

ORDER NO. 1463

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

Before Commissioners:

Ruth Y. Goldway, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton;
Tony Hammond; and
Robert G. Taub

Complaint of American Postal Workers Union,
AFL-CIO

Docket No. C2012-2

ORDER DISMISSING COMPLAINT

(Issued September 10, 2012)

I. INTRODUCTION

On June 12, 2012, the American Postal Workers Union (APWU) filed a complaint alleging violations by the Postal Service of 39 U.S.C. §§ 3661 and 3691.¹ The alleged violations relate to a Postal Service request for an advisory opinion on proposed service standard changes that had previously been filed with the Commission.² The Postal

¹ Complaint of American Postal Workers Union, AFL-CIO Regarding Violations of 39 U.S.C. 3661 and 3691, June 12, 2012. The following day, June 13, 2012, APWU filed a revised version of the complaint that incorporated minor corrections but made no substantive changes. See American Postal Workers Union, AFL-CIO, Notice of Filing Revised Complaint [Errata], June 13, 2012; Complaint of American Postal Workers Union, AFL-CIO Regarding Violations of 39 U.S.C. 3661 and 3691, June 13, 2012. Unless otherwise noted, references in this Order will be to the revised complaint of June 13, 2012, which will be cited simply as the Complaint.

² Request of the United States Postal Service for an Advisory Opinion on Changes in the Nature of Postal Services, December 5, 2011 (Request). As of this date, the Postal Service's Request remains pending.

Service moves to dismiss the Complaint.³ For the reasons set forth below, the Commission grants the Motion to Dismiss.

II. BACKGROUND

On September 21, 2011, the Postal Service published an advance notice of proposed rulemaking inviting public comments on a conceptual proposal to revise service standards for market dominant products.⁴ A major objective of the proposal was to facilitate the consolidation of Postal Service processing and transportation networks. *Id.* According to the Postal Service, further network consolidations would be largely unachievable without the relaxation of certain service standards. *Id.* at 58434. The Postal Service stated that if it were to decide to move forward with the proposal, it would solicit public comments on a proposed rule and would request an advisory opinion from the Commission. *Id.* at 58435-58436.

On December 5, 2011, the Postal Service filed its Request with the Commission. In its Request, the Postal Service advised the Commission of its earlier ANOPR and of its intent to institute a notice and comment rulemaking proceeding to revise its service standard regulations in conjunction with the service changes that were the subject of its Request. Request at 7. On December 7, 2011, the Commission established Docket No. N2012-1 to consider the Request.⁵

On December 15, 2011, the Postal Service published proposed revisions to its market dominant service standards in the *Federal Register* and sought public comment.⁶ On May 25, 2012, the Postal Service published a final rule revising the

³ Motion of the United States Postal Service to Dismiss Complaint, July 2, 2012 (Motion to Dismiss).

⁴ Proposal to Revise Service Standards for First-Class Mail, Periodicals, and Standard Mail, 76 FR 58433 (Sept. 21, 2011) (ANOPR).

⁵ Order No. 1027, Notice and Order Concerning Request for an Advisory Opinion regarding the Revision of Service Standards for First-Class Mail, Periodicals, Package Services, and Standard Mail, December 7, 2011. David B. Popkin filed a request to intervene June 13, 2012. The request is premature, as notice to intervene is permissible only after the Commission issues an order establishing a proceeding. See 39 CFR 3001.17. The request is therefore denied.

⁶ Service Standards for Market-Dominant Mail Products, 76 FR 77942 (December 15, 2011).

service standards for market dominant mail products and announcing its intention to implement those revisions in two phases.⁷ An interim version of the new rules for market dominant service standards would apply from July 1, 2012 through January 31, 2014, in conjunction with what the Postal Service referred to as Phase One of Network Rationalization.⁸ The final version of the new standards would be implemented beginning February 1, 2014, in conjunction with Phase Two of Network Rationalization. *Id.*⁹

Following publication of the Final Rule, the Commission established additional procedures in Docket No. N2012-1 to incorporate additional information into the record regarding the modified network consolidation plan.¹⁰

III. APWU'S COMPLAINT AND THE POSTAL SERVICE'S MOTION TO DISMISS

A. APWU's Complaint

APWU filed its Complaint under 39 U.S.C. § 3662. Complaint, ¶ 6. Section I of the Complaint sets forth a brief introduction. *Id.* ¶¶ 1-5. Section II presents a statement of jurisdiction. *Id.* ¶¶ 6-9. Section III sets forth facts that allegedly demonstrate that the Postal Service did not submit its network consolidation plan within a reasonable period

⁷ Revised Service Standards for Market-Dominant Mail Products, 77 FR 31190 (May 25, 2012) (Final Rule). The Postal Service attributed the phased implementation plan and some of the service standard revisions, in part, to Senate passage of S. 1789 on April 25, 2012. See Motion to Dismiss at 3-4. That legislation, if enacted, would restrict its ability to reduce overnight delivery standards for Intra-Sectional Center Facility First-Class Mail and Periodicals. *Id.* at 31191. The Postal Service identified three main differences between the two implementation phases.

⁸ The interim version of the revised regulations will be suspended from September 1 through December 31, 2012, in order to avoid disruption of the fall election and the holiday mailing cycle. *Id.* at 31192.

⁹ The Postal Service stated that the delay in implementation of the final version of the revised regulations would afford the Postal Service flexibility to amend or withdraw the final version through a new notice and comment rulemaking proceeding should subsequent events or changed circumstances so warranted. *Id.*

¹⁰ Order Scheduling Hearing Concerning Postal Service's Modified Network Consolidation Plan, May 24, 2012 (Order No. 1353). The additional procedures included the presentation by the Postal Service of a witness to answer questions posed by the Commission and participants at a public hearing; the submission by the Postal Service of responses to additional Commission information requests; and Commission authorization of participants to supplement their prior written testimony. *Id.* at 3.

of time prior to the July 1, 2012 implementation date of Phase One of the plan adopted by the Postal Service's Final Rule. *Id.* ¶¶ 10-36. Section IV alleges that the Postal Service's decision to implement the Phase One service standard changes effective July 1, 2012 was made without regard to the proceeding pending before the Commission in Docket No. N2012-1. *Id.* ¶¶ 37-52. Section V alleges that there is no evidence to support the July 1, 2012 Phase One service standard changes and that, indeed, there is evidence that such changes are unnecessary. *Id.* ¶¶ 53-55.

Based on the foregoing assertions, APWU alleges essentially three violations of sections 3661 and 3691 of title 39.¹¹ Those three violations are:

- That the Postal Service's implementation of service standard changes on July 1, 2012, prior to receipt of the Commission's advisory opinion in Docket No. N2012-1 constitutes a violation of section 3661, Complaint ¶¶ 58-61;
- That even if section 3661 does not require the Postal Service to receive an advisory opinion before implementing, the Postal Service's failure to request a new advisory opinion concerning the Phase One service standard changes provided for in the Postal Service's Final Rule constitutes a violation of section 3661, *id.* ¶¶ 56-57; and
- That the service changes adopted in the Postal Service's Final Rule constitute a violation of section 3691 because the Postal Service failed to consider adequately the factors or meet the objectives specified in section 3691, *id.* ¶¶ 62-63.

APWU alleges further that these violations will have adverse impacts on both the Postal Service and mailers. *Id.* ¶¶ 64-66.

¹¹ Section 3661 provides that when the Postal Service determines there should be a change in the nature of postal services that will generally affect service on a nationwide or substantially nationwide basis, it is to submit a proposal, within a reasonable time prior to the effective date of such proposal, requesting an advisory opinion from the Commission on the change. 39 U.S.C. 3661(b). Section 3691(a) requires the Postal Service, in consultation with the Commission, to establish, by regulation (and amendments thereto), a set of service standards for market dominant products based on four objectives and eight factors. Subsections (b) and (c) identify four objectives that service standards are to be designed to achieve and eight factors the Postal Service is to take into account in establishing or revising the service standards.

APWU requests the Commission to:

- Declare that the Postal Service cannot implement the Phase One service standard changes provided for in the Final Rule on July 1, 2012, until it seeks a new advisory opinion;
- Declare that the Postal Service cannot implement the Phase One service standard changes on July 1, 2012, before the Commission issues an advisory opinion;
- Declare that the Postal Service failed to satisfy the requirements of section 3691 with respect to the implementation of new service standards on July 1, 2012; and
- Order the Postal Service not to implement the service standard changes adopted by the Final Rule until the Commission issues an advisory opinion.

Id. at 28-29.

B. Postal Service Motion to Dismiss

The Postal Service generally contends that some aspects of the Complaint fail to satisfy Commission filing requirements, and that APWU misinterprets controlling statutory provisions. It therefore argues that APWU's claims are without merit or otherwise unsupported. More specifically, the Postal Service asserts:

- That section 3661 does not require the Postal Service to obtain an advisory opinion before implementing a nationwide service change, that it requires only that the Postal Service request an opinion within a reasonable time before implementation, and that it did so, Motion to Dismiss at 7-15;
- That the decision in the Postal Service's Final Rule to implement the service standard changes in phases beginning July 1, 2012, did not require the submission of a new request for an advisory opinion, *id.* at 16-19; and
- That the Postal Service has complied with the terms of section 3691, *id.* at 19-22.

On the basis of these arguments, the Postal Service requests dismissal of the Complaint. *Id* at 22.

C. APWU Opposition and Pasadena Brief

APWU opposes the Postal Service's Motion to Dismiss.¹² The City of Pasadena, California, (Pasadena) also filed an opposition to the Postal Service's motion.¹³

APWU argues (1) that the Postal Service's interpretation of section 3661 is facially invalid, APWU Opposition at 1-4; (2) that section 3661's legislative history demonstrates that the Postal Service is required to do more than simply request an advisory opinion before making substantial service standard changes, *id.* at 4-6; (3) that other sections of title 39 as interpreted by various courts support APWU's interpretation of section 3661, *id.* at 6-9; (4) that the Postal Service failed to file its Request in a reasonable time before implementing service standard changes, *id.* at 9-14; and (5) that the Commission needs a more complete record to make any decisions on other aspects of the Complaint, *id.* at 14-15.

Pasadena also asserts that the Postal Service's implementation of service standard changes prior to issuance of an advisory opinion is in violation of section 3661 and urges denial of the Postal Service's Motion to Dismiss. Pasadena Brief at 2.¹⁴

¹² American Postal Workers Union, AFL-CIO, Reply in Opposition to USPS Motion to Dismiss, July 12, 2012. On July 13, 2012, APWU filed a revised version of its opposition which incorporated minor, non-substantive, corrections. See American Postal Workers Union, AFL-CIO, Reply in Opposition to USPS Motion to Dismiss [Revised], July 13, 2012 (APWU Opposition). References in this Order are to the revised version of the opposition.

¹³ Brief in Support of Petition by the City of Pasadena, July 6, 2012 (Pasadena Brief). The City of Pasadena also filed a petition for leave to intervene. Petition to Intervene by the City of Pasadena, July 6, 2012. This latter petition was previously denied as premature. Order Denying City of Pasadena Motions for Intervention, July 12, 2012 (Order No. 1400). The Commission nevertheless ordered that the Pasadena Brief be treated as an *amicus* filing in opposition to the Postal Service's Motion to Dismiss. *Id.* at 3. As such, the Pasadena Brief is considered in this Order.

¹⁴ Pasadena also objects to the Postal Service's conclusion that it is appropriate to close the Pasadena, California mail processing and distribution center. *Id.* at 1-2. This latter argument was previously addressed by the Commission in Order No. 1400. Order No. 1400 at 2-3.

IV. COMMISSION ANALYSIS

The Commission rules that govern the filing of complaints provide that within 90 days after a complaint is filed, the Commission will issue an order that either (1) finds the complaint raises one or more material issues of fact or law and begin proceedings on the complaint, or (2) dismisses the complaint. See 39 U.S.C. § 3662(b) and 39 CFR 3030.30. Before filing an answer to a complaint, the Postal Service may file a motion to dismiss. 39 CFR 3030.12(b). In its Motion to Dismiss, the Postal Service argues that all three violations alleged by APWU are without foundation.

A. APWU's Allegation That Implementation of Service Standard Changes Prior to Issuance of an Advisory Opinion Violates Section 3661

Motion to Dismiss. The Postal Service asserts that APWU's claim that section 3661 requires the Postal Service to obtain an advisory opinion prior to implementing related changes is contrary to the plain language of the provision, which requires only that the Postal Service "shall submit a proposal within a reasonable time prior to the effective date of such proposal...requesting an advisory opinion on the change" and does not require the Postal Service to obtain an advisory opinion before implementing proposed changes. Motion to Dismiss at 7.

The Postal Service points to additional support in section 3661(b)'s reference to the submission of a proposal "within a reasonable time prior" to the proposed effective date. It argues that this statutory requirement and the Commission's rule that requires the filing of requests for advisory opinions "not less than 90 days in advance" of the effective date of proposed service changes would be "wholly unnecessary" if the Postal Service had to wait for the Commission's decision before implementing a service change. *Id.* at 7-11.

It observes further that, unlike other provisions of former title 39 contemporaneously adopted as part of the Postal Reorganization Act, Pub. L. 91-375, 84 Stat. 719 (1970), (such as sections 3622(a), 3623(b), 3624(a), 3625, and 404(d)), section 3661 does not impose a deadline on Commission action, nor does it require

Commission action or approval before the Postal Service may act on its proposal. *Id.* at 9-11.

The Postal Service maintains that its interpretation does not render the Commission's role "nugatory" or defeat the purpose of the statute because much of the value of the section 3661 process lies in the exchange of views and information. *Id.* at 12. It argues that such an exchange of views and information has been taking place for more than 6 months in the Docket No. N2012-1 proceeding, and therefore the APWU "cannot seriously contend that it has not had an opportunity to be heard." *Id.*

The Postal Service points out that it has elected to implement its proposed network changes in two discrete phases, with the implementation of Phase One commencing July 1, 2012, which is 210 days after the filing of its Request—far more than the 90 days required by 39 CFR 3001.72. *Id.* at 15. Moreover, implementation of the more significant Phase Two will not occur until February 1, 2014, which will be approximately 790 days after the filing of its Request and "presumably long after the Commission has rendered its advisory opinion in Docket No. 2012-1." *Id.* The Postal Service claims further that APWU's allegation that the Postal Service's Request was not filed within a reasonable time of implementation is deficient because it does not set forth the facts and circumstances supporting this assertion, as required by rule 3030.10(a)(1) and does not clearly identify and explain how the request violates applicable statutory standards or regulations as required by rule 3030.10(a)(2)). *Id.* at 13.

APWU Opposition and Pasadena Brief. APWU claims that it is the Postal Service's interpretation of section 3661, not APWU's, which fails to recognize the "bedrock principle" of construing a statute in a way that prevents any clause, sentence, or word from being superfluous, void or insignificant. APWU Opposition at 1. In support of this contention, APWU asserts the Postal Service's interpretation would render the role and duties of the Commission described in and the due process rights guaranteed by section 3661(c) superfluous, void, and insignificant. *Id.*

APWU notes that section 3661(c) requires Commissioners to certify that an advisory opinion complies with the policies of title 39. APWU asserts that the

Commission must necessarily evaluate whether the Postal Service's proposal is in compliance with all applicable statutory policies, including those establishing its various powers and obligations. APWU claims that if the Postal Service is only required to request an advisory opinion before moving forward with changes in postal services, but not required to receive and consider the opinion, the requirement that the Commission review the plan for compliance with title 39 would be rendered insignificant. *Id.* at 2. It also alleges that the requirement that the Postal Service submit its plan "a reasonable time prior" to implementation would be void. *Id.*

APWU points out that section 3661(c) requires that the Commission not issue an advisory opinion until after an opportunity for a hearing on the record under section 556 and 557 of the Administrative Procedure Act. *Id.* at 3. It concludes that permitting the Postal Service to implement service changes before it receives an advisory opinion would render the due process guarantees of section 3661(c) nugatory. *Id.*

Finally, APWU claims that legislative history, other statutory provisions, and judicial decisions support its position that section 3661 requires the Postal Service to receive and consider a Commission advisory opinion before implementing service changes subject to section 3661. *Id.* at 4–9. The City of Pasadena presents a similar claim. Pasadena Brief at 2.

Finding. The Commission agrees that a plain reading of section 3661 links implementation of a Postal Service proposal to make a change in the nature of postal services to the filing by the Postal Service of a request for an advisory opinion. This linkage is consistent with the Postal Accountability and Enhancement Act (PAEA)'s delegation to the Postal Service of primary responsibility for both long-range planning and day-to-day operations and does not diminish the Commission's complementary advisory role. The Postal Service's longstanding practice of awaiting a Commission opinion prior to implementation appears to have served its interests and those of the larger postal community well. However, this practice has been voluntary and is not mandated by law or regulations.

As the Commission finds the language of section 3661 clear on its face, there is no need to search for additional sources of support. However, the Commission has considered whether the legislative history, other statutory provisions, and judicial decisions relied upon by APWU in support of its reading of section 3661 are persuasive. See APWU Opposition at 6-9. The Commission concludes that although these policies, the cited legislative history, and the cited cases provide useful guidance with respect to the interpretation of section 3661, they do not support APWU's position that the Postal Service must await issuance of an advisory opinion before implementing a service change that is the subject of a request for an advisory opinion.

The legislative history cited by APWU is fragmentary and inconclusive. *Id.* at 4-5. While it may be susceptible to an interpretation consistent with APWU's position, it is not compelling or dispositive. APWU made no attempt to reconcile its interpretation of this legislative history with the absence from section 3661 of any express requirement that an advisory opinion must be issued before the Postal Service may act on a service change proposal. As the Postal Service points out, other statutory sections clearly require prior Commission action before Postal Service action is permitted. Motion to Dismiss at 9-11. Where Congress intended to require Commission action as a prerequisite before the Postal Service could act, it was clear. Section 3661 contains no such requirement. Accordingly, the Commission finds APWU's interpretation of section 3661, based on citation to minimal legislative history, unpersuasive.

Similarly, APWU's citation to the Court's comparison of sections 3622 and 3623 to section 3661 in *United Parcel Service v. United States Postal Service*, 604 F.2d 1370 (3rd Cir. 1979) does not support its interpretation of section 3661. In *United Parcel Service*, the Court's comparison of those three statutory sections was made for the purpose of interpreting the word "change" in former section 3622. 604 F.2d at 1378. The Court was not called upon to address the issue here, *viz.* whether the Postal Service must await the issuance of an advisory opinion before it implements a service change. In interpreting the term "change", the Court concluded that "the substantive differences in § 3661 (services) as contrasted with § 3662 [sic] (rates) and § 3623

(classifications) reflect different Congressional concerns and therefore different Congressional requirements.” *Id.* at 1378-79. Not only does this conclusion fail to support APWU’s interpretation, it can be read to support the Postal Service’s argument that Congress’ decision not to include in section 3661 the same requirement of prior Commission action as it has in other sections was intentional and conclusively eliminates any requirement of prior Commission action.

The remaining court cases cited by APWU, with language suggesting a requirement that advisory opinions must be issued before service changes may be implemented, are also irrelevant. APWU Opposition at 7-9. In none of these cases did the courts address the specific issue presented here. At most, the language cited by APWU is *dicta* and therefore of no precedential value for purposes of this proceeding. In at least one case, the Court’s discussion supports the Postal Service’s position. For example, the Court in *Bradley v. U.S. Postal Service*, 554 F.2d 186, 187 (5th Cir. 1977). states:

Under the Postal Reorganization Act of 1970, 39 U.S.C.A. § 3661, before the Postal Service may implement any ‘change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis,’ it must *request* the...Commission to render an advisory opinion on the change, which may issue only after an opportunity for a public hearing.

APWU Opposition at 7 (emphasis added). Although the cited statement in this decision affirms the need for the Postal Service to request a decision before implementation, it does not address the issue of whether implementation must be deferred until after a Commission decision is received.

A separate question is whether, given the revised implementation date of July 1, 2012 for some changes, the Postal Service will have satisfied section 3661’s requirement for filing “within a reasonable time” prior to implementation. The APWU’s position is that the Postal Service has not met that standard for either the original Request or the recent changes identified in the Final Rule.

The Postal Service filed its advisory opinion request in Docket No. N2012-1 on December 5, 2012. Developments led the Postal Service to adopt a phased implementation plan, with July 1, 2012 (Phase One) and February 2014 (Phase Two). These dates are well in excess of the 90-day minimum in Commission rule 3001.72.

APWU also claims that the Postal Service is not in compliance with section 3661 because a separate filing was required related to the Phase One at least 90 days before its effective date. The Commission finds that in this instance the Phase One implementation can best be characterized as a lesser included aspect of the overall Request filed in Docket No. N2012-1. Therefore, a new request was not required.

Finally, APWU contends that because Docket No. N2012-1 is a case of such complexity, the 90-day minimum established by the Commission rule does not satisfy the statutory requirement that a Request be filed “a reasonable time” prior to the intended effective date. The Commission finds the period between filing (on December 5, 2011) and implementation of Phase One (on July 1, 2012) is reasonable. Similarly, the period between the December 5, 2011 filing date and implementation of Phase Two in February 2014 clearly constitutes a “reasonable” time prior to the effective date.

In rejecting APWU’s assertion that the Postal Service has violated the requirements of section 3661, the Commission nevertheless acknowledges that the issuance of an advisory opinion before implementation by the Postal Service of changes in the nature of services subject to section 3661 is preferred. As the Commission stated in its Order denying APWU’s motion for an emergency order prohibiting the Postal Service from implementing its proposed service changes until after an advisory opinion had been issued:

The advisory opinion process envisions the Postal Service taking the advisory opinion into account in implementing its plans. The public interest is served when the full process is completed.

Order No. 1387 at 12. The Commission continues to take that view.

B. APWU's Allegation That the Postal Service's Failure to File a New Request for an Advisory Opinion Violates Section 3661

Motion to Dismiss. The Postal Service claims that its decision to implement the service change in two phases did not require it to submit a new request for an advisory opinion and that the APWU has not “come close” to establishing that circumstances require a new filing. Motion to Dismiss at 16. Instead, it claims the overarching difference between its proposed rule and the Final Rule is the additional detail on how the service standards will be gradually implemented. It contends the new standards that take effect in February, 2014 are “fundamentally the same” as those under review in Docket No. N2012-1. *Id.* It essentially argues that Phase One and Phase Two are intermediate implementing stages it is passing through on the way to effectuating the changes under consideration by the Commission in the pending case. The Postal Service therefore contends that the facts that could support a claim that it has effectively abandoned its original proposal and replaced it with something else are not present. *Id.* at 16-17.

APWU Opposition. APWU claims the differences between Phase One and Phase Two plans are material and claims the Postal Service has provided no evidence to enable the Commission and participants to evaluate the changes. APWU Opposition at 10. It concludes that the record evidence in Docket No. N2012-1 is comprised almost exclusively of information related to the changes proposed in the first two notices, and says that information does not address all of the changes and related concerns raised by the May 25, 2012 Final Rule. *Id.*

APWU further claims that its contention regarding the need for a new submission is “so heavily fact-bound” that it cannot be decided on the basis of a motion to dismiss. It asserts “the truncated procedure” the Commission adopted to address the revised plan fails to provide the due process required by section 3661. Accordingly, APWU concludes that the question of whether “a wholly new” proceeding must be filed under section 3661 requires further factual development, and should not be resolved in a summary proceeding. *Id.* at 14.

Finding. Determining the materiality of changes in a filing made by the Postal Service pursuant to section 3661 must be made on a case-by-case basis. In this instance, the APWU claims the changes related to Phase One are material, and that the Postal Service is under an obligation to file a new section 3661 request. The Postal Service, in contrast, views the changes in the Final Rule, collectively, as largely a matter of a revision to the implementation approach, and claims the fundamentals are essentially unchanged.

The relevant standard for determining the materiality of the changes in a Final Rule is whether they work a fundamental change in the overall purpose and direction of the original Request. The Commission finds they do not. The Final Rule simply requires a phased implementation of the Request. Thus, it does not trigger the need for a “wholly new” filing. Overall, they can be viewed as consistent with the stated purpose of the original Request, which seeks network consolidation through changes to service standards. This is consistent with the characterization of the changes in the Final Rule as updates to the original Request, rather than a wholesale replacement.

C. APWU’s Allegation That the Service Changes Adopted by the Postal Service Violate Section 3691

Motion to Dismiss. The Postal Service argues that APWU’s claim that the service changes adopted by the Final Rule violate 39 U.S.C. § 3691 is misplaced because compliance with that provision “is at the heart” of Docket No. N2012-1, and is therefore “pending in...an existing Commission proceeding.” Motion to Dismiss at 19, citing 39 CFR 3030.10(a)(7). It contends that Commission filing rules provide that APWU must explain why timely resolution cannot be obtained in the existing case, and claims it has failed to do so. *Id.* The Postal Service emphasizes that APWU fails to recognize that its Request includes testimony addressing the consistency of the proposal with section 3691 factors and objectives. *Id.* at 20. It also says APWU attempts to reverse the burden of proof and misstates the applicable legal standard. *Id.* at 19-20.

APWU Opposition. APWU argues that its contention that the Postal Service's network consolidation plan violates section 3691 "is not suitable for decision on a motion to dismiss" and that a complaint proceeding is necessary to develop an adequate record on which to determine compliance with section 3691. APWU Opposition at 14-15.

Finding. The Commission concludes that in the circumstances presented here, APWU's claims relating to section 3691 deficiencies are not properly the subject of a complaint proceeding. To the extent APWU's argument extends to the original filing, the Commission notes that testimony in Docket No. N2012-1 addresses the consistency of the proposal with the relevant section 3691 factors and objectives. To the extent this argument concerns the Final Rule, the Commission directed the Postal Service to provide an update, and it has complied with this directive.¹⁵ Under Commission rule 3030.10, the forum for addressing APWU's concern about the consistency of the Request with section 3691 considerations is pending in Docket No. N2012-1, absent a persuasive argument that timely resolution cannot be achieved in that case. APWU has not, as required by Commission rule 3030.10(a), presented the requisite argument.

D. Conclusion

The Commission has considered arguments raised by the APWU and the City of Pasadena claiming violations of 39 U.S.C. §§ 3661 and 3691. It also has considered the Postal Service's counter-arguments. Based on the applicable standard of review, the Commission concludes that the Complaint fails to raise any material issues of fact or law. Accordingly, pursuant to rule 3030.30(a)(2), the Commission dismisses the Complaint.

¹⁵ See Order No. 1353, See *also* Commission Information Request No. 1, May 24, 2012, and Responses of United States Postal Service Witness Emily Rosenberg to Commission Information Request No. 1 (Questions 1 through 9), June 4, 2012.

It is ordered:

The Motion of the United States Postal Service to Dismiss Complaint, filed July 2, 2012, is granted.

By the Commission.

Shoshana M. Grove
Secretary