

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Station and Branch Optimization and
Consolidation Initiative, 2009

)
)

Docket No. N2009-1

REPLY BRIEF

OF

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.**

(December 16, 2009)

INTRODUCTION

Under Presiding Officer's Ruling No. N2009-1/11, Initial Briefs were required to be filed by December 2, 2009, and were filed by seven parties: Association of Postal Workers Union ("APWU"), Association of United States Postal Lessors, National League of Postmasters, David B. Popkin, Public Representative, United States Postal Service, and Valpak Direct Marketing Systems, Inc. and Valpak Dealers Association, Inc. (collectively "Valpak"). This reply brief addresses certain comments of the Postal Service and APWU.

I. UNITED STATES POSTAL SERVICE INITIAL BRIEF

The Postal Service, correctly, takes the position that the changes in service relating to possible closing of certain stations and branches does not trigger 39 U.S.C. section 3661(b), in that the changes will not "generally affect service on a nationwide or substantially nationwide basis...." However, the Postal Service continues to argue its case to the Commission as though the Commission has authority to make this determination, which it does not.

A. The Postal Service Has Exclusive Statutory Authority to Make the Determination to Request an Advisory Opinion under 39 U.S.C. Section 3661(b).

On pages 3-13 of its Initial Brief, the Postal Service urges the Commission to determine that it does not have jurisdiction over this present docket and then dismiss it:

It is now clear that the potential service changes that could result from the Station and Branch Optimization and Consolidation (SBOC) Initiative are **insufficient** to trigger the exercise of the Commission's jurisdiction to issue an advisory opinion. Accordingly ... the Commission is **obliged to terminate proceedings** in Docket No. N2009-1, thus obviating all remaining procedural steps. [*Id.*, p. 4 (emphasis added).]

The Postal Service Initial Brief appropriately begins its analysis of the jurisdictional question with a discussion of the relevant statute, 39 U.S.C. section 3661(b). It explains how it filed the case “on the presumption that Commission jurisdiction [only] *might* be proper,” noting the statute's threshold jurisdictional question in its initial request, and that the Commission “prudently initiated proceedings.” Postal Service Initial Brief, p. 6 (italics original).

However, the Postal Service identifies where it made its error in statutory interpretation when it states that it then asked the Commission to determine whether the Initiative constituted a “change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis.” The Postal Service states that “the Docket No. N2009-1 record now clearly rebuts any presumption of Commission jurisdiction” (*id.*, p. 6). But there is no such presumption in this docket.

Section 3661(b) is not unclear as to which government agency makes the determination that a particular undertaking would constitute a change in the nature of postal services affecting service on a nationwide or substantially nationwide basis. Responsibility is vested exclusively

in the Postal Service, not the Commission. *See* Valpak Initial Brief, pp. 3-5. However, the Postal Service in its request, instead of making the determination (or even stating that it was deferring such a determination), mistakenly asked the Commission to do so. The Postal Service took the position, and explained, that it (quite properly) initiated this docket to protect itself against the possibility that it might later determine that its contemplated service changes would trigger an advisory opinion under the statute. If the Postal Service subsequently had made that finding, the Commission then would have jurisdiction to issue an advisory opinion. But if the Postal Service has not made that finding (and it has not), the Commission has no jurisdiction to issue an advisory opinion. The Postal Service Initial Brief is fully consistent with the position it took in its initial filing, but at odds with section 3661(b).

The Postal Service's (erroneous) interpretation of section 3661(b) creates the risk that the Commission could take the position (also erroneous) that the Postal Service has delegated to it the authority to make this threshold decision, and issue an advisory opinion. However, the Postal Service is without power to "pass the buck" and re-delegate a power that Congress vested in it to anyone, even to another government agency.

On the other hand, there is no reason why the Commission could not use this opportunity to comment on the procedure used by the Postal Service to select and analyze stations and branches for closure, and to obtain public input. Indeed, the Postal Service has asked for just that sort of advice. Postal Service Request, p. 7. Nevertheless, the form in which such Commission advice is issued must be something other than an "advisory opinion" issued under section 3661(b).

B. The Postal Service Now Has Made its Determination — that Section 3661(b) Is Not Triggered.

Until the Postal Service filed its Initial Brief, there had been no unequivocal statement from the Postal Service that the Initiative under consideration will or will not change service on a nationwide or substantially nationwide basis.¹ However, the Postal Service now has taken this position — in its Initial Brief. *See, e.g.*, “[N]o rational basis exists for concluding that the [Station and Branch Optimization and Consolidation Initiative] will generate changes in the nature of postal services of at least a substantially nationwide character.” Postal Service Initial Brief, p. 7. “[T]he facts now make clear that the potential service changes do not satisfy that threshold. Thus, the Commission lacks jurisdiction to issue an advisory opinion and must terminate this docket....” Postal Service Initial Brief, p. 13.

Accordingly, in its Initial Brief, the Postal Service now has made the determination required of it under section 3661(b). Despite the fact that the Postal Service sometimes puts this determination in the context of an argument to the Commission, it is no less an unequivocal statement of Postal Service policy. Albeit for somewhat different reasons than those urged by the Postal Service, this determination requires the Commission to dismiss this case for lack of jurisdiction.

¹ Since the Postal Service’s Initial Brief was filed, the Postal Service has reduced the number of stations and branches under consideration in the SBOC Initiative to 168. *See* Library Reference USPS-LR-N2009-1/4 (revised Dec. 14, 2009).

II. AMERICAN POSTAL WORKERS UNION, AFL-CIO INITIAL BRIEF

APWU states that “The Postal Accountability and Enhancement Act requires that the PRC issue an advisory opinion on the Postal Service SBOC Initiative’s compliance with the Act,” but never addresses the statute as giving the Commission authority to make the threshold finding under the statute.

APWU believes not only that section 3661(b) has been triggered, but that the closing of a station and branch requires the Postal Service to follow the same procedure required for the closing of a “post office” under 39 U.S.C. section 404(d). APWU’s apparent position, that Congress was imprecise in its language, and that, subsequent to the 1970 enactment of section 404(d), the Commission has retroactively expanded Congress’ meaning of “post office,” such as by the 2009 Congressional testimony of a Commission employee, is wholly unpersuasive. Of course, the issue of section 404(d) is not now before the Commission, and therefore a complete response to APWU’s position is not required here.

APWU does make one interesting observation in explaining the difference between the Station and Branch Optimization and Consolidation (“SBOC”) Initiative and the closing of a post office in Docket No. A82-10 — stating that here the SBOC Initiative “does not consider adding **additional alternative retail access** methods...” (APWU Initial Brief, p. 12 (emphasis added)) — and in urging the Postal Service to consider “whether any available **alternatives** are adequate...” (*id.*, p. 15 (emphasis added)). Along similar lines, Valpak’s Initial Brief urged that the Postal Service should consider the use of **Contract Postal Units** (“CPUs”) where stations and branches are closed. Valpak Initial Brief, pp. 25-26. Indeed, failure to consider such alternatives is an obvious limitation of the existing process being used by the Postal

Service under the present Initiative to close costly stations and branches. Indeed, the Postal Service appears to have neglected to give any consideration whatsoever to the possibility of establishing newly-franchised community post offices (*i.e.*, CPUs) as replacements. As explained in Valpak's Initial Brief (pp. 25-27), a CPU can be a far more cost-effective and economical way to provide postal services in any neighborhood or area where the volume of postal transactions has fallen below the level required for an existing brick and mortar facility to be "consistent with reasonable economies of postal operations." 39 U.S.C. § 403(b).

Respectfully submitted,

William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc. and
Valpak Dealers' Association, Inc.