

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Mail Processing Network  
Rationalization Service Changes, 2012

Docket No. N2012-1

PUBLIC REPRESENTATIVE RESPONSE TO POSTAL SERVICE  
MOTION FOR RECONSIDERATION

(January 25, 2012)

On January 18, 2012, the Postal Service submitted a motion<sup>1</sup> asking the Presiding Officer to reconsider the ruling<sup>2</sup> establishing the procedural schedule that was established January 12, 2012.

The Postal Service premises its Motion on the fact that under the schedule established in P.O.R. 5, the Commission's Advisory Opinion would not be issued until after "the Postal Service would like to begin implementation of the service changes." Motion at 2. The Postal Service again cites its precarious financial condition as a reason it wishes to expedite the changes at issue in this docket and realize the resulting cost savings. *Id.* at 3. The Postal Service avers that "[i]f the Commission issues its Advisory Opinion in mid-April, the Opinion will still be provided more than 130 days after the filing of the Request. This is adequate time for the Commission to review the proposal..." *Id.*

The Presiding Officer should deny the Postal Service's Motion and move forward with the proceeding. The Postal Service's Motion must fail because: 1) the matter has already been fully and fairly discussed and litigated, and to change the schedule now would deny due process to the parties; 2) the Postal Service ignores all concerns but its own financial condition, conveniently omitting any reference to the requirements of Title 5 of the United States Code and the rights of the parties; and 3) the Postal Service, in its time-consuming but

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<sup>1</sup> Motion for Reconsideration of Presiding Officer's Ruling No. N2012-5 Establishing Procedural Schedule, January 18, 2012 (Motion).

<sup>2</sup> Presiding Officer's Ruling Establishing the Procedural Schedule, January 12, 2012 (P.O.R. 5).

necessary diligence to put forth a robust initial request for an advisory opinion and its delay in filing the Motion contradict the urgency cited in the Motion.

#### A. Due Process Requires Finality

The Postal Service, along with any other interested party, was invited (and availed itself of the opportunity) to present its arguments and proposed procedural schedule before the Commission. A prehearing conference was held at the Commission on January 4, 2012. Later that week, the Commission received multiple comments from interested parties on the proposed schedule.<sup>3</sup> The Postal Service responded the next week with its own comments.<sup>4</sup>

Prior to the Presiding Officer's issuing the scheduling order, the Postal Service raised the issue of its precarious financial condition.<sup>5</sup> P.O.R. 5 balances the Postal Service's request to expedite the proceeding with parties' due process rights to review the Postal Service's proposal. See P.O.R. 5 at 1. The Postal Service is now asking the Presiding Officer to rebalance those interests, based on the understanding that its financial condition trumps any other considerations.

In order to coordinate with outside consultants and potential witnesses about the scope of work and deadlines, parties, including the Public Representative would be put at an extreme disadvantage to renegotiate contracts, or drop entire lines of rebuttal due to time constraints. As it is, given the nature and complexity of the Postal Service's direct case, the Public Representative has had significant difficulty in procuring an expert who could research, provide adequate testimony, and be available for cross examination in the abbreviated time frame established. Further curtailing the procedural schedule will undoubtedly reduce the utility of any rebuttal testimony the Public Representative may be able to put forward. The Commission would be left with a shell of a proceeding where the advisory opinion on the Postal Service's proposal is reduced to a notice and comment procedure.

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<sup>3</sup> See, e.g. Public Representative Notice of Proposed Procedural Schedule, January 5, 2012.

<sup>4</sup> United States Postal Service Reply to Comments Regarding Scheduling and Other Procedural Matters, January 9, 2012 (Postal Service Scheduling Comments).

<sup>5</sup> See, e.g. Postal Service Scheduling Comments at 4.

## B. The Postal Service Ignores Title 5 Requirements

As the Presiding Officer recognizes, “[m]ost dates appearing on the schedule are driven by the due process equipments of the Administrative Procedure Act 5 U.S.C. 556, 557.” P.O.R. 5 at 2. The Postal Service’s Motion does not make a single reference to 5 U.S.C. 556 or 557.<sup>6</sup> Title 39 § 3661 of the U.S. Code specifically provides that the formal hearing requirements of 556 and 557 of Title 5 be 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 Postal Service’s statement that a mid-April issue date for the forthcoming advisory opinion (and presumably cascading deadlines which would cut discovery off in a matter of days) provides “adequate time for the Commission to review the proposal and would ensure that the advisory opinion process works in an efficient and effective manner” misses the mark and neglects both chapter 36 of Title 39, and chapters 556 and 557 of Title 5. The Postal Service appears to state that the advisory opinion process is for “the Commission to review the proposal” rather than for formal a formal hearing to be accorded to the parties, including the Postal Service, as set forth in the statute.

The Public Representative requests that the Presiding Officer uphold the Title 5 formal hearing due process rights of the parties, and allow for the development of a robust record to form a basis for the Commission’s advisory opinion.

## C. The Postal Service’s Words and Actions are Inconsistent

The Public Representative grants that the Postal Service is in a dire financial situation. The Public Representative agrees with the Postal Service that every effort must be made to reform and streamline the Postal Service so that it is able to continue to provide its vital

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<sup>6</sup> The Postal Service has previously demonstrated awareness of the due process requirements of the APA when it believes its due process rights have been violated. See, e.g. Docket No. N2011-1, Initial Brief of the United States Postal Service, November 4, 2011 at 71-73 (where the Postal Service equates its failure to complete cross examination on a specific issue to undercutting the “vitality of the Commission’s...opinion”).

services that bind the Nation together. However, the Public Representative does not agree that the Postal Service may invoke “financial distress” as a trump to reasonable attempts at oversight and due process to ensure the Postal Service, in its haste to remedy its financial distress, does not irreparably deviate from the course set forth by policies of Title 39.

The Postal Service’s need for the Commission to abandon prudence and hastily issue an advisory opinion is not, however, supported by the Postal Service’s actions. The Postal Service notes that it briefed outside parties on August 9, 2011 about the network rationalization. See Postal Service Scheduling Comments at 7. Likewise the Postal Service has produced documents in discovery demonstrating that it intended, as late as September of 2011, to submit an advisory opinion request to the Commission in October of 2011.<sup>7</sup> However, the Postal Service did not file its request until December 5, 2011.

The Public Representative appreciates the complexity of the case, and the amount of work and expertise required to put together the request, and the Postal Service’s efforts to make sure it puts its best case forward. Undoubtedly the filing date for the request was pushed back to ensure the best possible foundation for the request. However, that same complexity plagues the parties’ and Commission’s efforts to review the case in a swift manner. The Public Representative does not advocate indefinite delay, but rather a prudent balancing of the Postal Service’s need to move forward with its plans and the parties’ rights to ensure those plans are consistent with the law.

Finally, the Motion itself demonstrates the tension between the Postal Service’s arguments and its actions. The Motion is comprised of less than a single page of discussion of the Postal Service’s financial condition and arguments concerning the need for a more expedited procedural schedule. Motion at 3. The remainder of the Motion restates the background in the testimony and outstanding service standards rulemaking. *Id.* at 1-2. The Motion requests a schedule that allows for a Commission advisory opinion to be issued by mid-April, but contains no alternate proposed schedule that comports with the formal hearing requirements. The Postal Service delayed its Motion for six days after the Presiding Officer issued P.O.R. 5. During that six day delay, the Postal Service did not reach out to the Public

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<sup>7</sup> See USPS-LR-N2012-1/41, Documents Responsive to Interrogatory PR/USPS-2, January 4, 2012.

Representative or other parties to see if discovery could be streamlined or alternate agreeable dates could be arranged.<sup>8</sup> The Postal Service's actions lead to the conclusion that the Motion, rather than a good faith effort to balance the interests of the Postal Service and parties, is an effort to exert political pressure to limit the scope, utility, and value of the record on which the Commission's advisory opinion must be based.

The Public Representative requests that the Presiding Officer deny the Postal Service's Motion. The issues raised in the Motion were previously raised by the Postal Service prior to the issuance of the procedural schedule, and the parties will not be afforded due process if the schedule is abbreviated. The Postal Service has not explained how its Motion is consistent with the requirements of Title 5 or Title 39. Finally, the Postal Service's dilatory actions lead to the conclusion that it is selectively invoking a need for haste only when such haste would prejudice the parties' due process rights and benefit the Postal Service.

Respectfully Submitted,

/s/ Christopher J. Laver

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<sup>8</sup> The Postal Service instead appears to be pursuing a litigation tactic where press releases announcing the filing of motions are issued before the motions are filed. See [http://about.usps.com/news/national-releases/2012/pr12\\_0118prc.pdf](http://about.usps.com/news/national-releases/2012/pr12_0118prc.pdf), accessed January 8, 2012.