

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Six-Day to Five-Day Street Delivery
and Related Service Changes

)
)

Docket No. N2010-1

INITIAL BRIEF

OF

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

(October 15, 2010)

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STATEMENT OF THE CASE

On March 30, 2010, the Postal Service filed a Request of the United States Postal Service for an Advisory Opinion on Changes in the Nature of Postal Services, pursuant to 39 U.S.C. § 3661. The Postal Service proposed eliminating Saturday delivery to street addresses. The request was supported by the direct testimony of eleven witnesses:

Samuel Pulcrano (USPS-T-1)
Joseph Corbett (USPS-T-2)
Dean Granholm (USPS-T-3)
Frank Neri (USPS-T-4)
Luke Grossman (USPS-T-5)
Michael Bradley (USPS-T-6)
Jeffrey Colvin (USPS-T-7)
Rebecca Elmore-Yalch (USPS-T-8)
Gregory Whiteman (USPS-T-9)
Thomas Day (USPS-T-10)
Stephen Kearney (USPS-T-11)

On April 1, 2010, the Commission issued Order No. 436, “Notice and Order Concerning a Postal Service Request for an Advisory Opinion on Changes in the Nature of Postal Services,” commencing proceedings. Valpak Direct Market Association, Inc. and Valpak Dealers’ Association, Inc. (hereinafter “Valpak”) intervened on April 23, 2010, and counsel for Valpak attended the prehearing conference held on April 27, 2010. Hearings on the Postal Service’s direct case were held between July 14-22, 2010.

The Commission held seven field hearings:

Las Vegas, Nevada, May 10, 2010
Sacramento, California, May 12, 2010
Dallas, Texas, May 17, 2010
Memphis, Tennessee, May 19, 2010
Chicago, Illinois, June 21, 2010
Rapid City, South Dakota, June 23, 2010
Buffalo, New York, June 28, 2010

On August 2, 2010, rebuttal testimony was submitted by three parties: National Association of Letter Carriers, National Newspaper Association, and the Public Representative. Medco Health Solutions, Inc., initially filed, and then withdrew, the testimony of Thomas M. Moriarty (Medco-T-1) after the Postal Service attempted to test the basis for the testimony through written interrogatories.

Frederic V. Rolando (NALC-T-1)
William H. Young (NALC-T-2)
Stephen DeMatteo (NALC-T-3)
Michael A. Crew (NALC-T-4)
Michael J. Riley (NALC-T-5)
Max Heath (NNA-T-1)
Al Cross (NNA-T-2)
Kate Brown (PR-T-1)
Edward Luttrell (PR-T-2)

The Commission held hearings on the rebuttal witnesses between September 13-16, 2010.

On September 23, 2010, the Postal Service submitted the surrebuttal testimony of four witnesses:

Peter Boatwright (USPS-RT-1)
Alan Moore (USPS-RT-2)
Melissa Starr (USPS-RT-3)
Samuel Pulcrano (USPS-RT-4)

The Commission held a hearing on October 4, 2010, for two rebuttal witnesses for which cross-examination was requested.

Pursuant to Presiding Officer's Ruling ("POR") No. N2010-1/29, the deadline for initial briefs is October 15, 2010, and that for reply briefs is October 21, 2010.

ARGUMENT**I. THE POSTAL SERVICE PROPOSAL TO REDUCE OPERATING COSTS COMES DURING A TIME OF INTENSE FINANCIAL PRESSURE.**

The Postal Service's proposal seeks to reduce operating costs to a level commensurate with dramatically-reduced volume.¹ The request was filed in March 2010 at a time when the Postal Service's financial position was deteriorating² and, since then, other cost reduction and revenue generation approaches to remedy the situation have proved unavailing. To put the current docket into context, we briefly review three recent developments which came within a turbulent one-week period, placing great additional strain on the Postal Service's finances.

1. It no longer appears that over-payments resulting from the Postal Service's payments into the Civil Service Retirement System ("CSRS") will be made available to the Postal Service for any purpose in the foreseeable future. On September 24, 2010, the Office of Personnel Management ("OPM") informed the Commission (and the Postal Service) that it does not believe it has the authority to reallocate any prior CSRS payments in the manner suggested by the Commission's Segal Report,³ and that no such reallocation or fiscal relief would be forthcoming unless and until explicitly authorized by Congress.⁴

¹ See Postal Service Request, pp. 3-4.

² See discussion in Docket No. R2010-4, Initial Comments of Valpak, pp. 3-12 (August 17, 2010) [http://www.prc.gov/Docs/69/69766/VP Initial Comments final.pdf](http://www.prc.gov/Docs/69/69766/VP%20Initial%20Comments%20final.pdf).

³ http://www.prc.gov/prc-docs/home/whatsnew/Report%20on%20CSRS%20Cost%20and%20Benefit%20Allocation%20Principles_1122.pdf

⁴ See letter from OPM to Honorable Ruth Y. Goldway, dated September 24, 2010, and posted on the Commission's web site on October 1, 2010. http://www.prc.gov/prc-docs/home/whatsnew/OPM%20Response%20to%20PRC%20Report_1402.pdf

2. On September 30, 2010, the Commission denied the Postal Service's request for an exigent rate increase.⁵

3. Also on September 30, 2010, in the continuing resolution funding the government in the absence of any enacted appropriations bills for FY 2010,⁶ Congress declined to provide the Postal Service any end-of-fiscal-year relief from the Postal Service Retirement Health Benefits Fund ("RHBF") payment required by the Postal Accountability and Enhancement Act ("PAEA"). Later that same day, the Postal Service made the required \$5.5 billion payment.⁷ To make that payment, the Postal Service (i) borrowed from the U.S. Department of the Treasury \$1.8 billion (leaving available borrowing authority of \$3 billion, which could be drawn down in FY 2011), and (ii) drained a substantial portion of its working capital.⁸ As a result, the Postal Service begins FY 2011 with less than \$2 billion of cash, and available credit of only \$3 billion.⁹ With annual expenditures of around \$70 billion, the Postal Service's

⁵ See Docket R2010-4, Order No. 547, "Rate Adjustment Due to Extraordinary or Exceptional Circumstances" (Sept. 30, 2010).

⁶ See Continuing Appropriations Act, 2011. Pub.L. 111-142, Sept. 30, 2010 (<http://thomas.loc.gov/home/approp/app11.html>).

⁷ Statement of Postmaster General on PRC Ruling, Fully Paying Retiree Health Benefit Mandate (Sept. 30, 2010) (http://www.usps.com/communications/newsroom/2010/pr10_pm0930.htm).

⁸ USPS Form 8-K (Sept. 30, 2010), filed with the Commission on Oct. 6, 2010.

⁹ *Id.* See also 39 U.S.C. § 2005(a).

current working capital is sufficient to sustain current Postal Service operations for about one month.¹⁰

If mail volume fails to meet projections, the Postal Service enters FY 2011 at risk of defaulting on its financial obligations sometime during the year. Even if the economy resumes strength and the Postal Service does not default prior to the end of the fiscal year, it will not have sufficient cash to make the \$5.5 billion payment due the RHBF on September 30, 2011.¹¹ The Commission acknowledged the existence of this liquidity problem in its denial of an exigent rate increase:

Whether the requested rate increases are approved or not, the Postal Service will be **unable to meet this [RHBF] annual obligation either in 2011** or in succeeding years. [Docket No. R2010-4, Order No. 547, p. 3.]

The Postal Service projects continued losses in FY 2010 to FY 2011, and forecasts that it will exhaust its borrowing authority of \$15 billion and still **fall \$4 billion short of its cash needs by the end of FY 2011**. [*Id.*, p. 36.]

The Postal Service's liquidity problem is both serious and of pressing importance. However, it is distinguishable from the Postal Service proposal under consideration in this docket. The 5-day delivery proposal primarily addresses the Postal Service's longer-term problem arising from the secular decline in mail volume (*see* Section II, *infra.*).

¹⁰ "The Postal Service has demonstrated that it faces a liquidity problem." Docket No. R2010-4, Order No. 547, p. 60.

¹¹ USPS Form 8-K (Sept. 30, 2010). *See also* Docket No. R2010-4, Statement of Joseph Corbett (July 6, 2010), p. 8.

II. THE POSTAL SERVICE'S FINANCIAL PROBLEMS ARE LONG-TERM IN NATURE, AND DEEP-ROOTED.

Facing the financial challenges set out in Section I, *supra*, and the long-term structural problems discussed in this section, the Board of Governors has a fiduciary duty to reduce costs significantly to seek the type of financial stability required by PAEA. *See, e.g.*, 39 U.S.C. § 3622(b)(5). Based on an analysis of its FY 2009 costs, the Postal Service estimates that elimination of “six-day delivery could generate an annual net improvement to postal finances of approximately \$3.1 billion on an annual basis.” Postal Service Request, p. 4. Probably no other single change in postal operations could save such substantial costs. *See* Direct Testimony of Joseph Corbett (USPS-T-2), p. 13, ll. 1-6.

A. The Internet Presents a Formidable Challenge to the Postal Service.

The Internet is a vital and energizing, yet highly disruptive, technology. It has caused major changes and disruptions to previously existing business models in virtually every communications medium that can be digitized — *e.g.*, recorded music, publishing (magazines, books, and newspapers), and movie industries. It has already rendered the Postal Service's previous business model obsolete. Yet, further widespread change is on the way. As one example, mobile communication devices, linked to the Internet, threaten further disruption — *e.g.*, check deposits via smart-phones, and in other ways, as yet unknown.

The Internet is not going away.¹² Communication habits spawned by the Internet will persist,¹³ and the long-term challenge to the Postal Service is only going to become more serious, while mail volume continues its secular decline. Within the next year or so, the U.S. Department of the Treasury plans to remove all Social Security and other benefits checks from the mail,¹⁴ and the federal government through the Federal Communications Commission is attempting to spread the Internet to every corner of rural America, as well as promote still higher speed connections in urban areas.

For businesses and others that deal in hard-copy materials, these changes can be gut-wrenching. The Postal Service, in order to remain a viable hard-copy delivery service, must reorganize, streamline, achieve major cost reductions through a number of means, and keep its rates affordable and competitive. Otherwise, the Postal Service may not have much mail to deliver on Saturday — or any other day of the week, for that matter. Failure to rethink what is essential and to cut costs aggressively risks lapsing into a much-discussed death spiral (as has happened recently to many companies dealing with or involved in communications media).

¹² An example close to home is the Commission itself. Participation in rate and mail classification cases before the Commission used to result in extensive use of the mail, but this no longer occurs because of the Commission's electronic filing system.

¹³ See, e.g., Nick Bilton, "[I Live In the Future & Here's How it Works: Why Your World, Work and Brain Are Being Creatively Disrupted](#)," New York: Crown Business, 2010, pp. 262-266.

¹⁴ See Ed O'Keefe, "Benefits payments going paperless by 2013," Washington Post, June 14, 2010, http://voices.washingtonpost.com/federal-eye/2010/06/benefits_payments_going_paper1.html.

B. The Postal Service Has Limited Means to Address Major Structural Problems.

The Commission’s recent decision in the exigent rate case explicitly recognized that the Postal Service is faced with serious, but unidentified, long-term structural problems.

Rather, [the requested exigent rate adjustments] represent an attempt to address **long-term structural** problems not caused by the recent recession....

This cash flow crisis would have occurred whether or not the recession took place, and it is the result of other **unrelated structural** problems. [Docket No. R2010-4, Order No. 547, p. 3 (emphasis added).]

In large part, these long-term, unrelated structural problems are creations of, or at least are in the control of, Congress. Largely as a result of these structural problems, the Postal Service is expected, even required to cut costs, but then is barred from executing most types of cost cutting — stuck between the proverbial “rock and a hard place.”

On the one hand, the applicable statutes have said that the Postal Service is supposed to operate in an efficient, businesslike manner (as well as to aggressively pre-fund retiree healthcare benefits). The Commission’s decision in the exigent rate case noted, for instance, that “[i]n 1970, ... Congress determined that the Postal Service should be **operated in a more business-like fashion.**”¹⁵ Likewise, “On December 20, 2006, Congress enacted the [PAEA].... This bipartisan legislation incorporated five principles recommended by the

¹⁵ Docket No. R2010-4, Order No. 547, p. 7, citing the Postal Reorganization Act of 1970 (“PRA”).

Administration to guide Congress's effort to reform the Postal Service: ... provide for greater **operating** flexibility...."¹⁶

On the other hand, major cost-reduction improvements normally expected from a businesslike operation are blocked by the narrow parochial interests of various constituencies and stakeholders. For instance, the Postal Service has noted repeatedly that it cannot close post offices it no longer needs because local constituencies want their post offices to remain open, regardless of how much it costs or how little it is used. They would have the Postal Service spend \$3, \$5, even \$10 just to facilitate the mailing of an envelope with 44 cents postage — a munificence they would not expect from any organization that in fact operated in a businesslike fashion. The Postal Service likewise has great difficulty closing and consolidating plants it does not need because, almost invariably, various stakeholders want the local employment picture to continue unchanged, regardless of whatever costs or inefficiencies that may impose on the Postal Service.

Congress, for its part, has made it clear that it will not provide any direct funding for such extravagances, even though they may be required.¹⁷ To the extent that the Postal Service must cater to such unbusinesslike preferences of certain constituencies, other stakeholders either must pay more (which the rate cap now severely limits), or forego certain services, such as Saturday delivery. Since Congress cannot be expected to appropriate any money, the Postal

¹⁶ *Id.*, p. 6 (emphasis added).

¹⁷ It often appears that some think the postal monopoly can fund any and every extravagance any special interest desires. But the Internet is rapidly eroding the monopoly almost to the point of being meaningless. In other words, what is the value of a monopoly over letter mail when few send letters?

Service, like all households and private business firms, will have to live within its budget constraint.

One of the most important legislative constraints is that the Postal Service for many years has been legislatively restricted (by appropriations riders) from eliminating Saturday residential delivery, regardless of cost or need. These restrictive appropriations riders have never been part of the omnibus postal reforms (PRA or PAEA), which ostensibly provide the Postal Service flexibility to operate in a businesslike manner, but they co-exist alongside, and negate the effectiveness of, such reforms.

Notwithstanding rhetoric to the contrary, Congress has given the Postal Service almost **no** meaningful **operating** flexibility that would enable it to operate in a **more businesslike** fashion. It has gained only **pricing** flexibility, the advantages of which are offset to some extent by the price cap and the mandate to apply it at the class level. Collectively, to the extent that the narrow, parochial interests of stakeholders and other constituencies foreclose and prevent any meaningful increase in Postal Service profitability, either through cost reductions or expansion of profitable services and products, the Postal Service is in a no-win position.

C. The Postal Service Urgently Needs — and Has Proposed — a New Business Model.

Few, if any, would argue that the Postal Service's previous business model, based on ever-expanding mail volume, continues to be valid. This fact is readily admitted by the Postal Service itself. *See* Corbett Direct Testimony, p. 8, ll. 3-16. In the recently concluded exigent rate case, the Commission indicated its awareness by noting that “[t]he Postal Service can not

resolve **severe shortcomings in its business model** by resorting to the exigent rate provision.”¹⁸

The Commission has acknowledged — implicitly to be sure — that some of the legislative constraints which restrict the Postal Service’s business model call for some sort of change — including, but not limited to, changing the requirement to provide universal residential delivery 6 days a week. “The Commission is sympathetic to the Postal Service’s current financial challenges and agrees that **change is warranted regarding certain of the [legislative] constraints** cited by the Postal Service. Those issues, however, **must be decided in a different forum.**”¹⁹

On March 2, 2010, the Postal Service unveiled a 10-year Action Plan.²⁰ Implementation of that plan would represent a major change in the Postal Service’s business model. It included several major recommendations. One important part of this plan is to gain the flexibility to adjust residential delivery frequency from 6 to 5 days per week.²¹ That will help the Postal Service reduce certain costs permanently and become more financially sustainable over the long term.

That Postal Service plan represents a dramatic change from the past. Essentially, it is part of a new, improved business model. If allowed to be implemented, the Postal Service will

¹⁸ Docket No. R2010-4, Order No. 547, p. 63 (emphasis added).

¹⁹ *Id.*, p. 65 (emphasis added, footnote omitted).

²⁰ *Ensuring a Viable Postal Service for America, an Action Plan for the Future*, Mar. 2, 2010.

²¹ For most businesses, 6-days a week delivery ceased long ago.

start to transform itself into a dramatically different operation, attuned to the decline in mail volume, both existing and projected.²² The Postal Service urgently needs to implement its proposed new business model in order to:

- (1) adapt to the secular decline in mail volume;
- (2) comply with the overly optimistic RHBF refunding schedule mandated by Congress²³; and, finally,
- (3) reduce debt.

If the Commission were to issue an opinion opposing 5-day delivery, it would itself become part of the problem. If the Commission tells the Postal Service it cannot use its statutory authority to have an exigent price increase and then tells the Postal Service it cannot reduce certain costs, it would assume responsibility for laying the groundwork for the Postal Service's financial default.

III. THE COMMISSION'S ADVISORY OPINION MUST CONFORM TO THE POLICIES OF TITLE 39, AND BY THIS STANDARD CAN ONLY CONCLUDE THAT THE POSTAL SERVICE PROPOSAL DOES CONFORM.

The Commission's responsibility under 39 U.S.C. section 3661(c) is:

- (I) to conduct a "hearing on the record under sections 556 and 557 of title 5," and, based on the record evidence developed in that docket,

²² Ideally, the Postal Service would be allowed to institute simultaneously a number of major cost-reduction initiatives that would enable it to operate in a truly businesslike and efficient manner. (Many of the narrow constituent interests now dragging the Postal Service down would disagree, of course.) Not only should the Postal Service strive to live within the existing rate cap, it also should try to do much better, reducing existing rates even as the Consumer Price Index ("CPI") inches up.

²³ Congressional deferral of the FY 2009 \$4 billion RHBF payment must, for now, be considered as a one-time event. Congress explicitly declined the Administration request for a second deferral in the September 30, 2010 continuing resolution.

- (ii) to provide a written advisory opinion to the Postal Service that “conforms to the policies established under this title.”

Therefore, the Commission needs to identify those policies of 39 U.S.C. which could apply to a change from 6-day to 5-day home delivery.²⁴

The Postal Service request discusses many sections of Title 39 which the Postal Service believes could bear on its request.²⁵ However, only two policy provisions in Title 39 U.S.C. specifically reference the delivery of mail:

- a. 39 U.S.C. § 404(a)(1): “to provide for the collection, handling, transportation, **delivery**, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail.” (Emphasis added.)
- b. 39 U.S.C. § 403(b)(1): “It shall be the responsibility of the Postal Service — (1) to maintain an efficient system of collection, sorting, and **delivery** of the mail nationwide.” (Emphasis added.)

With respect to 39 U.S.C. section 404(a)(1), no specific frequency of delivery is required.

With respect to 39 U.S.C. section 403(b)(1), the Postal Service has demonstrated not only that elimination of Saturday delivery will not impede its “efficient” operation — but also elimination of Saturday delivery will facilitate “efficient” operation. *See, e.g.*, Direct

²⁴ The only policy actually set out in 39 U.S.C section 3661 requires “adequate and efficient postal services.” 39 U.S.C § 3661(a). However, there is no indication as to how this standard would apply to the Postal Service’s proposal.

²⁵ *See Request of the United States Postal Service for An Advisory Opinion On Changes in the Nature of Postal Services* (Mar. 30, 2010), pp. 4-5.

Testimony of Sam Pulcrano, USPS-T-1, relating to necessary trade-offs, pp. 2-4; Direct Testimony of Luke T. Grossmann, USPS-T-5, relating to increasing transportation efficiency.

In some respects, the Postal Service’s proposal to eliminate Saturday delivery parallels the analysis required by 39 U.S.C. section 3691(c) for the Postal Service to “establish[] or revis[e]” service standards. Such service standards revisions are set by the Postal Service “in consultation with the Postal Regulatory Commission...” There, the Postal Service is required to “take into account” certain dynamic factors, looking to the future, which were given significant attention in Postal Service testimony in this docket.

- (c) Factors. — In establishing or revising such [service] standards, the Postal Service shall take into account— ...
- (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. [39 U.S.C. § 3691(c) (emphasis added).]

As modified by PAEA, the majority of Title 39 looks forward, not backward. It recognizes the truth of the aphorism that “the only thing in life that’s consistent is change.” What yesterday was considered “normal,” tomorrow may be considered impractical, or even impossible. As “mail volumes and revenues projected for future years” decline,²⁶ and the “number of addresses” grows, and the “current and projected future cost” of delivering one

²⁶ See Direct Testimony of Joseph Corbett (USPS-T-2), pp. 8-10.

piece of mail to a household and as technology changes,²⁷ service issues like Saturday delivery need to be modified accordingly. It is difficult to find any provision or policy in Title 39 which supports the proposition that any particular level of service is written in stone. An examination of the relevant policies in Title 39 demonstrates that none imposes a requirement for Saturday delivery.

On occasion, 39 U.S.C. section 101(a) has been invoked: “The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people.” The view has been advanced that the Commission should determine whether the removal of Saturday delivery is consistent with the Constitutional “mandate to provide a postal system that binds the Nation together.”²⁸ It was said that a question to be addressed in this docket would be “What does the Constitution ... require?” *Id.* Valpak agrees that the Commission must consider the policies of Title 39, but can find no potential constitutional violation. Among the enumerated powers vested in Congress by the United States Constitution is that “Congress shall have the power ... [t]o establish post offices and post roads....” U.S. Constitution, Article I, Section 8. This provision only authorizes Congress to “establish post offices and

²⁷ See *id.*, pp. 11-12.

²⁸ See, e.g., Testimony of Chairman Ruth Y. Goldway before the U.S. Senate Homeland Security and Governmental Affairs Committee’s Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security (Apr. 22, 2010), p. 5; and Testimony of Chairman Ruth Y. Goldway before the U.S. House of Representatives Committee on Oversight and Government Reform and the Subcommittee on Federal Workforce, Postal Service and the District of Columbia (Apr. 15, 2010), p. 2.

post roads.”²⁹ It does not even require that Congress to do so. This constitutional provision does not bear upon the issue before the Commission in this docket.

Nor should the Commission view 6-day delivery as being inherent in the concept of the Universal Service Obligation (“USO”).³⁰ During its recent examination of this issue, the Commission came to the following conclusion which should govern this docket as well:

It is the Commission’s judgment that a **minimum frequency** of delivery for a postal operator that is obligated to provide **universal coverage** of delivery addresses is **5 days** per week. [PRC Report on Universal Postal Service and the Postal Monopoly (Dec. 19, 2008), p. 123 (emphasis added).]

Therefore, being required neither by the policies of Title 39, nor by Article I, Section 8 of the United States Constitution, nor by the Universal Service Obligation, it is submitted that Saturday delivery may be eliminated by the Postal Service for the good and sufficient reasons it has established by record evidence in this docket.

²⁹ See generally Richard B. Kielbowicz, A History of Mail Classification and Its Underlying Policies and Purposes, July 17, 1995, p. 9 (“[N]either the debates at the Constitutional Convention nor those at state ratifying conventions offer much help in construing the phrase.”) <http://www.prc.gov/prc-docs/library/refdesk/techpapers/Kielbowicz/hist-mail-class.pdf>.

³⁰ See generally, Richard B. Kielbowicz, Universal Postal Service: A Policy History, 1790-1970, Nov. 15, 2002 (revealing no support for that proposition that 6-day or Saturday delivery is a component of the USO). <http://www.prc.gov/prc-docs/library/refdesk/techpapers/Kielbowicz/paper.pdf>. That Saturday delivery is not part of the statutory USO should be inferred from the fact that Congress **annually** includes the 6-day appropriations rider. If it were part of the USO, Congress would not need to protect it every year.

IV. THE COMMISSION MUST BE CAREFUL TO BASE ITS ADVISORY OPINION ONLY ON RECORD EVIDENCE AS REQUIRED BY PAEA AND THE ADMINISTRATIVE PROCEDURE ACT.

In view of the fact that PAEA requires the Commission to issue its opinion after a “hearing on the record under sections 556 and 557 of title 5,” the Commission must be careful to ensure that it bases its advisory opinion only on record evidence.

At the prehearing conference in this docket, Chairman Goldway discussed the Commission’s intention to hold a series of “field hearings,” saying:

Furthermore, witnesses at each of these hearings will testify under oath, and the hearings will be transcribed. The transcripts for each hearing will be made available as quickly as practicable. Field hearings were quite helpful during the Commission’s consideration of the Postal Service’s Stations and Branch Optimization and Consolidation Initiative and **caused no procedural or due process problems.**

Any Intervenor seeking to **clarify or comment on evidence received during our field hearings** may do so during **the rebuttal phase of this case.** If the Postal Service wishes to clarify or comment on such evidence, it may do so as part of a surrebuttal. [Tr. 1/39, ll. 8-21 (emphasis added).]

This procedure was reiterated during at least one of the field hearings. *See, e.g.*, Transcript of Chicago, Ill. Field Hearing (June 21, 2010), p. 26, l. 22 – p. 27, l. 6 (“These hearings are being transcribed and the witnesses’ testimony and responses to any questions from the Commission will be **part of the evidentiary record** in this case. Other participants will have the opportunity to review the transcript of this hearing and offer comments if they so choose during the rebuttal phase of the case.”).

The question now is whether the Commission’s original plan is consistent with PAEA — whether it can base any part of its decision on “field hearings.” PAEA requires the Commission’s advisory opinion in this docket to be developed in the following manner:

(c) The Commission shall not issue its opinion on any proposal until an opportunity for **hearing on the record under sections 556 and 557 of title 5** has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title. [39 U.S.C. § 3661(c) (emphasis added).]

After enactment of PAEA, section 3661(c) proceedings are one of the only formal rulemaking provisions remaining in Title 39.³¹ An Administrative Procedures Act (“APA”) “hearing on the record” vests specific rights in the parties, including:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct **such cross-examination as may be required for a full and true disclosure of the facts**. [5 U.S.C. § 556(d) (emphasis added).]

Under Commission rules, statements, written and oral, given at field hearings may be considered and addressed by the Commission in the same manner as opinions and arguments

³¹ Notice-and-comment rulemakings are designated as “informal rulemakings” under the APA.

submitted in comments and briefs. 39 C.F.R. § 3001.20b(c).³² However, they do not constitute “record evidence.”

Were the Commission now to treat comments at field hearings as evidentiary “testimony” upon which it can rely to base its advisory opinion, this would constitute a clear violation of the APA because such “evidence” was subject to rebuttal only, but not effective cross-examination.

The Commission apparently has been operating based on the belief that allowing parties to address field hearing statements in rebuttal testimony accorded adequate procedural due process protection to those who disagreed with such statements. This assumption is in error.³³ The right to cross-examination cannot be ignored. The requirements of the APA are not imposed to prevent people from stating their views, but rather requiring people share their views in a way that can be tested and challenged to ensure that “statements” rise to the level of “evidence” before they are relied upon.

The problem can be illustrated by Medco’s withdrawal of its rebuttal testimony, ostensibly in part because it had already submitted a statement in a field hearing. Medco

³² “**Statements** filed pursuant to this section shall be made a part of the Commission’s files in the proceeding. The Secretary shall maintain a file of such statements which shall be **segregated from the evidentiary record** in the proceeding, and shall be open to public inspection during the Commission’s office hours. A statement or exhibit thereto filed pursuant to this section **shall not be accepted in the ‘record,’** as defined by §3001.5(k) except to the extent that it is (1) otherwise formally introduced in evidence, or (2) a proper subject of official notice, pursuant to §3001.31(j).” (Emphasis added.)

³³ Treating untested statements as evidence has the perverse effect of requiring those parties opposing the field hearing statements to submit rebuttal testimony, which testimony subjects them to cross-examination never required of the field hearing participants.

participated in the May 10, 2010 field hearing in Las Vegas, Nevada. Medco then submitted rebuttal testimony on August 3, 2010. The Postal Service then submitted eminently reasonable written interrogatories to Medco's witness, and answers to those interrogatories could have undermined the testimony and most certainly would have enhanced the record. In response, Medco withdrew the testimony as it could not "justify the legal expense and in-house effort of responding to these requests in order to maintain testimony that is duplicative of what Mr. Underkoffler has already presented to the Commission in the field hearing." Motion of Medco Health Solutions to Withdraw Testimony of Thomas Moriarty (T-1) (Aug.13, 2010). This statement comes from a corporation near the size of the Postal Service, that grossed \$59.8 billion in 2009, with net income that year of \$1.3 billion.³⁴

In granting Medco's motion to withdraw, the Presiding Officer reiterated her intent to treat field testimony as part of the evidentiary record:

Duplicative testimony does not benefit the evidentiary record, and Medco properly recognizes the Commission's determination to treat testimony received at field hearings as part of the evidentiary record in this docket. [POR No. N2010-1/26, p. 2.]

However, this plan is a departure from prior dockets. When the Presiding Officer stated at the prehearing conference that the field hearings in Docket No. N2009-1 caused no problems (quoted above), she was correct. However, the Commission's Advisory Opinion in that docket recognized the APA issue and, ruled, in effect, that field hearing statements did not constitute record evidence:

³⁴ Medco Health Solutions, Inc. SEC Form 10-K (Feb. 23, 2010), p. 36 (<http://phx.corporate-ir.net/phoenix.zhtml?c=131268&p=irol-reportsIndex>).

The Postal Service questions the evidentiary status or the weight that may be given to testimony obtained through field hearings. Tr. 4/804. The field hearings serve to inform the Commission of the concerns of members of the public that rely on the mail, but whose views may not have been fully represented in Washington, D.C. as well as some who already felt directly impacted by the Initiative. **Assertions of fact presented therein have not been relied upon in this Advisory Opinion unless otherwise supported by the official record.** [Docket No. N2009-1, Advisory Opinion, p. 5 n.8 (emphasis added).]

In other words, it is correct to say that there was no due process problem in Docket No. 2009-1, but only because the Commission treated the field hearings properly, declining to give statements made there evidentiary status.³⁵ The Commission should not now change the approach developed in Docket No. N2009-1, which was consistent with APA and its own rules, by blurring the clear line between record and non-record evidence. The Commission must rely only on record evidence in making its decisions, including issuing its advisory opinion under 39 U.S.C. section 3661(c) in this case. That is the essence and purpose of an on-the-record hearing under 5 U.S.C. section 556.

V. NATIONAL POSTS IN MANY OTHER INDUSTRIALIZED COUNTRIES HAVE ELIMINATED SATURDAY DELIVERY WITHOUT REPORTED SIGNIFICANT NEGATIVE IMPACT.

The Postal Service has estimated the volume loss that would result from elimination of Saturday delivery,³⁶ and this estimate has been challenged on the record. *See* Direct Testimony

³⁵ The same principle that applies to comment applies to briefs. Interested parties have the opportunity to submit a brief, but that brief must be **based on** record evidence. Such a brief does not itself constitute record evidence.

³⁶ Direct Testimony of Gregory M. Whiteman on Behalf of United States Postal Service, p. 14, ll. 23-26.

of Dr. Michael A. Crew on Behalf of the National Association of Letter Carriers, AFL-CIO, p. 2 (“I conclude that implementation of the proposal may cause a far more significant drop in mail volume than the Postal Service projects....”). Since lessons could be learned about the effect on volume that has occurred in countries where the post has eliminated Saturday as a regular delivery day, the Postal Service asked National Association of Letter Carriers (“NALC”) witness Michael Crew about his testimony on this issue:

Interrogatory USPS/NALC-T4-9:

(c) If your answers to subparts (a) or (b) are negative, are you aware that several **foreign postal administrations** have eliminated Saturday delivery since 1960? If so, please identify the posts that, to your knowledge, have eliminated Saturday delivery and state your understanding of the change in volume they experienced in the first year after eliminating Saturday delivery.

RESPONSE:

(c) Yes, I am aware that Saturday delivery was eliminated in **Belgium, Latvia and Singapore**. I do **not know** what **change in volume** the postal operators in those countries experienced in the first year after eliminating Saturday delivery. Indeed, Singapore only eliminated Saturday delivery in 2010. [Emphasis added.]

Witness Crew’s response did not mention that postal administrations in many other countries were known to have eliminated Saturday delivery for a number of years without significant negative impact. As long ago as 2002, it had been written that:

While many posts in industrialized countries deliver six days a week, several **deliver only five days without apparent problems** (Australia, Austria, Canada, Finland, Greece, Ireland, Luxembourg, Portugal, Spain and Sweden). Sweden Post’s competitor, City Mail, delivers every third business day. **Thus,**

six-day-a-week delivery may not be necessary to retain volume. [Emphasis added.³⁷]

Moreover, witness Crew previously has written that the European Union (“EU”) only requires member nations to maintain one delivery per working day, *i.e.*, Monday through Friday.

Clearly, Saturday is not part of the USO in the EU. Member nations are permitted to have a higher standard, but only 37 percent have regular Saturday street delivery.³⁸ EU competitors are even less concerned about 5- or 6-day delivery as “delivery frequency [is] not considered by most competitors as essential to the postal service. Indeed, these operators typically operate on 2- or 3-day delivery frequencies, and put more emphasis on date-definite delivery rather than on fixed frequency.” *Id.*, p. 233.³⁹

Contrary to the concern expressed by witness Crew, none of the 13 industrialized countries that has eliminated Saturday delivery appears to have had volume losses requiring its return to regular 6-day delivery, and witness Crew identified no country where a private

³⁷ Robert Cohen, Matthew Robinson, John Waller, and Spyros Xenakis, “The Cost of Universal Service in the U.S. and Its Impact on Competition,” published in the Proceedings of Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste GmbH (WIK) 7th Königswinter Seminar on Contestability and Barriers to Entry in Postal Markets, Nov. 17-19, 2002. An early version of this paper was presented at “The Future of Universal Postal Service in the United States,” The Brookings Institution, June 18, 2002. (http://www.prc.gov/prc-docs/library/refdesk/techpapers/prcstaff/cost_of_universal_service.pdf.)

³⁸ See M. Crew, G. d’Alcantara, P. Kleindorfer, P. Claeys, and B. Keypers, “Economic Factors Underlying Postal Reform in the European Union,” published in *Handbook of Worldwide Postal Reform*, ed. Michael A. Crew, Paul R. Kleindorfer, and James I. Campbell, Jr. (Edward Elgard Pub.: 2008), p. 229.

³⁹ Canada Post maintains five-day delivery service. Canada has been referred to as the “especially relevant because of its proximity to the United States and its similarities in geographic size, business environment, and market-oriented economic systems.” See GAO Testimony, “U.S. Postal Service: A Look at Other Countries’ Postal Reform Efforts,” Jan. 25, 1996, p.3 (<http://gao.gov/archive/1996/gg96060t.pdf>).

company moved in to “fill the gap” about which he speculated. *See* Testimony of Crew, p. 8; Response of NALC witness Crew (NALC-T4) to USPS Interrogatory, USPS/NALC-T4-8 (Tr. 8/2395).

CONCLUSION

Every study of moving from 6-day to 5-day delivery has found major cost savings.⁴⁰ Although the exact amount may not be known until after the fact, Valpak believes that the Postal Service’s estimates of cost savings in this docket are based on reasonable assumptions and that the Postal Service has supported its case well. Valpak believes the few who have presented record evidence in this docket against the Postal Service change have not made their case.⁴¹ The narrow, parochial interests of small, almost tiny, groups of stakeholders cannot be allowed to block major cost reduction efforts. The Postal Service is correct that Valpak and other mailers can and will adapt, as necessary, to delivery 5 days a week.⁴² What its own business model needs and depends upon is the existence of a reliable universal delivery service such as that envisioned in the PRA and PAEA. Therefore, Valpak generally agrees that the

⁴⁰ *See, e.g.*, Robert Cohen, Matthew Robinson, John Waller and Spyros Xenakis, *The Cost of Universal Service in the U.S. and Its Impact on Competition*, pp. 10-11, Proceedings of Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste GmbH (WIK) 7th Königswinter Seminar on “Contestability and Barriers to Entry in Postal Markets” Nov. 17-19, 2002. *See also* George Mason University School of Public Policy, “The Cost of the USO and the Value of the Monopoly in the U.S.,” pp. 9-13 (published on the PRC web site as an appendix to the PRC’s report to the Congress).

⁴¹ The majority of the opposition to the 5-day proposal appears based in four types of mail: (1) small newspapers, (2) pharmaceuticals, (3) live animals, and (4) voting by mail. The rebuttal testimony submitted demonstrates few problems with the elimination of Saturday delivery that cannot be adapted to by mailers.

⁴² Direct Testimony of Samuel Pulcrano on Behalf of the United States Postal Service (USPS-T-1), pp. 6-7.

Postal Service should be accorded the flexibility to adjust delivery frequency and achieve major long-term cost reductions to accord with the secular decline in mail volume, and urges issuance of an advisory opinion favorable to the Postal Service's proposal.

Respectfully submitted,

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