explained that “service performance issues [may] be brought to the attention of the

Commission through either the complaint process or during an annual compliance review,” JA 160, and specifically reaffirmed that “[a] finding in an annual compliance determination” may “be challenged through the complaint process.” JA 161; *see also* JA 160 (“The approaches are not mutually exclusive.”).

The Commission’s decision to dismiss the Union’s amended complaint did not depend merely on the fact that the complaint implicated matters also considered in the annual compliance determinations. Instead, the Commission dismissed the complaint because the Union had alleged claims that were entirely “consistent with the Commission’s reporting in past annual compliance determinations.” JA 161. The complaint therefore “d[id] not raise new material issues of fact for the Commission to consider.” *Id.*

The Union’s suggestion that the Commission is not permitted to rely upon its prior annual compliance determinations is also inconsistent with the express language of the statute. As the Commission noted, *see* JA 161, Congress provided in section 3653(e) that “[a] timely written determination” of compliance in an annual determination “shall, for purposes of any proceeding under section 3662, create a rebuttable presumption of compliance by the Postal Service.” 39 U.S.C. § 3653(e). Congress thus indicated that “Commission findings in an annual compliance

determination” would be legally “relevant to a pending complaint proceeding,” even if those findings would “not necessarily [be] dispositive” in all instances. JA 340.¹⁸

The Union’s contentions ring hollow in any event because the Union itself actively participated in the Commission’s annual-compliance-determination process. *See* JA 258 & n.156, 309. When the Commission issued its FY 2014 determination, which included remedial directives to the Postal Service concerning its service performance with respect to various First-Class Mail products, the Union did not challenge the Commission’s determination. If the Union believed that the Commission had abused its discretion by failing to impose a harsher remedy, it could have sought further review of the Commission’s determination in this Court. *See* 39 U.S.C. § 3663. It did not do so.

3. The Union fares no better in disputing that its amended complaint—like its original complaint—was “premised on allegations of ‘nationwide or substantially nationwide’ violations.” JA 156-57. The Union now contends that it “[was] not simply alleging a general fact of noncompliance nationwide,” but instead intended to claim that noncompliance was “disproportionately acute in communities whose mail processing facilities have been closed.” Pet. Br. 15, 41.

¹⁸ The Union is entirely correct that “Section 3653(e) allows private complaints even when inconsistent with [annual compliance determinations].” Pet. Br. 39. What the Union overlooks is that its own complaint was in no way “inconsistent” with the Commission’s prior determination.

These assertions are at odds with the complaint presented to the Commission.

As explained, the Union asserted a single claim: “The Postal Service is violating service standards on a nationwide or substantially nationwide basis.” JA 93.

Although the Union’s amended complaint included allegations of service problems purportedly arising from closures of specific mail-processing facilities, the Commission and all parties understood those allegations to be mere “illustrative examples” (Pet. Br. 6) intended to support the Union’s claimed nationwide violation.¹⁹

The Union never presented any claim of “disproportionate[]” noncompliance to the Commission (Pet. Br. 41), and it cannot now amend its administrative complaint by making inconsistent arguments in this Court. *See Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1297-98 (D.C. Cir. 2004) (per curiam) (“It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review.”); *cf. Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 526 (D.C. Cir. 2010) (“A party generally must exhaust administrative remedies before seeking relief in federal court.”).

¹⁹ The “illustrative” nature of these examples is underscored by the fact that the Union offered a mostly different set of examples in its original complaint. Compare JA 15-20 (Tyler, Texas; Brooklyn, New York; Colorado Springs, Colorado; Kilmer, New Jersey; Saginaw, Michigan; Williamsport, Pennsylvania; Salem, Oregon; LaCrosse, Wisconsin; Carbondale, Illinois; and Cape Girardeau, Missouri), with JA 93-102 (Waco, Texas; Altoona, Pennsylvania; Brooklyn, New York; New Brunswick, New Jersey; Colorado Springs, Colorado; and Jacksonville, Florida).

The Union’s criticism that the Commission did not consider “the possibility of deliberate Postal Service noncompliance,” Pet. Br. 42, fails for the same reason. Section 3662(d) provides that “in cases of deliberate noncompliance by the Postal Service,” the Commission may—“based on the nature, circumstances, extent, and seriousness of the noncompliance”—impose a “fine” against the Postal Service in an “amount specified by the Commission.” 39 U.S.C. § 3662(d). But the Union never urged the Commission to rule that the Postal Service had committed a “deliberate” violation of the service standards. To the contrary, the Union’s amended complaint alleged only that the “Postal Service *knew or should have known*” that its actions would result in “violation[s],” JA 92 (emphasis added), not that the Postal Service’s actions were willful. *Accord* Pet. Br. 6 (“The Union alleges that the Postal Service knew or should have known that [facilities] closures would result in the systemic noncompliance with First Class Mail service standards.”). The Union’s failure to bring this claim before the agency bars it from raising it now. *See Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1150 (D.C. Cir. 2005) (refusing “‘review’” of petitioner’s claim that “ha[d] never even been presented to the agency for its consideration”).

4. Finally, the Union has no entitlement to “discovery” of the Postal Service’s “underlying EXFC data.” Pet. Br. 43-44. The Commission’s regulations provide that “the discovery and deposition rules [are] inapplicable” unless and until the

Commission “finds that the complaint raises a material issue of fact or law.” JA 354; *see* 39 C.F.R. § 3030.1(b). The regulations thereby “ensure[] that only complainants raising material issues of fact or law will subject the Postal Service to the time and expense of the discovery process.” JA 354. The Union’s desire for access to the “the Postal Service’s raw databases,” Pet. Br. 44, is not in itself a justification for continuing proceedings on a complaint that the Commission has found to be subject to dismissal.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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NOVEMBER 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,044 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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**STATUTORY
AND
REGULATORY
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39 U.S.C. § 3652—Annual reports to the Commission.

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

(1) which shall analyze costs, revenues, rates, and quality of service, using such methodologies as the Commission shall by regulation prescribe, and in sufficient detail to demonstrate that all products during such year complied with all applicable requirements of this title; and

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

(A) product information, including mail volumes; and

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

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

(ii) the degree of customer satisfaction with the service provided.

The Inspector General shall regularly audit the data collection systems and procedures utilized in collecting information and preparing such report (including any annex thereto and the information required under subsection (b)). The results of any such audit shall be submitted to the Postal Service and the Postal Regulatory Commission.

....

(e) Content and form of reports.—

(1) In general.—The Postal Regulatory Commission shall, by regulation, prescribe the content and form of the public reports (and any nonpublic annex and supporting matter relating to the report) to be provided by the Postal Service under this section. In carrying out this subsection, the Commission shall give due consideration to—

(A) providing the public with timely, adequate information to assess the lawfulness of rates charged;

(B) avoiding unnecessary or unwarranted administrative effort and expense on the part of the Postal Service; and

(C) protecting the confidentiality of commercially sensitive information.

(2) Revised requirements.—The Commission may, on its own motion or on request of an interested party, initiate proceedings (to be conducted in accordance with regulations that the Commission shall prescribe) to improve the quality, accuracy, or completeness of Postal Service data required by the Commission under this subsection whenever it shall appear that—

- (A) the attribution of costs or revenues to products has become significantly inaccurate or can be significantly improved;
- (B) the quality of service data has become significantly inaccurate or can be significantly improved; or
- (C) such revisions are, in the judgment of the Commission, otherwise necessitated by the public interest.

...

(g) Other reports.—The Postal Service shall submit to the Postal Regulatory Commission, together with any other submission that the Postal Service is required to make under this section in a year, copies of its then most recent—

- (1) comprehensive statement under section 2401(e);
- (2) performance plan under section 2803; and
- (3) program performance reports under section 2804.

39 U.S.C. § 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.

39 U.S.C. § 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.

39 U.S.C. § 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.

39 U.S.C. § 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.

39 U.S.C. § 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 (2011)—First-Class Mail.

(a) For all intra-Sectional Center Facility (SCF) domestic First-Class Mail® pieces properly accepted before the day-zero Critical Entry Time at origin, the service standard is 1-day (overnight), except for mail between the territories of Puerto Rico and the U.S. Virgin Islands, and intra-SCF mail originating and destinatting in the following 3-digit ZIP Code TM areas in the state of Alaska or designated portions thereof: 995 (5-digit ZIP Code areas 99540 through 99591) 996, 997, 998, and 999. First-Class Mail pieces addressed to a destination 3-digit ZIP Code area outside of an origin intra-SCF service area may be considered for overnight delivery from that origin SCF, if that mail is accepted before the day-zero Critical Entry Time at origin, if sufficient customer need exists [the destination SCF receives at least 1.5 percent of the total annual First-Class Mail volume originating from the origin Processing & Distribution Center/Facility (OPDC/F)], and if operational and transportation feasibility permit.

(b) A 2-day service standard is established for all domestic First-Class Mail pieces properly accepted before the day-zero Critical Entry Time at origin if a 1-day service standard is not required, and if the origin PDC/F to Area Distribution Center surface transportation drive time is 12 hours or less, unless the origin and destination are within the state of Alaska; or if the origin and delivery address are separately in the territories of Puerto Rico and the U.S. Virgin Islands; or if the mail is intra-SCF and originating from or destinatting to one of the following 3-digit ZIP Code areas in Alaska or designated portions thereof: 995 (5-digit ZIP Code areas 99540 through 99591), 996, 997, 998, and 999.

(c) A 3-day service standard is established for all remaining domestic First-Class Mail pieces properly accepted before the day-zero Critical Entry Time at origin, if neither a 1-day nor a 2-day service standard is required and

- (1)** Both the origin SCF and the delivery address are within the contiguous 48 states;
- (2)** The origin SCF is in the contiguous 48 states, and the delivery address is in either of the following: the 995 3-digit ZIP Code area in the state of Alaska, or the 968 3-digit ZIP Code area in the state of Hawaii, or in the 006, 007, or 009 3-digit ZIP Code areas of the territory of Puerto Rico;
- (3)** The origin is in the 006, 007 or 009 3-digit ZIP Code areas of the territory of Puerto Rico and the delivery address is in the contiguous 48 states;
- (4)** The origin SCF is in the state of Hawaii and the delivery address is in the territory of Guam; the origin is in the territory of Guam and the delivery address is in the state of Hawaii; or
- (5)** Both the origin SCF and the delivery address are within the state of Alaska.

(d) A 4-day service standard is established for all remaining First-Class Mail pieces properly accepted before the day-zero Critical Entry Time at origin, if either a 1-day, 2-day, or 3-day service standard is not required, and if:

- (1)** The origin SCF is in the contiguous 48 states and the delivery address is in either of the following: any portion of the state of Alaska not in the 995 3-digit ZIP Code area; or any portion of the state of Hawaii not in the 968 3-digit ZIP Code area; or the territory of the U.S. Virgin Islands.
- (2)** The delivery address is in the contiguous 48 states and the origin is in either of the following: the state of Alaska, the state of Hawaii, or the territory of the U.S. Virgin Islands;
- (3)** The origin and delivery address are in different states or territories, excluding mail to and from the territory of Guam and mail between the territories of Puerto Rico and the U.S. Virgin Islands.

(e) A 5-day service standard is established for all remaining domestic First-Class Mail pieces properly accepted before the day-zero Critical Entry Time at origin, if those pieces originate in the territory of Guam but are not destined for Guam or the state of Hawaii, or if those pieces originate other than in Guam or Hawaii and are destined for Guam.

(f) The service standard for Outbound Single-Piece First-Class Mail InternationalTM pieces properly accepted before the day-zero Critical Entry Time at origin is equivalent to the service standard for domestic First-Class Mail from the same origin 3-digit ZIP Code to the 3-digit ZIP Code area in which that origin's designated International Service Center is located.

(g) The service standard for Inbound Single-Piece First-Class Mail International is equivalent to the service standard for domestic First-Class Mail pieces from the 3-digit ZIP Code area in which that inbound mail's designated International Service Center is located to the 3-digit ZIP Code of the delivery address.

39 C.F.R. § 121.1 (2015)—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.

39 C.F.R. § 3030.1—Applicability.

- (a)** The rules in this part govern the procedure for complaints filed under 39 U.S.C. 3662 that meet the form and manner requirements of subpart B of this part. Part 3001, subpart A of this chapter, applies unless otherwise stated in this part or otherwise ordered by the Commission.
- (b)** Sections 3001.25 through 27 of this chapter and § 3001.33 of this chapter do not apply to this part unless and until the Commission makes a finding under § 3030.30(a)(1) that the complaint raises material issues of fact or law.
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39 C.F.R. § 3030.20—Sufficiency of information.

If, after review of the information submitted pursuant to this part, the Commission determines that additional information is necessary to enable it to evaluate whether the complaint raises material issues of fact or law, the Commission shall, in its discretion, either require the complainant and/or the Postal Service to provide additional information as deemed necessary, issue an appropriate order to appoint an investigator in accordance with § 3030.21, or do both.

39 C.F.R. § 3055.2—Contents of the annual report of service performance achievements.

- (a)** The items in paragraphs (b) through (k) of this section shall be included in the annual report of service performance achievements.
- (b)** The class or group-specific reporting requirements specified in §§ 3055.20 through 3055.25.
- (c)** The applicable service standard(s) for each product.
- (d)** The applicable service goal(s) for each product.
- (e)** A description of the measurement system for each product, including:
 - (1)** A description of what is being measured;
 - (2)** A description of the system used to obtain each measurement;
 - (3)** A description of the methodology used to develop reported data from measured data;
 - (4)** A description of any changes to the measurement system or data reporting methodology implemented within the reported fiscal year; and
 - (5)** Where proxies are used, a description of and justification for the use of each proxy.
- (f)** A description of the statistical validity and reliability of the results for each measured product.
- (g)** A description of how the sampled data represents the national geographic mail characteristics or behavior of the product.
- (h)** For each product that does not meet a service standard, an explanation of why the service standard is not met, and a plan describing the steps that have or will be taken to ensure that the product meets or exceeds the service standard in the future.
- (i)** The identification of each product, or component of a product, granted an exception from reporting pursuant to § 3055.3, and a certification that the rationale for originally granting the exception remains valid.
- (j)** Documentation showing how data reported at a given level of aggregation were derived from data reported at greater levels of disaggregation. Such documentation shall be in electronic format with all data links preserved. It shall show all formulas used, including volumes and other weighting factors.
- (k)** For each product, documentation showing how the reports required by subpart A of this part were derived from the reports required by subpart B of this part. Such documentation shall be in electronic format with all data links preserved. It shall show all formulas used, including volumes and other weighting factors.

39 C.F.R. § 3055.5—Changes to measurement systems, service standards, service goals, or reporting methodologies.

The Postal Service shall file notice with the Commission describing all changes to measurement systems, service standards, service goals or reporting methodologies, including the use of proxies for reporting service performance, 30 days prior to planned implementation. The Commission may initiate a proceeding at any time to consider such changes if it appears that the changes might have a material impact on the accuracy, reliability, or utility of the reported measurement, or if the changes might have a material impact on the characteristics of the underlying product.

39 C.F.R. § 3055.20—First-Class Mail.

(a) Single-Piece Letters/Postcards, Bulk Letters/Postcards, Flats, and Parcels. For each of the Single-Piece Letters/Postcards, Bulk Letters/Postcards, Flats, and Parcels products within the First-Class Mail class, report the on-time service performance (as a percentage rounded to one decimal place), disaggregated by mail subject to the overnight, 2-day, and 3/4/5-day service standards.

(b) Outbound Single-Piece First-Class Mail International and Inbound Single-Piece First-Class Mail International. For each of the Outbound Single-Piece First-Class Mail International and Inbound Single-Piece First-Class Mail International products within the First-Class Mail class, report the on-time service performance (as a percentage rounded to one decimal place).