

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

COMPLAINT OF ADVO CARE, INC.

Docket No. C2013-1

**MOTION OF THE UNITED STATES POSTAL SERVICE
TO DISMISS COMPLAINT
(November 20, 2012)**

Pursuant to 39 C.F.R. § 3030.12(b), the United States Postal Service submits this motion to dismiss the Complaint¹ dated October 26, 2012 and filed October 31, 2012, by AdvoCare, Inc. (“AdvoCare”).² In its Complaint, AdvoCare argues that, despite the overwhelming support of the community for keeping the Great Cacapon Post Office open with realignment of weekday window service hours, the POSTPlan procedure, as implemented, was flawed. Instead, AdvoCare argues that the Post Office should remain open without the planned adjustment from eight hours of weekday window service to six hours based upon actual workload. As the Postal Regulatory Commission (Commission) acknowledged in its Advisory Opinion regarding POSTPlan, this option to retain the current window service hours was not, and is not, available to customers in locations studied pursuant to POSTPlan. See Docket No. N2012-2, Advisory Opinion at 2 (recognizing “a clear choice [for a community] between (1) keeping their [P]ost [O]ffice open with reduced hours, or (2) closing their [P]ost [O]ffice

¹ It should be noted that while AdvoCare presents this case as a complaint, it also purports to appeal the decision to realign window service hours at the Great Cacapon Post Office pursuant to 39 U.S.C. § 404(d). Complaint at 1-3. The Commission has docketed this as a complaint case pursuant to section 3662, but as discussed in detail below, subsection 404(d) is not among those enumerated in subsection 3662(a) as the basis for a complaint. Nevertheless, this pleading attempts to explain how all pertinent sections of title 39 apply (or not) to Complainants assertions.

² Pursuant to this rule, the Postal Service’s Answer is deferred. If the Commission denies the Postal Service’s motion or postpones disposition, the Postal Service’s answer is due within 10 days of the Commission’s action. 39 C.F.R. § 3030.12(b).

and providing replacement delivery service.”). No legal principle justifies AdvoCare’s preferred outcome.

AdvoCare would have the Great Cacapon Post Office formally studied for discontinuance despite the near universal opposition of its customers.³ The fundamental flaw in AdvoCare’s position is the assumption that the Great Cacapon Post Office has the option of remaining an EAS Level 15 Post Office with eight hours of daily retail window service. As a result of the POSTPlan initiative, the Great Cacapon Post Office, like other POSTPlan Offices, has only two options, realignment of window service hours or study for discontinuance with replacement service. As Witness Day testified in Docket No. N2012-2, “the status quo is no longer an option,” and the community, through the survey responses and at the meeting, has voiced its support to maintain the Post Office with realigned window service hours. See Docket No. N2012-2, Tr. 1/226; Complaint Exhibit B.

The Commission should dismiss the Complaint with prejudice for several reasons. First, the issues presented in this Complaint also were already litigated in Docket No. N2012-2, and the Commission should dismiss the Complaint with prejudice because it fails to raise any new or material issues of fact or law. Second, as described in the Complaint, the POSTPlan process followed all statutory and regulatory requirements and resulted in the community choosing to retain its Post Office, serviced by a career Postal Service employee with six hours of weekday window service. Third, AdvoCare has laid no legal foundation either for an appeal or the existence of any

³ AdvoCare makes no representation that its action in this docket is supported more generally by customers, the majority of whom have already demonstrated interest in retaining their Post Office in accordance with POSTPlan procedures. Hence, AdvoCare prefers to assert its personal preference for an outcome not available over the clear preference of surveyed customers.

undue discrimination, so no basis exists for invoking the Commission's jurisdiction. In the alternative, the Commission should dismiss the complaint without prejudice because AdvoCare failed to satisfy the "meet and confer" requirement of 39 C.F.R. § 3030.10(a)(9) before filing its Complaint.

BACKGROUND

On May 25, 2012, the Postal Service filed with the Commission a request for an advisory opinion on the Postal Service's POSTPlan initiative to realign the window service hours at Post Offices classified at EAS Level 16 or below. The Great Cacapon Post Office, currently classified as EAS Level 15, was included in the list of Post Offices to be evaluated for window service hours realignment. See Docket No. N2012-2, USPS-LR-N2012-2/1. The Commission is well aware of the empirical foundation for the policies fulfilled by POSTPlan, together with prior history that had some smaller Post Offices being studied for discontinuance rather than an improved policy to match operational hours with measured workload. Indeed, the Commission's Advisory Opinion in Docket No. N2012-2 helped shape POSTPlan as it is being implemented in Great Cacapon. The Postal Service need not repeat that foundational information in this motion. Instead, the Postal Service explains herein how it implemented POSTPlan with respect to the Great Cacapon Post Office (which is reflected in the Complaint and its attachments).

The Great Cacapon Post Office currently provides window service hours for eight hours per day from 8:00am to 12:00pm and from 12:30pm to 4:30pm. Pursuant to USPS-LR-N2012-2/1, the Great Cacapon Post Office has a POSTPlan Adjusted Earned Workload (AEWL) of 4.58, which results in the Post Office being reclassified as a

Level 6 Post Office, with six hours of window service each weekday.⁴ The Post Office currently has a Postmaster vacancy and is staffed with an Officer-in-Charge (OIC) from the Berkeley Springs Post Office.

On September 19, 2012, the Postal Service mailed a letter and survey to all customers served by the Great Cacapon Post Office and made the same available at the Post Office retail counter. See Complaint Exhibit A. A total of 860 surveys were distributed to customers. Of those, 376 surveys were returned to the Postal Service by the October 10, 2012, deadline. See Complaint Exhibit B. On October 24, 2012, the Postal Service held a community meeting to discuss the survey results and the steps moving forward. The public meeting was attended by approximately 150 customers. At the meeting, the Postal Service presented a Fact Sheet for the Great Cacapon Post Office, which included the survey results and the proposed hours of operations based on customer input. See *id.* As the Fact Sheet indicates, ninety-six percent of respondents indicated a preference for the realignment of hours rather than initiating a discontinuance study to close the Post Office. *Id.* Of the 376 surveys returned, nine indicated a preference for initiating a discontinuance study and five surveys contained no selection. *Id.* Because of the election and holiday season, customers were informed at the meeting that the realignment of hours would likely occur in January 2013.

⁴ As set forth in Docket No. N2012-2, weekend hours and access to mail receptacles are not affected by POStPlan. Docket No. N2012-2, Direct Testimony of Witness Day (USPS-T-1) at 16.

RELEVANT LEGAL STANDARDS AND PROCEDURES

Pursuant to 39 U.S.C. § 3662(a), any person “may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.” The Commission’s Rules of Practice and Procedure prescribe the form of the initiation of a complaint. Under those rules, a complaint must, among other things:

- “Set forth the facts and circumstances that give rise to the complaint,” 39 C.F.R. § 3030.10(a)(1);
- “Clearly identify and explain how the Postal Service’s action or inaction violates applicable statutory standards or regulatory requirements,” *id.* § 3030.10(a)(2);
- “State the nature of the evidentiary support that the complainant has or expects to obtain during discovery to support the facts alleged in the complaint,” *id.* § 3030.10(a)(5);
- “State whether the issues presented are pending in or have been resolved by an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party; and if so, provide an explanation why timely resolution cannot be achieved in that forum,” *id.* § 3030.10(a)(7); and
- “Include a certification that states that prior to filing, the complainant attempted to meet or confer with the Postal Service’s general counsel to resolve or settle the complaint, why the complainant believes additional steps would be inadequate, and the reasons for that belief,” *id.* § 3030.10(a)(9).

Within 20 days after a complaint is filed, the Postal Service generally must either file an answer or a dispositive motion. *Id.* § 3030.12.

Within 90 days after a complaint is filed, the Commission must either dismiss the complaint or, upon a finding that the complaint “raises material issues of fact or law,

begin proceedings on such complaint.” 39 U.S.C. § 3662(a); *accord* 39 C.F.R. § 3030.30(a). If, at the conclusion of that proceeding, the Commission finds the complaint to be “justified,” it may take appropriate action to remedy the noncompliance. 39 U.S.C. § 3662(c).

Accordingly, the issue before the Commission here is whether AdvoCare’s Complaint both satisfies the procedural requirements of 39 C.F.R. § 3030.10(a) and raises material issues of fact or law warranting the initiation of complaint proceedings.

ARGUMENT

AdvoCare failed to satisfy 39 C.F.R. § 3030.10(a)(2), which requires it to address in the Complaint “how the Postal Service’s action or inaction violates applicable statutory standards or regulatory requirements.” Furthermore, the Complaint entirely fails to raise any issue of material issues of fact or law.

The Complaint presents various circular and disjointed arguments that the Postal Service reassembles as three arguments regarding the realignment in hours of operation at the Great Cacapon Post Office pursuant to POSStPlan: (1) the realignment constitutes undue and unreasonable discrimination and grants undue or unreasonable preferences to other users of the mail in violation of 39 U.S.C. § 403(c), Complaint at 3-4; (2) the format of the survey was flawed, *id.* at 6; and (3) the realignment violates the discontinuance procedures of 39 C.F.R. § 241.3(3), *id.* at 4-5. Each argument is examined below to demonstrate why it cannot survive a motion to dismiss, thereby supporting dismissal of the Complaint with prejudice.

In addition to its substantive inadequacies, AdvoCare failed to satisfy the procedural requirements by improperly certifying that it had complied with the meet and

confer requirements of 39 C.F.R. § 3030.10(a)(9). AdvoCare did not even attempt to completely satisfy the legal requirements to meet and confer with the Postal Service's General Counsel as required by the Commission's rules, although it did leave a voicemail message for an attorney indicating an intent to file the Complaint regardless of any response. This procedural failure should result independently in dismissal of the complaint, without prejudice, as discussed in detail below.

I. THE POSTAL SERVICE'S REALIGNMENT IN HOURS AT THE GREAT CACAPON POST OFFICE IS CONSISTENT WITH ALL STATUTORY AND REGULATORY REQUIREMENTS.

1. The Postal Service's Implementation of POStPlan with Respect to the Great Cacapon Post Office Did Not Result in Undue or Unreasonable Discrimination or Preference.

AdvoCare argues that POStPlan unfairly and unduly discriminates against local users of the mail and provides undue or unreasonable preferences to other mailers in violation of section 403(c) of title 39. Section 403(c) states:

In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

This rule is often summarized as requiring that the Postal Service have a good business reason for distinguishing between customers. The facts here show that the Postal Service has good reason for undertaking POStPlan; indeed, it sought and obtained a Commission advisory opinion prior to implementing POStPlan under 39 U.S.C. § 3662. Further, the Postal Service is treating all customers of the Great Cacapon Post Office the same, giving each of them the same access to postal services (AdvoCare is treated no differently than other customers notwithstanding its insistence on special treatment).

The reasonableness test has a very low standard and federal courts have “broadly” interpreted 403(c) in cases where the Postal Service has been charged with undue or unreasonable discrimination. See *UPS Worldwide Forwarding, Inc. v. USPS*, 66 F.3d 621, 634-35 (3d Cir. 1995) (“[T]he ‘undue or unreasonable’ language, twice repeated in § 403(c), means that reasonable discrimination and preferences among users of the mail are permitted[.]”).⁵ The reasonableness test involves a two part inquiry: (1) the goal must be “legitimate”; and (2) the distinction made must be “rationally related” to the achievement of that goal. See *Egger v. USPS*, 436 F. Supp. 138, 142 (W.D. Va. 1977) (“While it is obvious that [§ 403(c)] prohibits undue or unreasonable discrimination among users in the provision of delivery services, it is also equally obvious that the Postal Service may provide different levels of delivery service to different groups of mail users so long as the distinctions are reasonable.”). Section 403(c) does not bar the Postal Service from discriminating among postal customers or granting a preference to some customers when providing service. It only bars discrimination and preferences that are *unreasonable* or *undue*. Thus, so long as the realignment of window service hours at the Great Cacapon Post Office is reasonably related to a legitimate business goal, the Postal Service has not violated section 403(c).

The Postal Service clearly established that the realignment of window service hours at all offices affected by POSTPlan, including the Great Cacapon Post Office, is

⁵ Examples of cases where courts have defined when actions do not constitute undue or unreasonable discrimination include: *Mail Order Ass’n of Am. v. USPS*, 2 F.3d 408, 436-37 (D.C. Cir. 1983) (holding that, although the Postal Rate Commission’s refusal to adopt a “zoned” second-class mail rate “appears unsupported by any cost principle,” the decision was supported by “valid reasons” and therefore did not violate 39 U.S.C. § 403(c)); *Aimes Publ’ns, Inc. v. USPS*, Civ. A. No. 86-1434, 1988 WL 19618, at *6 & *7 n.13 (D.D.C. Feb. 23, 1988) (holding that USPS enforcement of second-class statutory rules, while “at best, uneven,” was entitled to “broad discretion” and therefore did not violate 39 U.S.C. § 403(c)); *Ludewig v. Wolff*, 492 F. Supp. 1048, 1049 (S.D. Tex. 1980) (finding no violation of 39 U.S.C. § 403(c) where “the distinctions made by the regulations are reasonably related to the effectuation of the pertinent [statutory] objectives”).

reasonably related to the legitimate business goal of increased efficiency. The Commission also has already considered and directly advised on the issue of whether POSTPlan creates undue or unreasonable discrimination. As the Postal Service stated in its Request for an Advisory Opinion on POSTPlan, “the objective in pursuing POSTPlan is to improve efficiency and meet customer needs by matching retail hours and services to community postal needs and use patterns.” Docket No. N2012-2, Request for an Advisory Opinion at 3. In its Advisory Opinion, the Commission found this objective consistent with public policy. Docket No. N2012-2, Advisory Opinion at 2.

While some communities may retain their Post Office with eight hours of weekday window service, others instead will see their window service hours reduced. Both decisions are based on customer use of the Post Office and the legitimate operational need to reduce costs while maintaining service. As witness Day stated in Docket No. N2012-2, POSTPlan “is designed to tailor the Postal Service retail network to actual customer use of postal services, using [AEWL] as a proxy for customer use.” Docket No. N2012-2, Direct Testimony of Witness Day (USPS-T-1) at 16. Despite AdvoCare’s assertions that profitability and revenue are key decision inputs, the Postal Service examined neither of these factors when determining the hours of operation for respective POSTPlan Offices; the Postal Service instead examined the data showing the actual workload needed to serve the office’s customers. The AEWL test ensures that actual customer needs are met by the Postal Service and that affected customers, both within and across offices, are not facing undue or unreasonable discrimination. In fact, the Commission found that, “despite a reduction in customer convenience, [P]ost [O]ffice hours remain sufficient to allow customers to complete their postal transactions.”

Docket No. N2012-2; Advisory Opinion at 31. Concurring with the advisory opinion, Commissioner Hammond stated that “the Postal Service came up with a constructive plan that adjusts its retail operations yet keeps [P]ost [O]ffices open.” Docket No. N2012-2, Concurring Opinion of Commissioner Hammond.

Notwithstanding overwhelming evidence proving that POSStPlan’s implementation is neither unduly discriminatory nor preferential, AdvoCare fails even to allege any evidence or present any plausible claims to support its conclusory allegations that the Postal Service has violated section 403(c).⁶ Following the parallel standard of Fed. R. Civ. P. 12(b)(6), a complainant must allege sufficient facts to make it plausible that proof of those facts would support a conclusion that undue discrimination has occurred. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555-56 (2007). In contrast to the legal requirements of both Rule 12(b)(6) and the Commission’s rules, AdvoCare has presented no facts in support of its claim of undue or unreasonable discrimination or preferential treatment. Furthermore, none of the facts alleged by AdvoCare go beyond the simple application of POSStPlan to the Great Cacapon Post Office. As such, AdvoCare fails to present any issues of material fact or law, and the Commission should dismiss this Complaint.⁷

⁶ AdvoCare, on page 3 of the Complaint, asserts that the Postal Service has violated 39 U.S.C. § 101(b) (closing Post Offices solely for operating at a deficit) by realigning window service hours, yet on page 5 of the Complaint, it advocates for the elimination of *other* postal units with negative balance sheets. These inconsistent positions obscure the more fundamental points that revenue is immaterial to inclusion in POSStPlan or its implementation, generally and with respect to the Great Cacapon Post Office.

⁷ Unrelated in any way to its requested relief to maintain the Great Cacapon Post Office at its current status of eight hours of weekday window service and without any factual support, AdvoCare argues that the Postal Service’s delivery of “private carrier mail” in Great Cacapon violates the undue or unreasonable preferences prohibition. This tangential and conclusory statement, without additional support, fails to satisfy the requirements for filing a complaint. As such, the Commission should afford it no weight.

2. The Survey for the Great Cacapon Post Office Clearly Identified the Options for the Community and Resulted in Crucial Feedback to the Postal Service in How Best to Proceed.

AdvoCare argues, without citing any statutory or regulatory authority, that the survey is flawed because (1) it failed to provide customers the option to maintain the Great Cacapon Post Office at its current level of service and (2) the option to conduct a discontinuance study was linked to options which would result in closing of the Post Office.⁸ In short, AdvoCare wants options that do not exist and second-guessing postal management's judgment, especially when that judgment is informed by the Commission views via the advisory opinion process, does not confer Commission jurisdiction for a complaint case. AdvoCare remains free to disagree with the format of the surveys, but the survey was fully vetted by Postal Service judgment that was also informed by the Commission's opinion. The survey was provided in draft form to the Commission in the N2012-2 docket and then edited based on feedback received from the Commission in its Advisory Opinion. AdvoCare presents no cogent legal argument that the format of the survey violates any law or regulation or that the Postal Service's use of the survey was in any way improper.

First, as the Commission is well aware, POSTPlan is an initiative driven by the current financial status of the Postal Service as a whole together with a recognized need to realign retail hours with customer use, thereby keeping Post Offices open instead of pursuing discontinuance of Post Offices. As detailed in the oral testimony of witness Day in Docket No. N2012-2, the status quo is not an option for the Postal Service. See Docket No. N2012-2, Tr. 1/226. The survey for the Great Cacapon Post

⁸ As the Commission recognizes, the Postal Service can and does exercise its statutory authority to close Post Offices when it follows the applicable law and procedures for doing so.

Office is in line with gathering realistic feedback to make informed decisions and keep the Post Office open. In contrast, AdvoCare prefers survey options that are unrealistic, untenable and quite different from what evolved through the advisory opinion process. Use of an option that is not realistic would be disingenuous with customers while defeating the purpose of the survey—to gauge customer interest and determine the best, realistic, option for providing postal services to the community. If keeping the office open without any changes was a choice on the survey but not an actual option for the Postal Service, the vast majority of customers would choose that option and the Postal Service would have no insight about how to pursue necessary change.

Second, the survey presents realistic options for which community input is indeed determinative. Options available to the community from the survey are categorized into two primary outcomes, realignment of window service hours versus study for discontinuance, with three secondary outcomes if discontinuance is chosen: service through delivery, a village Post Office, or a nearby Post Office. AdvoCare contends that the Postal Service failed to inform the community in the survey and letter that choosing to study the Great Cacapon Post Office for discontinuance, options 2, 3 or 4, would require that the Postal Service follow its statutory and regulatory process governed by section 404(d) of title 39. AdvoCare claims that failing to include language in the letter and survey that the Postal Service would abide by all applicable laws and regulations is “intentional[ly] deceptive” and done “in order to avoid compliance with the Code of Federal Regulations.” Complaint at 3. Such statements are patently unreasonable, have no basis in fact, and fly in the face of the factual record in Docket No. N2012-2 and the A-series dockets the Commission has seen so frequently. AdvoCare never bothers

to explain why the Postal Service would choose not to follow its own regulations, although its argument presumes as much.

The Postal Service used the survey to gather community input and determine how best to meet the needs and interests of the community. The Postal Service was able to gain valuable information from the community to determine the most attractive option for customers and in no way stated or even implied that it would commence any discontinuance study outside of any regulatory requirement.

The Postal Service is legally required to abide by all applicable federal statutes and regulations, but there is no requirement that the Postal Service continually inform its customers that for each transaction or interaction, the Postal Service will continue to abide by its legal obligations. Such a requirement would be cumbersome and confusing to customers and would give the incorrect impression that the Postal Service did not always intend to follow its legal obligations. As such, the Postal Service does not indicate on every survey that it will follow its discontinuance regulations if the customers choose a discontinuance study option. Customers already reasonably and rightfully expect that whether realigning window service hours or studying a Post Office for discontinuance, the Postal Service will abide by all of its legal requirements.

AdvoCare's assertions regarding deception and lack of compliance essentially reflect unfamiliarity with the Post Office discontinuance process. The statutory and regulatory requirements for conducting a discontinuance study set forth the procedural process that the Postal Service follows when closing or consolidating an office. As the Commission is aware, the final decision to discontinue a Post Office is a management

decision of the Postal Service.⁹ The Commission's appeal authority is limited to ensuring that the Postal Service complied with all applicable procedures, not whether the decision to discontinue a Post Office was operationally prudent.

Any decision to discontinue a POSTPlan office should generally follow from a joint request of sixty percent of respondents to that Post Office's survey. The Postal Service would then conduct a discontinuance study pursuant to 39 C.F.R. § 241.3 and USPS Publication PO-101 and proceed to discontinue the Post Office. AdvoCare's contention that the community should choose to undergo a discontinuance study so as to maintain the status quo, reflects an apparent lack of awareness of the reality that the Postal Service can generally close any Post Office so long as it follows the requisite process; the standard of review is procedural, not substantive. Hence, were AdvoCare's remedy granted, its outcome would very likely not be what most customers prefer.

3. The Realignment of Window Service Hours Does Not Constitute a Discontinuance Action Pursuant to 39 U.S.C. § 404(d) and the Postal Service Is Not Required to Follow the Discontinuance Rules of 39 C.F.R. § 241.3.

AdvoCare erroneously claims that the realignment of window service hours violates the Postal Service's rules regarding the discontinuance of a Post Office as formalized in 39 C.F.R. § 241.3. This argument directly contradicts the very regulations cited by AdvoCare. Section 241.3 only applies to the discontinuance of a Post Office, not to the realignment of window service hours. 39 C.F.R. § 241.3(a)(ii) states, in whole:

⁹ While the decision to discontinue a Post Office is a management decision, the Postal Service may not close a small Post Office solely for operating at a deficit. See 39 U.S.C. § 101(b).

The conversion of a Post Office into, or the replacement of a Post Office with, another type of USPS-operated retail facility is not a discontinuance action subject to this section. A change in the staffing of a Post Office such that it is staffed only part-time by a postmaster, or not staffed at all by a postmaster, but rather by another type of USPS employee, is not a discontinuance action subject to this section.

The Great Cacapon Post Office is not being closed but is instead merely changing its staffing and hours of operation. As such, the discontinuance regulations of § 241.3 do not apply to the realignment of the window service hours at the Great Cacapon Post Office.

Furthermore, AdvoCare's argument that the Postal Service failed to follow section 241.3 implies that the statutory requirements of 39 U.S.C. § 404(d) must be followed when realigning window service hours. Presenting a section 404(d) claim under the guise of a complaint proceeding, however, is jurisdictionally improper. After the Postal Reorganization Act, former section 3662 gave the Commission jurisdiction over all complaints concerning compliance with "the policies of this title," so long as those complaints concerned rates or service. Complaint jurisdiction regarding former section 404(b) appeals concerning Post Office discontinuance actions was specifically excluded as provisions for challenging Postal Service procedure were provided in formerly number section 404(b). In promulgating Section 3662(a) as part of H.R. 6407, the 109th Congress specifically chose to revise complaint jurisdiction to limit more narrowly the scope of the Commission's jurisdiction by enumerating in explicit detail the specific statutes that can form the basis for that jurisdiction. Congress elected this approach over earlier bills that would have given the Commission much broader jurisdiction over complaints concerning the entirety of chapters 1, 4, 6, and 36 of title 39. See, e.g., H.R. 22, 109th Cong. § 205 (2006); S. 662, 109th Cong. § 205 (2006).

By invoking section 241.3 in its complaint, AdvoCare is, in essence, attempting to collaterally invoke violations of section 404(d) as the basis for its Complaint. However, the Commission lacks jurisdiction to review such claims through the complaint procedures of section 3662, because section 404(d) is not an enumerated statute within the scope of the Commission's complaint jurisdiction.

Moreover, AdvoCare argues in one line on page three of the Complaint that realignment of the window hours at the Great Cacapon Post Office violates 39 U.S.C. § 101(b). While AdvoCare fails to suggest any legal framework or evidence to support its passing reference to the statute, the Postal Service believes it important to highlight that POStPlan and the realignment of hours at the Great Cacapon Post Office, fulfill, and thereby support, the spirit and goals of section 101(b). Communities affected by POStPlan will continue to receive postal services that meet or exceed their actual use. See Docket No. N2012-2, USPS-T-1 at 15; *see also* Tr. 1/91. Thus, effective postal services will continue to be provided to residents of rural communities after POStPlan implementation. POStPlan also is consistent with the foreclosure by section 101(b) of closing small Post Offices solely for operating at a deficit; POStPlan offices were not selected based on revenue and, if discontinued, would further depend upon customers having expressed a preference for alternate service.

4. Any Legal Issues Raised by this Case Were Already Addressed and Resolved by the Commission in Docket No. N2012-2.

Despite AdvoCare's statement that the issues presented in its Complaint have not been resolved by a Commission proceeding, all of the concerns plausibly raised by AdvoCare were presented and discussed in the Postal Service's request for an advisory

opinion on POSTPlan, Docket No. N2012-2. In that docket, the Commission heard evidence on the POSTPlan initiative and how it satisfies all of the statutory requirements of title 39. Several parties raised issues through interrogatories, at the hearing, and on brief about the operational limitation of POSTPlan and its consistency with title 39. In its Advisory Opinion, however, the Commission addressed all of the concerns and concluded that “the objective of the POSTPlan is consistent with public policy” and that “the POSTPlan should help balance service and cost savings in a manner consistent with title 39.” Docket No. N2012-2, Advisory Opinion at 1-2. AdvoCare is simply attempting to rehash arguments upon which the Commission previously opined in an apparent attempt to short-circuit the advisory opinion process and essentially re-open that now closed docket. Instead, AdvoCare’s issues are already *res judicata*.

AdvoCare had its opportunity to review the list of Post Offices affected by POSTPlan and raise its concerns in the N2012-2 docket if it believed POSTPlan violated title 39.¹⁰ AdvoCare cannot now ignore the months of proceeding and attempt to restart the N2012-2 case. Such a result would greatly prejudice the Postal Service and would have substantial financial and operational implications as the implementation of POSTPlan is now ongoing.¹¹ The procedural history only strengthens the argument that the Commission should dismiss the Complaint for failing to present any issues of material fact or law not already addressed by the Commission.

¹⁰ Media reports surrounding POSTPlan and the filing of the advisory case at the Commission were widespread throughout May and June 2012. The Postal Service published the list of affected offices when it filed its case on May 25, 2012, which indicated that Great Cacapon would be evaluated to have its weekday window service hours reduced to six hours per day. The general public, including AdvoCare, had sufficient notice to intervene in the N2012-2 docket if they believed there were legal concerns regarding POSTPlan.

¹¹ Nor should the Commission’s own strengths and capabilities be committed to this exercise.

5. The Documents Identified in the Complaint Support Neither the Facts Alleged nor AdvoCare's Theory of the Case.

AdvoCare also states in its Complaint that it expects to obtain certain types of evidentiary documentation to support the facts alleged in the Complaint, including financial reports, the POStPlan methodology and records of the surveys and public meetings. In identifying these documents, however, AdvoCare fails to explain how such information would bear on the decision to realign the window service hours at the Great Cacapon Post Office. As the Commission is aware, the Postal Service relied entirely on the calculation of AEWL in determining new Post Office levels, which was vetted in detail during Docket No. N2012-2, where office-specific calculations and raw numbers can be found. Net revenue and costs were not included in, nor germane to, the calculation; hence, elucidation of those finance details can have no bearing on pursuit of the Greater Cacapon Post Office's POStPlan implementation. While the parties are not engaged in a discovery dispute, the Postal Service finds it necessary to point out that the Complaint fails to identify any factual disputes or "evidentiary support" that are capable of shedding light on any material disputes of law.

II. IN THE ALTERNATIVE, ADVOCARE FAILED TO MEET AND CONFER WITH THE POSTAL SERVICE'S GENERAL COUNSEL PRIOR TO FILING ITS COMPLAINT IN VIOLATION OF 39 C.F.R. § 3030.10(a)(9).

AdvoCare states on page 9 of its Complaint that "prior to filing, the complainant attempted to meet or confer with the Postal Service's General Counsel to resolve or settle the complaint and that, after being directed to unavailable staff where voicemail message were left, the Complainant received no reply." This certification is both

misleading and legally insufficient, as it fails to satisfy the requirements of 39 C.F.R. § 3030.10(a)(9).

On the afternoon of Friday October 26, 2012, an individual identifying himself as Keith DeBlasio, director of AdvoCare, left a voice message for Kenneth Hollies, a Postal Service attorney familiar to the Commission. Mr. Hollies had already left for the day when Mr. DeBlasio's voicemail message indicated that his message constituted his attempt to meet and confer and that he would thereafter be filing a complaint with the Commission regarding the Great Cacapon Post Office. On the ensuing Monday, October 29, 2012, at 9:25 a.m., when both Postal Service Headquarters and the Commission were closed due to the severe weather associated with Hurricane Sandy, AdvoCare electronically filed its Complaint with the Commission. Prior to AdvoCare filing its Complaint, the Postal Service's Law Department, including the General Counsel, received no other communications from AdvoCare beyond the voicemail left the previous Friday. At no time did Mr. DeBlasio attempt to reach the Postal Service General Counsel herself, as the law requires, or actually met and confer with anyone in the General Counsel's office.

Pursuant to section 3030.10(a)(9), a complainant must:

Include a certification that states that prior to filing, the complainant attempted to meet or confer with the Postal Service's general counsel to resolve or settle the complaint, why the complainant believes additional such steps would be inadequate, and the reasons for that belief.

The Commission clarified the level of effort necessary to comply with this requirement in its Order No. 195, *Order Establishing Rules for Complaints and Rate or Service Inquiries* ("Order No. 195"). As a prerequisite to filing a complaint, the complainant must

first notify the Postal Service's General Counsel of its concerns and permit the parties to meet or confer regarding them.

An e-mail, letter, or similar attempt at communication with appropriate Postal Service personnel explaining the nature of the complainant's concerns should ordinarily initiate the meet or confer requirement. After the complainant has initiated communication, the Postal Service has a reasonable time to resolve the issue, or notify the complainant that a resolution in a reasonable period of time is likely.

Order No. 195 at 16. As the Commission explained, "[t]he goal of the meet or confer provision is to ensure that complainants attempt to resolve their issues with the Postal Service prior to bringing a more formal proceeding to the Commission for its consideration." Order No. 195 at 15-16. However, to achieve this end, the parties must be permitted a reasonable opportunity in which to do so. Here, this simply did not occur, and the Postal Service urges that it should not be denied this opportunity.

Various United States district courts have established what affirmative steps are sufficient to satisfy the meet or confer requirement as it relates to standard motions practice. In *Bolger v. District of Columbia*, 248 F.R.D. 339 (D.D.C. 2008), the plaintiff filed its motion to compel without the mandatory certification that it had satisfied its burden to meet and confer with the defendant. The plaintiff was permitted to establish to the court that it had in fact done so by providing evidence of its extensive efforts. Specifically, the plaintiff showed that it had engaged in discovery with the defendant over a 14-month period, including four hearings, and had been in contact with the defendant regarding its concerns. However, the defendant had not responded to the plaintiff. *Bolger v. District of Columbia*, 248 F.R.D. at 343-344. Relying on *Bolger*, the court in *Robinson v. Napolitano*, explained that conferment requires the parties actually

to meet and engage in two-way communication that enables meaningful discussion of contested issues, and that sending correspondence explaining the issues did not satisfy this requirement. *Robinson v. Napolitano*, No. 08-CV-4084, 2009 WL 1586959, at *3 (D.S.D June 4, 2009) citing *Bolger* at 343-344 (D.D.C. 2008).

Likewise, the court in *Home Design Services, Inc. v. Chris Kendrick Construction, et al.*, explained that the requirement obligates counsel to “converse, confer, compare views, consult and deliberate” before it involves the court. *Home Design Services, Inc. v. Chris Kendrick Construction, et al.*, No. 08-CV-01978, 2009 WL 1973503, at * 2 (D. Colo. July 7, 2009). The court went on to say that, “merely informing an opposing party of an impending motion” does not satisfy a party’s obligation. *Id.* citing *Cotracom Commodity Training Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999).

Since the Complaint was filed, various attorneys for the Postal Service have communicated via telephone with Mr. DeBlasio and have informed Mr. DeBlasio of the requirement to meet and confer with the Postal Service’s General Counsel to resolve or settle the complaint prior to filing. Discussion included the fact that the Commission had previously found failure to satisfy the meet and confer requirement fatal, leading to dismissal. During those conversations, Mr. DeBlasio did not indicate he had attempted any other communications with the Law Department, let alone the General Counsel, beyond the voicemail left with Mr. Hollies. Instead, Mr. DeBlasio indicated numerous conversations and attempted conversations with other Postal Service personnel, none of whom are identified in Rule 3030.10(a)(9). In Order No. 195 and at the request of both third party intervenors and the Postal Service, the Commission amended its proposed rule to direct that “the complainant’s meet or confer attempts be directed to

the Postal Service's General Counsel" to ensure that the issue reaches "a designated appropriate individual within the Postal Service who has the authority to settle issues raised by a complaint." Order No. 195 at 16. AdvoCare never attempted to confer with the General Counsel, attaining the requisite two-way interaction with an authorized person, as required by 39 C.F.R. § 3030.10(a)(9), and thus failed to perfect its complaint.

As explained above, AdvoCare did not pursue resolution or settlement in a meaningful way prior to filing its Complaint. Nor did AdvoCare's Complaint include an explanation of why it believes that its limited action of giving notice through voicemail satisfied the requirement to attempt to resolve or settle, or why additional steps would be inadequate, as required by Rule 3030.10(a)(9). AdvoCare's apparent unawareness of the Commission's previous Advisory Opinion regarding POSStPlan together with its conclusion that resolution or settlement was futile or overly burdensome can not create an exception to the requirement in Rule 3030.10(a)(9). In establishing the requirement, the Commission specifically addressed the issue of whether to "carve out an exception to the meet or confer requirement" in cases for which settlement attempts were presumed to be futile or unduly burdensome. In its Order No.195, the Commission found that "[t]he meet or confer requirement is not burdensome. It is a procedural mechanism which could lead to resolution of issues prior to a complaint being filed." Thus, the Commission affirmatively determined that there would be no exception to the meet or confer requirement of Rule 3030.10(a)(9). *Id.* at p. 16-17.

Dismissal of the Complaint for failing to satisfy 39 C.F.R. § 3030.10(a)(9) would not prejudice AdvoCare's ability to pursue its complaint in the future or unduly burden it. A dismissal for this procedural failure would merely provide both parties the opportunity to explore the potential for a mutually-agreeable resolution. Accordingly, if the Commission does not dismiss the Complaint with prejudice because of the substantive failures previously described, the Commission should dismiss the Complaint without prejudice for this procedural failure.

CONCLUSION

Based upon the foregoing, the Commission should dismiss the Complaint with prejudice for failing to raise material issues of fact or law, or in the alternative should dismiss the Complaint without prejudice for failure to satisfy the meet and confer requirements prior to filing.

Respectfully submitted,

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November 20, 2012