

ORDER NO. 1461

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

Before Commissioners: George Omas, Chairman;
Dawn A. Tisdale, Vice Chairman;
Ruth Y. Goldway; and
Tony Hammond

Complaint on Express Mail

Docket No. C2005-1

ORDER ON COMPLAINT ON EXPRESS MAIL

(Issued April 18, 2006)

I. INTRODUCTION

Douglas F. Carlson lodged a formal complaint with the Commission pursuant to section 3662 of the 1970 Postal Reorganization Act (the Act) regarding the Postal Service's Express Mail service.¹ He asserts that the Postal Service: (1) has curtailed its Sunday and holiday delivery and is no longer providing adequate postal services on those days; (2) has inappropriately reduced the delivery area for Saturday and eve of holiday acceptance of mailpieces; (3) has established a new type of Second Delivery Day Express Mail service without first seeking an advisory opinion from the Commission; (4) provides misleading or inaccurate information; and (5) is using unfair and inefficient acceptance procedures. The Complainant asks that the Commission hold hearings, and issue a public report documenting the changes that the Postal Service made to Express Mail service without first requesting an advisory opinion from the Commission. He further requests a recommended decision from the Commission

¹ Douglas F. Carlson Complaint on Express Mail, February 18, 2005 (Complaint).

establishing a classification and rate for Second Delivery Day Express Mail service pursuant to 39 U.S.C. § 3662, or § 3623(b).

The Postal Service filed an Answer addressing each paragraph in the Complaint.² It further argues that the Complainant is not entitled to the relief requested and the Complaint should be dismissed without further proceedings.

The Commission finds that parts of Counts 1, 2 and 3 of the Complaint have merit. With respect to Count 3 of the Complaint, the Commission is, concurrently with this Order, initiating a mail classification case to clarify ambiguous DMCS language regarding Second Delivery Day Express Mail service. For the reasons discussed below, the Commission has determined to refrain from taking further action on all of the counts of the Complaint except Count 3.

II. THE EXPRESS MAIL COMPLAINT

Upon filing, Mr. Carlson's complaint was designated as Docket No. C2005-1 for administrative purposes, pending a decision on whether to proceed on the merits. The Complaint includes identification of the Complainant; a statement of the grounds for the complaint and the statutory policies at issue; a description of similarly affected classes of persons; and a description of the relief sought. The filing also includes five exhibits. Exhibit 1 is a set of sample printouts from the Postal Service website for Express Mail sent on Friday, December 24, 2004, to Santa Cruz and Berkeley, California. Exhibit 2 is a copy of a page from the September/October 2004 issue of the Postal Service publication, *Mailers Companion*. Exhibit 3 is a copy of part of the *Shipping & Mailing Holiday Guide*. Exhibit 4 is the Postal Service's December 23, 2004 Press Release No. 04-097. Exhibit 5 is a copy of a Freedom of Information Act Request dated January 11, 2003, from Mr. Carlson to the Postal Service and the corresponding response.

² Answer of United States Postal Service, May 5, 2005 (Answer).

A. Grounds for Filing the Complaint

The Complainant claims that the Postal Service's Express Mail service is deficient and appropriate for Commission review under section 3662 because it does not conform to the policies of the Postal Reorganization Act in the following five ways.

Curtailment of Sunday and holiday delivery. Mr. Carlson alleges that the Postal Service stopped delivering Express Mail on Sundays and holidays to a substantial majority of ZIP Codes nationwide in 2001 or 2002. He alleges that as of December 24, 2004, the Postal Service only delivers to 13,122 ZIP Codes on Sundays and holidays out of approximately 43,000 active ZIP Codes. Complaint at 4, ¶ 17. Thus, he contends, the Postal Service changed the nature of postal services on a nationwide or substantially nationwide basis without first obtaining an advisory opinion from the Commission as required by 39 U.S.C. § 3661(b). Accordingly, he alleges that the Postal Service is no longer providing adequate delivery services on Sundays and holidays in violation of the Act's requirement that the Postal Service develop and promote "adequate and efficient postal services." 39 U.S.C. § 3661(a).

Reduction in overnight delivery area for Saturday and eve of holiday acceptance. Mr. Carlson alleges that the Postal Service shrank the breadth of the overnight network for Express Mail sent on Saturdays and eves of holidays in 2001 or 2002 to only a small fraction of destination ZIP Codes in up to 15 states. *Id.* at 7, ¶ 31. He contends that by substantially shrinking the radius of this overnight network, the Postal Service lowered the value of service and changed the nature of postal services on a nationwide or substantially nationwide basis without first obtaining an advisory opinion as required by 39 U.S.C. § 3661(b).

New Second Delivery Day service. Mr. Carlson contends that the Postal Service developed and implemented a new Express Mail service called Second Delivery Day which does not appear in the DMM or DMCS. *Id.* at 6, ¶ 27. This service, he alleges, applies when Express Mail would otherwise be guaranteed for delivery on a Sunday or holiday in a destination ZIP Code or post office box for which Sunday and holiday delivery are not available. He also alleges that the March 2004 version of Label 11-B,

Express Mail Mailing Label — Post Office to Addressee, has been revised to show three possible delivery days: Next, 2nd, and 2nd Del. Day. *Id.* at 6, ¶ 26. Accordingly, he contends that the Postal Service was required under 39 U.S.C. §§ 3621, 3622(a), and 3623(b) to request a recommended decision from the Commission before establishing a classification or rate for this lower valued, Second Delivery Day Express Mail service or shifting some Express Mail volume to this service. *Ibid.*, ¶ 27.

Misleading information provided by the Postal Service. The Complainant alleges that despite the above-listed service changes, the Postal Service misleads customers into believing that Sunday and holiday delivery are widely available. He points to the September/October 2004 issue of *Mailers Companion*, a statement by a Postal Service spokesman, the *Shipping & Mailing Holiday Guide* sent by the Postal Service, and the December 23, 2004 Postal Service press release No. 04-097 to support his allegations. *Id.* at 7-10, ¶¶ 35, 37 and 38. He contends that while the Second Delivery Day service offering does permit the Postal Service to provide accurate information to customers about service guarantees at the time of mailing, the information provided to customers prior to their visit to the post office may leave them relying on Postal Service advertisements to their detriment. *Ibid.*, ¶ 38.

Unfair and inefficient acceptance practices. The Complainant alleges the Postal Service fails to provide efficient postal services within the meaning of 39 U.S.C. § 3661(a) when the Postal Service does not offer Next Day or Second Day service to customers who enter the line at a retail window with a properly prepared Express Mail article that is ready for shipment when those transactions are not processed by the cut-off time. *Id.* at 10, ¶ 42. The Complainant alleges that the DMCS language from section 123.1, which he believes applies to this situation, “tendered by the time or times specified by the Postal Service” is the point in time when the customer enters the line at a retail window with a properly prepared Express Mail article since the customer has done all he/she can do to present the item for acceptance. *Ibid.*, ¶ 43. He further alleges that some post offices do not guarantee Express Mail for delivery on Sundays and holidays even when the retail terminal correctly indicates that such service is

available and guaranteed. *Ibid.*, ¶ 44. Additionally, the Complainant contends that some post offices advise customers that printed Express Mail Next Day service directories are unavailable even though DMM § 5005.5.2 says that such directories are available at post offices. *Ibid.*, ¶ 46. He also contends that the Postal Service does not provide sufficient information to allow customers to determine the service guarantee that will apply to an item that is deposited in an Express Mail collection box. *Ibid.*, ¶ 47.

B. Relief Requested and Jurisdiction

Relief requested. Mr. Carlson requests that the Commission issue a recommended decision establishing both a classification and rate for Second Delivery Day Express Mail service pursuant to 39 U.S.C. § 3662, or, in the alternative, a new classification for Second Delivery Day Express Mail service pursuant to 39 U.S.C. § 3623(b). *Ibid.*, ¶ 50. He further requests that the Commission conduct a hearing and issue a public report to document the changes described in his Complaint. *Ibid.*, ¶ 51.

Jurisdiction. The Complainant asserts that the Commission's jurisdiction to hear this matter is founded on 39 U.S.C. § 3662. *Id.* at 1-2, ¶ 4. Section 3662 establishes the Commission's authority to hear rate and service complaints. Section 3661(b) requires the Postal Service to submit a proposal to the Commission requesting an advisory opinion on any change in the nature of postal services that will generally affect service on a nationwide or substantially nationwide basis. Mr. Carlson asserts that if the Postal Service changes the nature of postal services in a way that generally affects service on a nationwide or substantially nationwide basis without first requesting an advisory opinion from the Commission, the Commission has jurisdiction to hear a complaint filed pursuant to 39 U.S.C. § 3662 on those services. He further asserts that he is an interested party within the meaning of section 3662 because he uses the Express Mail service. *Id.* at 1, ¶ 3.

III. THE POSTAL SERVICE ANSWER

The Postal Service filed its Answer to the Complaint on May 5, 2005. The Postal Service's Answer addresses each specific paragraph of the Complaint, avers additional facts where it believes they are appropriate, and sets forth the Postal Service's position on each of Mr. Carlson's claims. The Postal Service contends that the Complainant is not entitled to the relief requested and that the complaint should be dismissed without further proceedings. It states that its actions with respect to Express Mail have been entirely consistent with its statutory obligations, including its obligation to develop and promote adequate and efficient postal services under 39 U.S.C. § 3661(a); are consistent with applicable sections of the DMCS; and do not constitute a nationwide change in service requiring an advisory opinion under 39 U.S.C. § 3661(b). It also states that overall, the information provided to customers about Express Mail service is not misleading or inadequate, notwithstanding occasional inadvertent or unavoidable error. It contends that such occasional inadvertent errors should not become the subject of Commission scrutiny as a result of the Complaint. The Postal Service further argues that its Express Mail services, including service for pieces that are marked Second Delivery Day, are consistent with applicable law and the DMCS, and, therefore, it is unnecessary and inappropriate for the Commission to initiate a classification proceeding pursuant to 39 U.S.C. § 3623(b). Answer at 22-23.

Curtailment of Sunday and holiday delivery service. The Postal Service admits that during the time when Docket No. R2000-1 was being litigated, the Postal Service had in place a national Express Mail network that was designed, in part, to permit delivery of Express Mail to a large percentage of addresses in the United States on Sundays and holidays. The Postal Service further states that during this time period, the Postal Service guaranteed and delivered Next Day and Second Day Express Mail to a majority of addresses in the United States on Sundays and holidays with varying degrees of reliability. *Id.* at 5.

The Postal Service notes that on or about April 27, 2001, the Postal Service's ability to deliver Express Mail on Sundays and holidays to a number of ZIP Codes

nationwide changed due to a number of factors. First, in the preceding years, the Postal Service experienced significant problems with the reliability of its transportation network for Express Mail, including problems with the Eagle network, commercial lift and surface transportation. The Postal Service believed that these problems were serious and ongoing, and determined that corrective action was necessary. As part of that corrective action, the Postal Service contracted with Federal Express (FedEx) for provision of more reliable air transportation for Express Mail and other classes of mail. It notes that one limitation of this improved Express Mail transportation network was that it provided no service on Saturday nights, Sunday nights, and some federal holidays. Logistical gaps in the more reliable Express Mail air transportation network were required to be filled by the previous network and commercial aviation which remained unreliable and in some cases unavailable. The Postal Service found that it could no longer establish the transportation links necessary to support Sunday and holiday delivery in a number of ZIP Codes. The Postal Service admits that it did not issue broad public notifications specifically addressing this change in circumstances other than informing customers at the retail window when Sunday or holiday delivery could not be expected for their Express Mail shipments to affected ZIP Codes. *Id.* at 6. It states that as of the date of its answer, the Postal Service delivers to 13,928 ZIP Codes nationwide on Sundays and holidays, the destination of approximately 73.7% of Express Mail. *Id.* at 7.

Accordingly, the Postal Service states that it did not enact a policy or take action at ending delivery of Express Mail on Sundays and holidays to a substantial majority of ZIP Codes nationwide. Rather, it experienced problems with its Express Mail transportation network, and the solution led to collateral effects on its ability to maintain Next Day and Second Day delivery on Sundays and holidays to a number of ZIP Codes. *Ibid.* In sum, the Postal Service denies that it is failing to provide adequate and efficient postal services by curtailing its Sunday and holiday delivery service.

Reduction in overnight delivery area for Saturday and eve of holiday acceptance.
The Postal Service admits that as a collateral effect of its efforts to correct problems

with its Express Mail transportation network, it experienced a reduction in the scope of the overnight network for Express Mail sent on Saturdays and eves of holidays. It states that the extent to which Next Day Express Mail service is typically available for delivery on Sundays and on holidays varies according to the origination and destination ZIP Codes and the availability of surface and commercial air links necessary to permit such delivery and whether the volume levels experienced at a particular destination ZIP Code are determined to justify maintaining Sunday and holiday delivery capacity. *Id.* at 13.

The Postal Service denies that it has lowered the value of Express Mail service and states that the value of service for Express Mail does not depend solely on the scope of the overnight delivery network for Express Mail sent on Saturdays and eves of holidays, but rather on an evaluation and weighing of many intrinsic factors including network scope, size of the collection system, tracking capacity, service performance against the stated service standard, and the availability of a guarantee.³ It denies that this reduction in the scope of the overnight network for Express Mail sent on Saturdays and eves of holidays changed the nature of Express Mail service on a nationwide or substantially nationwide basis. *Ibid.*

Second Delivery Day service. The Postal Service denies that it has developed a new Express Mail service offering called Second Delivery Day. *Id.* at 8. It asserts that the change in wording is merely an effort to more accurately communicate to customers the intent of the existing classification. The Postal Service admits that if an Express Mail piece is destined for a ZIP Code where Sunday or holiday delivery is not available and would otherwise be guaranteed for delivery on that Sunday or holiday, it guarantees that Express Mail piece for delivery on the second delivery day. Under those circumstances, the Postal Service may deliver the item on the next day after the second calendar day, provided that next day is not a Sunday or holiday. Additionally, if an Express Mail item is entered before the cut-off on a Friday, and Next Day service is not

³ The Service notes that the relatively high price elasticity (in absolute value) for Express Mail suggests that Express Mail has for many years had a very low economic value of service. Answer at 14 (citing Docket No. R2001-1, USPS-T-27 at 27).

available to the destination, the item ordinarily will be delivered on the following Monday (or Tuesday, if Monday is a holiday). The Postal Service admits that in the circumstances above, Express Mail guaranteed for delivery on the second delivery day is guaranteed for delivery three or four calendar days after mailing. *Ibid.*

The Postal Service admits that 807 ZIP Codes designated exclusively to post office boxes provide Sunday and holiday delivery. *Id.* at 9. However, it states that there are 13,928 ZIP Codes with post office boxes within them that receive Express Mail on Sundays and holidays. The Postal Service admits that Express Mail items destined for post office boxes for which Sunday and holiday delivery is not available may be marked as 2nd Del. Day on the Day of Delivery section of the March 2004 Label 11-B.⁴

The Postal Service denies that the term Second Delivery Day denotes an Express Mail service distinct from Express Mail Second Day service. *Id.* at 11-12. It also takes issue with the assertion that the Postal Service has established a classification or rate for a Second Delivery Day Express Mail service, or that it has shifted Express Mail volume from guaranteed Second Day service to Second Delivery Day service. It further denies that the term Second Delivery Day does not appear in the DMCS. It highlights DMCS section 182.4 which contains references to second delivery day service.⁵

It explains that it has not filed a request for a recommended decision from the Commission to establish a classification or rate for a distinct Second Delivery Day

⁴ The Postal Service qualifies this response by stating that a previous version of the March 2004 Label 11-B may be used instead. In such a case, the item ordinarily would have been marketed as "2nd" and guaranteed for delivery on a Sunday or holiday if such Sunday and holiday delivery service were available. This is because the prior versions of that form did not show a check box for "2nd Del. Day."

⁵ DMCS section 182.4 states:

Except as provided in 182.5, the Postal Service will refund postage for Second Day Express Mail not available for claim or not delivered:

- a. By 10:00 a.m., or earlier time(s) specified by the Postal Service, of the second delivery day in the case of Post Office-to-Post Office service;
- b. By 3:00 p.m., or earlier time(s) specified by the Postal Service, of the second delivery day in the case of Post Office-to-Addressee service.

Express Mail service because it does not believe that such a request is necessary. *Ibid.*; *id.* at 23.

Misleading information provided by the Postal Service. The Postal Service denies that it makes a policy or practice of misleading customers regarding the availability of Express Mail Sunday and holiday delivery service. *Id.* at 14-15. It admits that the September/October 2004 issue of *Mailers Companion*, the statement by a Postal Service spokesman, the *Shipping & Mailing Holiday Guide* sent by the Postal Service,⁶ and the December 23, 2004 Postal Service press release No. 04-097 cited by the Complainant are accurately presented, but it argues they are not misleading. *Id.* at 15-17.

Unfair and inefficient acceptance practices. The Postal Service admits that when customers present Express Mail items at a retail window equipped with a Postal Service computerized retail terminal, they receive the delivery guarantee pertaining to their Express Mail items as reported by the retail terminal. *Id.* at 18. Depending on the origin and destination of the items, a number of different cut-off times for Next Day delivery may apply. The Postal Service admits that for Express Mail pieces entered at a post office's retail window, the cut-off time for Express Mail overnight delivery is determined when the Express Mail piece is presented at the retail window for mailing, regardless of when the customer enters the post office and whether the transportation used to enable overnight service has departed the post office. *Id.* at 18-19. The Postal Service states that the practicalities of running a post office in an efficient, orderly manner sometimes require the establishment of operating rules such as Express Mail cut-off times, rather than relying on ad hoc arrangements that might require individual window clerks to ascertain eligibility for Next Day service based upon whether the clerk has knowledge of the status of transportation arrivals and departures, and whether that clerk estimates that a mailpiece entered at his or her window will be placed upon particular vehicles for

⁶ The Postal Service notes that in this publication the following footnoted language appears: "Express Mail service overnight delivery to most major markets, including Saturday at no extra cost. Sunday and holiday delivery available to select ZIP Code™ locations at no extra cost. Some restrictions apply, call or visit your local Post Office™ for details." *Id.* at 16.

transportation to a processing facility. The Postal Service does not believe that it is violating DMCS section 123.1 or 39 U.S.C. § 3661(a) by following such practices. *Id.* at 19.

The Postal Service denies that some post offices, as a matter of policy or practice, do not guarantee Express Mail for delivery on Sundays or holidays even when the retail terminal correctly indicates that Sunday or holiday delivery is available and guaranteed. *Id.* at 20. The Postal Service admits that some post offices may from time to time advise customers that printed Express Mail Next Day service directories are unavailable; however, at post offices having electronic terminals, the Express Mail Next Day service directory is available in electronic form and may be viewed by customers at the retail window. *Ibid.* With respect to deposits in Express Mail collection boxes, the Postal Service states that collection times at Express Mail collection boxes are established such that mail deposited in the collection box before the last collection of the day will receive the same service as an identical Express Mail piece entered at a retail window before the earliest cut-off time in that jurisdiction. *Id.* at 20-21.

IV. COMMISSION ANALYSIS

The Complaint is brought pursuant to 39 U.S.C. § 3662, Rate and service complaints. With respect to filing complaints, § 3662 provides:

Interested Parties ... who are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe.

39 U.S.C. § 3662. Thus, for a complaint to satisfy the statutory elements, a Complainant must demonstrate “(1) that the Complainant is receiving (or not receiving) the service in question, and (2) a belief that the service in question is not in accordance with the policies of the Act.”⁷

⁷ PRC Order No. 1307, March 20, 2005, at 7. Here, the Postal Service does not challenge that Complainant has met the first element of the statutory requirements.

Once a party has demonstrated that the complaint meets these two statutory requirements, the Commission has discretion to decide whether or not to hear the complaint or certain counts of that complaint.⁸ The Commission's rules inform its discretion in this regard. Commission rule 82 provides:

The Commission shall entertain only those complaints which clearly raise an issue concerning whether or not rates or services contravene the policies of the Act; thus, complaints raising a question as to whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user or with regard to an individual, localized, or temporary service issue not on a substantially nationwide basis shall generally not be considered as properly raising a matter of policy to be considered by the Commission.

39 C.F.R. § 3001.82.⁹ This rule allows the Commission to “entertain complaints raising rate and service issues that contravene the policies of title 39 and that have nationwide implications.” PRC Order No. 1307 at 11-12.

Whether each count of the Complaint meets the statutory requirements and whether the Commission should exercise its discretion to hear those counts is analyzed below.

Accordance with policies of the Act/Commission discretion. As discussed above, once the Complainant shows that he is receiving (or not receiving) the service in question, he must demonstrate a belief that the service in question is not in accordance with the policies of the Act and that the Commission should exercise its discretion to hold hearings on the complaint. *Id.* at 8. Mr. Carlson attempts to show that Express Mail service is not in accordance with the policies of the Act in five separate ways: Count 1, Curtailment of Sunday and Holiday Delivery; Count 2, Reduction in Overnight

⁸ *Id.* at 11 (citing 39 U.S.C. § 3662 which states “[t]he Commission may in its discretion hold hearing on such complaint.”).

⁹ Mr. Carlson has made no allegation that this case is an exception to the general rule of 39 C.F.R. § 3001.82 requiring that the subject matter of the Complaint be “on a substantially nationwide basis” and be more than just an issue “to a particular mail user or with regard to an individual, localized, or temporary service issue.”

Delivery Area for Saturday and Eve of Holiday Acceptance; Count 3, New Second Delivery Day Service; Count 4, Misleading Information Provided by the Postal Service; and Count 5, Unfair and Inefficient Acceptance Practices. Mr. Carlson's five counts are addressed below.

a. Counts 1 and 2. These two counts are factually related.¹⁰ They deal with the Postal Service's decision to contract with FedEx for air transportation of Express Mail. Due to this contract, beginning on or about April 27, 2001, the Postal Service's network no longer provides Sunday and holiday delivery nor acceptance of mailpieces for overnight and second calendar day delivery on Saturdays or eves of holidays for certain customers. Mr. Carlson bases his argument that the service is no longer in accordance with the policies of the Act on the Postal Service's alleged failure to seek an advisory opinion for this change as required by § 3661(b), and the Postal Service requirement to develop and promote adequate and efficient postal services, § 3661(a). First, the Commission turns to the allegations that the Postal Service failed to seek an advisory opinion as required by § 3661(b).

As noted in Commission Orders Nos. 1307, 1312, 1239 and 1320 an alleged failure to follow the requirements of § 3661(b) can demonstrate a reasonable belief that the services in question are not in accordance with the policies of the Act.¹¹ However, for the Commission to hear a complaint on this basis, the § 3662 "belief" of an alleged failure to follow the requirements of § 3661(b) must be reasonable and not merely a "naked assertion." PRC Order No. 1307 at 9. At this point, to satisfy this requirement of

¹⁰ Counts 1 and 2 differ in that Count 1 deals with delivery of Express Mail on Sundays and holidays whereas Count 2 deals with Saturday and eve of holiday acceptance of Express Mail. They are two sides of the same coin.

¹¹ PRC Order No. 1307 at 8-10 (finding that the Postal Service's failure to request an advisory opinion under § 3661(b) on alleged changes to either Sunday, holiday, or holiday eve service may be heard as a complaint under § 3662 if certain other criteria are met); PRC Order No. 1312 at 4-6 (reaffirming PRC Order No. 1307 that § 3661(b) can sustain a complaint under § 3662 and bring into question the policies that underline the procedural requirements of § 3661(b)); PRC Order No. 1239 at 10 ("[T]o the extent that the § 3662 complaint mechanism has been viewed as a remedial supplement to the review of substantially nationwide service changes required under § 3661, consideration of a Postal Service action purportedly in violation of § 3661 in a complaint proceeding appears compatible with the statutory scheme of the Reorganization Act." (footnote omitted)); see *also* PRC Order No. 1320.

§ 3662, the Complainant must make out a colorable claim of a violation of § 3661(b).

*Ibid.*¹²

To begin this analysis, the Commission starts with the requirements of § 3661(b). It provides:

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

39 U.S.C. § 3661(b). This statute places the burden on the Postal Service to request an advisory opinion from the Commission when it is contemplating a change to a service if the change (1) involves a change to the nature of a postal service, and (2) affects service on a nationwide or substantially nationwide basis. PRC Order No. 1307 at 10.¹³

The facts necessary for the Commission to formulate an opinion on this issue are admitted by the Postal Service in its Answer. These relevant facts are as follows: (1) the Postal Service did not request an advisory opinion on the reduction in the overnight delivery network due to the FedEx contract; (2) "on or about April 27, 2001, the Postal Service's ability to deliver Express Mail on Sundays and holidays to a number of ZIP Codes nationwide changed;"¹⁴ (3) the Postal Service reduced the scope of the overnight network for Express Mail sent on Saturday and the eves of holidays;¹⁵ and (4) the Postal Service now only delivers to 13,928 ZIP Codes nationwide on Sundays and holidays out of approximately 42,500 active ZIP Codes.¹⁶

¹² As noted in PRC Order No. 1307, the colorable claim standard is appropriate because a higher standard could require the Commission to hear evidence on the complainant's allegations prior to deciding whether or not the case may proceed past the Complaint and Answer stage. *Ibid.* This would be inappropriate because, in many cases, such an evidentiary-based ruling would also be conclusive as to the outcome of the complaint.

¹³ See, e.g., PRC Docket No. N89-1.

¹⁴ Answer at 6.

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 7.

These facts clearly indicate that on or about April 27, 2001, the Express Mail network for mailpiece acceptance on Saturdays and the eve of holidays as well as mailpiece delivery on Sundays and holidays changed on a substantially nationwide basis. The Commission finds that this is a change in the nature of postal services. The Postal Service believes that this change, because it was due to “collateral effects,” does not provide a basis for initiating a § 3661(b) proceeding. However, such an interpretation is incorrect. The Postal Service’s motivation for a change in the nature of postal services is immaterial. As a direct consequence of changing the Express Mail transportation network, this change in the nature of postal services should have been brought to the Commission pursuant to a § 3661(b) proceeding. The statutory language does not contain an exception to § 3661(b) requirements for “collateral effects.” In fact, the statutory scheme set up by Congress is quite clear on its face that changes to the nature of a postal service affecting service on a substantially nationwide basis must be brought to the Commission for a public hearing and advisory opinion. An interpretation that § 3661(b) proceedings are unnecessary when changes in service are the result of “collateral effects” would render the provision meaningless since many changes in service could be couched as due to collateral effects and prevent timely public comment and Commission advice to the Postal Service.

A post-hoc examination of the Postal Service’s Express Mail network changes through allegations in a complaint and not through a more formal § 3661(b) proceeding frustrates the purposes of the Act’s public participation provision and provides for a much less reliable Commission analysis. It also does not allow the Commission and the Postal Service — prior to costly implementation — to consider potential suggestions, alternatives and trade-offs presented by customers through the course of these public proceedings. This underscores the importance that the Postal Service follow the Act with respect to § 3661(b).

In several recent dockets, the Commission has strived to clarify the appropriate scope of § 3661 Requests.¹⁷ The Postal Service recently filed a Request for an Advisory Opinion concerning its plans to alter processing and transportation practices in a way likely to impact service on a nationwide basis under § 3661.¹⁸ The Commission trusts that its recent clarification and the recent developments in Docket No. N2006-1 will aid the Postal Service and mailing public in reaching a better understanding of the breadth of § 3661 and the matters that are necessary and proper for filing Requests under that section of the Act.

This does not suggest that the Postal Service should not be more efficient or otherwise improve the reliability of its transportation or processing networks. It means simply that Congress provided the mailing public the opportunity to be heard in a neutral public forum *before* changes in service were imposed upon them. After giving reasonable notice, the Postal Service might well decide to proceed with certain changes, but it would do so informed by public comments and the advice of the Postal Rate Commission.

Here, the Postal Service should have given notice to potential participants prior to making changes to its Express Mail network. Its failure to do so was contrary to Congressional intent and statutory requirements. It also contributed to public confusion as to these nationwide changes since one of the benefits of a Commission proceeding is to notify the public of potential changes. As a result, the public is harmed.

However, the issues raised by Mr. Carlson with respect to Counts 1 and 2 of the Complaint are broader than just whether the Postal Service failed to request an advisory opinion as required by § 3661(b). Mr. Carlson also believes that his allegations show that Express Mail service is no longer in accordance with the policies

¹⁷ Order No. 1455, March 3, 2006, at 19-20; and Public Report — Complaint on First-Class Mail Standards Service, Docket No. C2001-3, April 17, 2006, at 1-3.

¹⁸ See *generally* Docket No. N2006-1.

of the Act with respect to the requirements of § 3661(a).¹⁹ Mr. Carlson avers that he received Express Mail delivery service on Sundays and holidays in the past, and that the Postal Service's failure to continue providing such delivery is a violation of its duty to provide "adequate" postal services.

However, Mr. Carlson does not provide sufficiently descriptive particulars for his allegation that the Postal Service "no longer provides adequate" Express Mail service due to the FedEx contract. A loss of service does not on its own mean that the "adequate and efficient" clause of § 3661(a) is being violated. Mere allegations of policy violations without particulars are ordinarily not enough to sustain a complaint. Moreover, the policy that Mr. Carlson alleges that the Postal Service is violating here, the "adequate and efficient" clause of § 3661(a), has an economic component. The Complainant has not made representations related to the economic feasibility of what he views as minimally adequate service. Accordingly, this portion of Mr. Carlson's Complaint is deficient and fails to meet the requirements of § 3662 since it does not sufficiently allege a policy violation of the Act.

b. Count 3. In this count of the Complaint, Mr. Carlson brings into question whether the Second Delivery Day Express Mail service offered by the Postal Service as a result of the FedEx contract is currently classified in and allowed by the DMCS.²⁰ Mr. Carlson alleges that it is not, and that it is a violation of the policies of the Act, and specifically 39 U.S.C. §§ 3621, 3622(a) and 3623(b), for the Postal Service to fail to request a recommended decision from the Commission before establishing a classification or rate for this Second Delivery Day Express Mail service. The Postal Service argues that this service is currently classified in the DMCS, and accordingly, it

¹⁹ See *Buchanan v. United States Postal Service*, 508 F.2d 259, 264 (5th Cir. 1975): "Section 3662 complements § 3661, and together they form a harmonious scheme. ... Although § 3662 is a more limited remedy, it insures that an unexpansive interpretation of § 3661 will not leave remediless the postal user dissatisfied by changes that do not rise to the level of those covered by § 3661."

²⁰ The DMCS provisions at issue here have not been changed since well before the FedEx contract was implemented and remain unchanged today. Compare PRC Op. R2000-1, App. Two §§ 123.1, 182.4 (November 13, 2000) with DMCS §§ 123.1, 182.4 (January 8, 2006).

did not need to seek a recommended decision from the Commission before instituting this service.

The creation of new domestic postal services without a Commission recommendation is not permitted.²¹ Unrestrained, such action could upset the checks and balances and public participation requirements established as postal policy in the Act. Section 3662 complaints are one method to allow the public to make sure that the Postal Service is following this Congressional policy and to assure that the DMCS language recommended by the Commission is not improperly interpreted by the Postal Service. Because the Postal Service almost always interprets the DMCS language in the first instance, disallowing a complaint seeking clarification of the DMCS language would be tantamount to tacit approval of the Postal Service's interpretation. Accordingly, when it comes to issues of interpretation of DMCS language, absent countervailing considerations, the Commission will clarify any ambiguous DMCS language that may be brought to light through a complaint proceeding.

As discussed in the previous analysis of Counts 1 and 2 of the Complaint, one of the unfortunate side effects of the Postal Service's failure to submit a § 3661(b) proposal is the resulting uncertainty and lack of clarity in the current DMCS language regarding delivery days. Had the Postal Service given advance notice of its intentions, the potential confusion might well have been identified and corrected. As it stands, several DMCS provisions call for second day delivery, when, in certain limited circumstances, the Postal Service does not expect to provide better than third or fourth day delivery. This situation can and should be remedied promptly. The Postal Service's attempt to use the Express Mail DMCS "refund" provision in section 182.4 to interpret DMCS section 123.1, the applicable provision cited by the Complainant, is not an adequate solution.

²¹ See PRC Order No. 1424 at 3 ("For those [services] that are postal services, within the meaning of the proposed rule, the Postal Service has an obligation to request a recommended decision before commencing service or charging rates."); *cf* 39 U.S.C. § 3624(d) ("The Commission shall transmit its recommended decision in a rate, fee, or classification matter to the Governors."); 39 U.S.C. § 3625(a) ("Upon receiving a recommended decision from the Postal Rate Commission, the Governors may approve, allow under protest, reject, or modify that decision in accordance with the provisions of this section.").

The Commission may initiate a proceeding to clarify DMCS language. See 39 U.S.C. § 3623(b). Accordingly, concurrently with this Order, the Commission is initiating a classification proceeding to clarify the ambiguous language related to Second Day Express Mail service. In that classification proceeding, the Commission will solicit comments and suggestions on how best to clarify the scope of Second Day Express Mail service that the Postal Service intends to provide its customers. The intended scope of that docket is solely to clarify existing language that is subject to confusion on second delivery day service offerings based upon admissions and statements of the Postal Service and its counsel in pleadings in this case.

c. Count 4. This count of the Complaint contains allegations that the Postal Service misleads customers into believing that Sunday and holiday delivery are available nationwide. The Postal Service denies that it makes a policy or practice of misleading customers on the availability of Express Mail Sunday and holiday service, although it acknowledges that the four alleged misleading statements cited by the Complainant were made. In order for a Complaint based upon misleading statements to become the subject of Commission inquiry, a Complainant must plead supportable factual allegations showing the existence of a pattern or practice of deceiving customers. Mr. Carlson's Complaint does not allege sufficient particulars to cause the Commission to make an inference of a pattern or practice of misleading statements. Additionally, Mr. Carlson does not directly state which postal policy he believes that this count of the Complaint violates. In the Commission's discretion, it finds that the unfortunate incidents identified by the Complainant do not rise to a level that justify holding hearings given the Postal Service representations that it will strive to assure accurate information is provided to customers regarding when Express Mail will be delivered.

d. Count 5. In this count of the Complaint, Mr. Carlson alleges that the Postal Service fails to provide "efficient" postal services within the meaning of § 3661(a) when it does not offer Next Day or Second Day Express Mail service to customers who enter the retail window line with an article that is ready for shipment but whose

transaction is not processed by the retail window clerks by the cut-off time. The Postal Service admits that the cut-off time is determined when the article is presented at the retail window for mailing, regardless of when the customer enters the post office and whether the transportation used to enable overnight service has departed the post office.

The Commission finds that this collection technique cannot be considered as not in accordance with the policies of the Act for purposes of § 3662. The Commission cannot find that having the time of a transaction as the cut-off time for determining service is either unfair or inefficient, and Carlson does not allege any specific benefit or efficiency to instituting a “get in line” cut-off time.²² If anything, due to the fact that the Postal Service does not know when a customer will reach the retail window, Mr. Carlson’s collection technique would promote a less reliable Express Mail service. As the Postal Service notes, the practicalities of administering a post office in an orderly manner sometimes requires cut-off times rather than relying on arrangements that could require a particular window clerk to know whether a particular truck has departed from a facility. Accordingly, Count 5 does not satisfy § 3662 and will not be heard by the Commission.

²² *Accord* PRC Order No. 1307 at 14.

It is ordered:

1. The Commission refrains from taking further action on all of the counts of the Complaint except Count 3.
2. With respect to Count 3, concurrently with this Order, the Commission is initiating a classification case to clarify ambiguous DMCS language regarding Second Delivery Day Express Mail service.

By the Commission

(SEAL)

Steven W. Williams
Secretary