

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

**Regulations Establishing Procedures for
Obtaining Information from the Postal Service**

Docket No. RM2009-12

**REPLY COMMENTS OF
AMERICAN POSTAL WORKERS UNION, AFL-CIO
(November 23, 2009)**

The American Postal Workers Union, AFL-CIO (APWU) hereby submits these reply comments in response to the Commission's September 2, 2009, Notice and Order on Proposed Rulemaking Concerning Obtaining Information from the Postal Service, Order No. 293. We join other commenters in commending the Commission for producing clear rules for obtaining information from the Postal Service pursuant its news authority contained in 39 U.S.C. § 504(f) of the Postal Accountability and Enhancement Act (PAEA). APWU offers these brief comments in response to points raised by the Postal Service in its Initial Comments.

In its comments, the Postal Services seeks to change Rule 15(e) which requires that a "covered person who fails or refuses to disclose or provide discovery of electronically store information on the grounds that the sources of such information is not reasonably accessible because of undue burden or cost must show by clear and convincing evidence that the burden or costs are undue."¹ The Postal Service expressed concern at the "high bar to cost-based objections" and asks the Commission to use a more "measured approach" than the "clear and convincing evidence" standard proposed by the Commission.² APWU supports the Commission's proposed Rule 15(e) and believes that the Postal Services requested change is unnecessary.

¹ Proposed 39 C.F.R. § 3005.15(e).

² USPS Comments in Response to Order No. 293, at p. 9 (November 9, 2009).

As recognized by the Commission, in most instances, a subpoena will issue only after a request for information had been made under other discovery procedures.³ The Postal Service will have been afforded the opportunity to make objections to the production of information based on undue burden or cost as it is permitted to do currently under the Rules of Practice Rules 25-28.⁴ The issuance of a subpoena by the Commission is seen as an extreme measure; therefore, it only makes sense that the Postal Service be required to meet a higher threshold for refusing to produce information deemed worthy of utilizing the subpoena procedures. Moreover, under the proposed Rule 11, the subpoena can be tailored in such a way to protect the interests of the disclosing party, which could include the Postal Services financial interests. The Postal Service is adequately protected by the current and proposed rules from any costs burden in responding to subpoenas. Proposed Rule 15(e) should be accepted without revision.

The Postal Service also seeks changes to the proposed Rule 31 regarding depositions.⁵ The Postal Service asks the Commission to require that a request for a deposition not be granted unless “one of the three circumstances set forth in 39 C.F.R. § 3001.33(a) is present.”⁶ APWU objects to this change. Rule 33(a) applies to the limited category of “testimony of a witness” and not the broader language used in the statute of “a covered person” defined as “an officer, employee, agent, or contractor of the Postal Service.”⁷ It makes sense if there is a proceeding before the Commission and witnesses have been identified and/or testimony produced, to require a showing of one of the three circumstances found in Rule 33(a).⁸ However, in other situations, where no witness has

³ PRC Order No. 293 at p. 10 (September 2, 2009).

⁴ In all other instances, the Postal Service can utilize other procedures, including a motion to quash.

⁵ USPS Comments in Response to Order No. 293, at pp. 12-14 (November 9, 2009).

⁶ *Id.* at 14.

⁷ 39 U.S.C. § 504(f) (4).

⁸ Rule 33(a) states:

(a) *When permissible.* The testimony of a witness may be taken by deposition upon authorization by the Commission or the presiding officer on application of any participant before the hearing is closed. An authorization to take the deposition of a witness will be issued only if (1) the person whose deposition is to be taken would be unavailable at the hearing, or (2) the deposition is deemed necessary to perpetuate the testimony of the witness, or (3) the taking of the deposition is necessary to prevent undue and excessive expense to a participant and will not result in undue delay or an undue burden to other participants.

been identified, no hearings are scheduled or are expected to be scheduled, and no testimony has been offered, the party requesting the deposition will likely be unable to meet any of the three circumstances. First, when a proceeding does not involve a hearing, the first circumstance, unavailability to appear at the hearing, is irrelevant. Likewise, when a proceeding does not involve testimony prepared by a witness, the second option, deposition would perpetuate the testimony of the witness, would also be moot. That leaves only the third circumstance, “the deposition is necessary to prevent undue and excessive expense to a participate and will not result in undue delay or undue burden to other participants.” This is a high bar for parties wishing to depose Postal Service personnel to meet. Depositions by their very nature are expensive and can be time consuming. This fact alone would deter many parties from seeking to utilize the Commission’s new deposition authority in bad faith.

Depositions can provide a useful means of gaining needed information that is not otherwise being produced by the Postal Service. Of course, depositions are only as useful as the rules governing them allow. Therefore, the Commission should not require parties to meet an unnecessarily high burden before being allowed to depose a covered person, as the Postal Service would like. Additionally, the Commission’s rules should make clear that the party seeking to depose a covered person be allowed to determine for itself who it would like to depose. This may require a revision to the rules to permit a party to seek information about who within the Postal Service has the appropriate knowledge, in advance of a deposition request, to determine who would be the best person to depose. The Postal Service should not be permitted to insist on the substitution of a witness of its choice in lieu of a person chosen by the party requesting the deposition.

Respectfully submitted,

Jennifer L. Wood
Counsel for American Postal Workers Union, AFL-CIO