

UNITED STATES OF AMERICA
BEFORE THE POSTAL REGULATORY COMMISSION
Washington, DC 20268

**First-Class Mail and Periodicals
Service Standard Changes, 2021**

Docket No. N2021-1

**STATEMENT OF POSITION OF
THE PRISON POLICY INITIATIVE, INC.**

Pursuant to Rule 3020.123(g) of the Commission's rules of practice, and the Presiding Officer's Ruling Further Adjusting Procedural Schedule and Pre-Hearing Filings (Ruling No. N2021-1/11), the Prison Policy Initiative, Inc. hereby submits the following statement of position regarding the Postal Service's proposed revisions to service standards governing First-Class Mail. We submit these comments on behalf of the millions of incarcerated people in the United States who depend on First-Class Mail perhaps more extensively than any other constituency in today's world. As explained herein, evidence produced by the Postal Service indicates that the proposed degradation of mail delivery would be devastating for incarcerated people, a group that lacks access to electronic alternatives. In addition, numerous legal inadequacies plaguing the Postal Service's plan require the Commission to issue an advisory opinion concluding that the proposed service standards do not comply with applicable statutory requirements.

I. Incarcerated People Are Uniquely Dependent on First-Class Mail

Approximately 2.3 million people are incarcerated in the United States on any given day, and the total number of people cycling through prison and jail each year exceeds 10 million (given the frequent churn of people in and out of local jails).¹ These millions of people represent a significant population that is uniquely sensitive to changes

¹ Wendy Sawyer & Peter Wagner, [Mass Incarceration: The Whole Pie 2020](#) (Mar. 24, 2020).

in postal rates and service standards, given a level of dependence on First-Class Mail that is unusual in modern life.

The Postal Service frames its proposal to degrade First-Class Mail service standards by pointing to the general trend toward electronic substitution.² Yet none of the electronic alternatives referenced by Mr. Montieth are available to incarcerated postal customers. People in prison and jail are reliant on postal mail to file tax returns (as hundreds of thousands of incarcerated people did recently to claim economic impact payments under the CARES Act³); file documents in court; conduct personal business; monitor credit reports for purposes of preventing identity theft; remain involved in family affairs; and maintain personal, professional, and familial relationships.

Moreover, even when certain prison or jail systems offer electronic correspondence options, such systems are generally inferior to First-Class Mail because the electronic alternatives are beset by defects in utility (by requiring recipients to register with a proprietary system), functionality (by prohibiting formatting or attachments), and privacy (by failing to offer even the most minimal data protections).⁴

Accordingly, incarcerated postal customers represent a rare group for whom Justice Holmes' observation still rings true: "the use of the mails is almost as much a part of free speech as the right to use our tongues."⁵ While the proposed degradation in service standards does not directly impact the *right* of incarcerated people to use the mail, the proposal does vitiate the value and utility of First-Class Mail to incarcerated

² Direct Testimony of Steven W. Monteith (USPS-T-4), PRC Dkt. No. N2021-1, at 9:10-11:2 (Apr. 21, 2021).

³ Lief Cabraser Heimann & Bernstein, "[CARES Act Relief for Incarcerated Americans](#)" (last accessed Jun. 15, 2021).

⁴ See generally, Stephen Raher, *You've Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation* (Jan. 21, 2016) (discussing benefits and drawbacks of electronic messaging systems in prisons); Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 *Hastings Race & Poverty L.J.* 3, 40-46 (2020) (discussing the lack of privacy protections as applied to electronic communications in correctional facilities).

⁵ *U.S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burlison*, 255 U.S. 407, 437 (Holmes, J., dissenting).

customers in contravention of the policies established by the Congress and set forth in the Postal Accountability and Enhancement Act (“PAEA”).⁶

II. The Proposed Service Standards Fail to Comply with the Requirements of Section 301 of the PAEA

The service standards that are the subject of this proceeding are governed by section 301 of the PAEA.⁷ The legislative purpose underlying this statutory provision is “to achieve the general policy goals of mail reliability and speed, and [to] specify the amount of time within which a customer may ordinarily expect his mail to be delivered.”⁸ Section 301 contains four mandatory objectives that must be achieved under service standards for market-dominant products.⁹ Compliance with the four objectives is informed by eight statutory factors that the Commission must consider.¹⁰ The Postal Service bears the burden of proving compliance with the governing statutory provisions.¹¹

While the current proposal seems to have no impact on the fourth statutory objective (external performance measurements), the proposal unquestionably fails to meet the other three objectives. And, as discussed in greater detail below, the proposal also fails to satisfy five of the eight relevant statutory factors.

A. The Proposed Service Standards Substantially Degrade the Value of First-Class Mail for Incarcerated Customers

Service standards for First-Class Mail must be designed to “enhance the value of postal services to both senders and recipients.”¹² When establishing service standards,

⁶ Pub. L. 109-435, 120 Stat. 3198 (2006).

⁷ 39 U.S.C. § 3691.

⁸ *Am. Postal Workers Union, AFL-CIO v. Postal Regulatory Comm’n.*, 842 F.3d 711, 712 (D.C. Cir. 2016).

⁹ 39 U.S.C. § 3691(b)(1). First-Class Mail is a market-dominant product. See 39 U.S.C. § 3621(a)(1) and (2).

¹⁰ 39 U.S.C. § 3691(c).

¹¹ *Carlson v. U.S. Postal Serv.*, 938 F.3d 337, 350 (D.C. Cir. 2019) (Postal Service bears the “initial burden of promulgating and explaining a non-arbitrary, non-capricious rule”).

¹² *Id.* § 3691(b)(1)(A).

the Postal Service is required to take into account customer satisfaction (Factor 2),¹³ “the needs of Postal Service customers” (Factor 3),¹⁴ and the policies of title 39, U.S. Code (Factor 8).¹⁵

Beginning with Factor 2, the evidence that the Postal Service cites in attempting to paint a picture of customer satisfaction with current service (or agnosticism toward the proposed service standards) is wholly inadequate because such evidence excludes incarcerated people by its very design. The Postal Service’s evidence concerning customer attitudes comes from three different surveys, none of which appear to include incarcerated people among potential participants.

First, the Postal Service points to the November 2020 Mail Moments survey, which was conducted online,¹⁶ thereby ensuring that no incarcerated people could participate. Second, the Postal Service cites various iterations of the ongoing Household Diary study, which includes only “households,” thereby excluding group quarters residences such as correctional facilities.¹⁷ Finally, the Postal Service cites the BHT survey (USPS-LR-N2021-1-10), the public version of which perplexingly redacts the methodology section. Nonetheless, nothing in the public record indicates that the BHT survey includes incarcerated people (or, for that matter, any respondents without phone or internet access).

At base, nothing in the record indicates that the Postal Service even allowed incarcerated people to participate in any of these surveys (let alone intentionally sought

¹³ *Id.* § 3691(c)(2).

¹⁴ *Id.* § 3691(c)(3).

¹⁵ *Id.* § 3691(c)(8).

¹⁶ Montieth Testimony, USPS-T-4, atch 1 at 2.

¹⁷ See [The Household Diary Study: Mail Use & Attitudes in FY 2019](#), appx B. In particular, the methodology states that survey participants consisted of households by reference to Census data. Under Census terminology, a household is mutually exclusive from group quarters. See Census Bureau, “[Subject Definitions](#)” (last accessed June 14, 2021). In any event, the 2019 Household Diary methodology also states that survey participants could only respond by phone or online, a design that categorically excludes incarcerated people, who cannot receive phone calls or access the internet. See 2019 Household Diary Survey at 77.

their input). The Postal Service bears the burden of proving compliance with statutory requirements, yet because of its survey design, it cannot plausibly allege (let alone prove) that the millions of incarcerated postal customers would be satisfied with the proposed service standards.

Turning next to Factor 3, incarcerated people need First-Class Mail to maintain personal relationships and complete necessary civic and business transactions (such as voting, filing taxes, responding to legal demands, and serving documents on others). While a callous cost-cutting approach may minimize the need to promptly deliver personal correspondence, under no realistic approach can the timeliness of business- and litigation-related mail be discounted. For First-Class Mail to retain its value for incarcerated mailers, delivery must be reasonably prompt.

As an illustrative example, suppose an incarcerated person receives a summons in a civil matter. Such summons will typically instruct the recipient to file a response within a certain number of days or else risk entry of a default judgment.¹⁸ Under current service standards, the recipient of such a summons may mail a responsive pleading with the knowledge that service standards call for its delivery within three days (while the Postal Service's compliance with existing standards is imperfect, it is substantial¹⁹). The Postal Service's apparent advice under the new standards is to simply mail the responsive pleading two days earlier (since delivery times could range up to five days).²⁰ Yet this leaves the litigant with two fewer days to prepare their response. Add to this the fact that the *receipt* of the summons could be delayed by up to two days under the proposed service standards, and the hypothetical incarcerated defendant could lose four precious days of preparatory time. Depending on the jurisdiction in

¹⁸ See e.g., Fed. R. Civ. P. 4(a)(1)(D) and (E).

¹⁹ See Cintron Testimony at 7-8 (showing First-Class Mail on-time performance ranging from 72.1% to 94.7% for the most recent reporting period, depending on type of mail).

²⁰ As explained below, in § III.C, incarcerated mailers have no realistic way of looking up the applicable service standards for any given piece of mail that they send.

question, a non-incarcerated litigant may be able to mitigate against such constraints by utilizing electronic filing. But for an incarcerated person, electronic filing is not an option and the value of First-Class Mail for purposes of filing documents in court would be severely impaired under the Postal Service's proposal, in derogation of PAEA § 301(b)(1)(A).

Finally, Factor 8 requires that service standards take into account the policies of title 39, U.S. Code.²¹ The current proposal contravenes three such policies. First, First-Class Mail fulfills the mandate that the "Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. . . . [Which] shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service."²² Under the proposed service standards, First-Class letters would categorically be excluded from air transportation,²³ even though other classes of mail would continue to be transported by air. This discrepancy plainly violates the requirement that First-Class letters be provided the most expeditious handling and transportation.

The second policy violated by the proposed service standards concerns the selection of transportation methods. Congress has mandated that the Postal Service "shall give the highest consideration to the requirement for the most expeditious collection, *transportation*, and delivery of important letter mail,"²⁴ and when "selecting modes of transportation, the Postal Service shall give highest consideration to the

²¹ 39 U.S.C. § 3691(c)(8).

²² 39 U.S.C. § 404(c) (originally codified as 39 U.S.C. § 3623(d), recodified under PAEA § 1010(e)).

²³ Cintron Testimony 26:15-30:17. Oddly, the testimony of witness Hagenstein states that only a "significant portion" of First Class Mail would be moved from air- to surface-transportation networks. Direct Testimony of Stephen B. Hagenstein (USPS-T-3), PRC Dkt. No. N2021-1, at 5:18-19 (Apr. 21, 2021). It seems that the only First-Class letters that would still be transported by air would be those originating in or delivered to locations outside the continental United States.

²⁴ 39 U.S.C. § 101(e) (emphasis added).

prompt and economical delivery of all mail.”²⁵ Compliance with these policies must be considered under Factor 8.²⁶ Here, using dubious factual allegations, the Postal Service argues that the proposed service standards will make First-Class Mail delivery more reliable (that is to say, reliably slow). But this argument fails as a matter of law because the Postal Service very deliberately seeks to read the requirements of expeditious transportation and prompt delivery out of § 101, an exercise that violates well-known canons of statutory construction.²⁷

Finally, Congress has required that postal rates must “be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.”²⁸ Yet the testimony of witnesses Steve Hutkins and Anita Morrison show that mailers in western and northeastern states would pay the same rates for mail delivery that is materially slower than mail sent from more central locations.²⁹ This geographic disparity is incompatible with to the statutory requirement of fair and equitable apportionment.

B. The Proposed Service Standards Would Deprive a Majority of Incarcerated Customers of Effective First-Class Mail Delivery

Service standards for market-dominant products must be designed to “preserve regular and effective access to postal services in all communities.”³⁰ Congress’s use of the conjunctive “and” makes clear that service must be *both* regular *and* effective to

²⁵ *Id.* § 101(f) (emphasis added).

²⁶ See *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 676 F.3d 1105, 1107-1108 (D.C. Cir. 2012) (when applying substantially identical language of 39 U.S.C. § 3622(c)(14) (relating to rate regulation), the Commission may to consider the broadly applicable policies of § 101).

²⁷ See *e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46:06 (6th ed. rev. 2000))).

²⁸ 39 U.S.C. § 101(d).

²⁹ Rebuttal Testimony of Steve Hutkins (SH-RT-1), PRC Dkt. No. N2021-1 (Jun. 2, 2021); Rebuttal Testimony of Anita Morrison (APWU RT-1), PRC Dkt. No. N2021-1, at 2:11-3:10 (Jun 2, 2021).

³⁰ 39 U.S.C. § 3691(b)(1)(B).

satisfy the statutory requirement.³¹ The Postal Service's argument in support of the proposed service standards focuses exclusively on regularity, but fails to acknowledge that degradation of current service standards would vitiate effectiveness of First-Class Mail for many purposes.

To be effective, delivery must be prompt. Nowhere is this more evident than in filing court documents, which is an elemental component of incarcerated peoples' constitutional right to access the judiciary.³² Many court systems have incorporated existing service standards into procedural rules, adjusting response deadlines to account for mailing time. Most of these adjustments reflect the 1-3 day delivery window under existing standards.³³ This reliance of court systems and litigants on previous service standards is legally relevant under Factor 1 of PAEA § 301, which requires the Postal Service to consider the impact of previous service standards on future revisions.³⁴ As illustrated here, court systems often design procedural rules to account for realistic delivery times based on available transportation networks (i.e., both surface and air, as appropriate depending on distance). The Postal Service's proposal would render First-Class Mail ineffective for purposes of court filing because this class of mail would no longer allow litigants to timely file documents in court while also enjoying the benefit of a full response time provided under relevant procedural rules.

³¹ See *Confederated Tribes & Bands of Yakama Nation v. Yakima County*, 963 F.3d 982, 990 (9th Cir. 2020) (“[W]hen ‘and’ is used to join two concepts, it is usually interpreted to require ‘not one or the other, but both.’” (quoting *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930))).

³² See *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (“[I]t is fundamental that access to prisoners to the courts for the purpose of presenting their complains may not be denied or obstructed.”).

³³ See e.g., Fed. R. Civ. P. 6(d) (3 additional days), Fed. R. App. P. 26(c) (3 additional days); Fed. R. Bankr. P. 9006(f) (3 additional days); Kan. Stat. Ann. § 60-206(d) (3 additional days); Ohio Civ. R. 6(D) (3 additional days); Minn. R. Civ. P. 6.01(e) (3 additional days); N.C. Gen. Stat. Ann. § 1A-1, Rule 6(e) (3 additional days).

³⁴ 39 U.S.C. § 3691(c)(1).

C. The Proposed Service Standards Destroy Any Assurance of Delivery Reliability, Speed, and Frequency Consistent with Best Business Practices

Finally, PAEA § 301 requires that service standards “assure Postal Service customers delivery reliability, speed and frequency consistent with reasonable rates and best business practices.”³⁵ Factor 7 of the same statute requires that service standards take into account “the effect of changes in technology, demographics, and population distribution on the efficient and reliable operation of the postal delivery system.”³⁶

The proposed service standards contravene this requirement in two ways. First, the Postal Service’s proposal arbitrarily ignores the nation’s robust and extensive air network that has routinely been used to transport First-Class Mail, and which is extensively utilized by private delivery companies. Second, the proposed 1-5 day delivery range leaves incarcerated mailers utterly unable to reliably estimate the time in which it will take for First-Class Mail to be delivered. Although the Postal Service makes aeriform statements regarding education and outreach to customers about new service standards,³⁷ these statements insultingly exclude incarcerated mailers. None of the generalized statements regarding customer outreach campaigns acknowledge the challenges of incarcerated mailers who have limited access to broadcast media and no access to retail clerks, the USPS website, or the Postal Service’s toll-free hotline.

III. Conclusion

Parties to this proceeding who represent the interests of postal customers have adeptly illustrated how the proposed service standards impair the value of First-Class Mail and work a disservice on individual and institutional mailers. These same problems that plague all customers acutely impact incarcerated mailers, who have few viable alternatives to First-Class Mail (or, depending on the context, *no* alternatives).

³⁵ *Id.* § 3691(b)(1)(C).

³⁶ *Id.* § 3691(c)(7).

³⁷ Montieth Testimony at 21:5-24:2.

The proposed service standards represent poor business management and damaging public policy; but more to the point, the Postal Service's proposal resoundingly fails to meet the standards mandated by § 301 of the PAEA. For the reasons stated herein, and on behalf of incarcerated users of the mail, Prison Policy Initiative implores the Commission to issue an advisory opinion finding that the proposed service standards do not comply with applicable law.

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Respectfully submitted,

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