

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Station and Branch)
Optimization and)
Consolidation Initiative, 2009)

Docket No. N2009-1

REPLY BRIEF OF THE PUBLIC REPRESENTATIVE

(December 16, 2009)

Respectfully Submitted,

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I. INTRODUCTION

The Postal Service's Initial Brief failed to focus on the merits of the case or to assist the Commission in formulating its advisory opinion. The Postal Service instead chose to concentrate its efforts in its Initial Brief on a creative procedural argument. At this late stage in the case, the Postal Service suggests that the Commission is divested of jurisdiction to hear this case because the Station and Branch Optimization and Consolidation Initiative (Initiative) is no longer substantially nationwide in scope. This unfounded procedural argument was previously rejected and should be rejected again. At the very least, based on the ambiguous factual record and public policy concerns, the Commission should issue a conditional advisory opinion on the Initiative.

Below, Part II of this Brief discusses the legal and Commission precedent regarding why the Initiative is, at a minimum, substantially nationwide in scope. Part III addresses the possibility of the Commission's issuance of a conditional advisory opinion. Part IV examines the public policy concerns relating to the Postal Service's divestiture of Commission jurisdiction argument. Finally, Part V discusses the Public Representative's support for Valpak's suggestion, in its Initial Brief, that the Initiative consider the feasibility of bringing alternate access to communities affected by closures.

II. THE SUBSTANTIALLY NATIONWIDE INITIATIVE REQUIRES AN ADVISORY OPINION

The Postal Service claims that at the time it filed the Initiative there was insufficient information to determine whether the Initiative would be "substantially nationwide."¹ The Postal Service claims that it initially sought Commission review of the Initiative out of an abundance of caution. *Id.* Now, however, the Postal Service argues that because the Service unilaterally removed 90% of the candidate station and branch post offices from consideration, the Initiative can no longer affect service on a

¹ Postal Service Brief at 3-13.

substantially nationwide basis. As a result, it asserts that the Commission is now divested of jurisdiction.²

For the reasons discussed below, applicable case law and Commission precedent demonstrate that, in spite of the Postal Service's attempts to divest the Commission of jurisdiction, the Initiative remains substantially nationwide in scope and the Commission has jurisdiction to issue an advisory opinion pursuant to 39 U.S.C. 3661.

A. Applicable Case Law Supports a Commission Finding that the Initiative is Substantially Nationwide in Scope

A review of relevant case law demonstrates that the Initiative is substantially nationwide in scope. In *Buchanan v. USPS*, 508 F.2d 259, 265 (5th Cir. 1975), the Fifth Circuit adopted a test to determine if the Commission has jurisdiction to issue an advisory opinion under 39 U.S.C. 3661.³ In determining whether a change in the nature of postal services is "substantially nationwide," the court held that a "broad geographic area must be involved." *Buchanan*, 508 F.2d at 263. In that case, among other things, the court was determining whether the Postal Service's program, "whereby a particular geographical area is analyzed to determine whether present postal stations and

² *Id.* Valpak makes a similar argument. Valpak Brief at 9-11.

³ Valpak argues that the decision to obtain an advisory opinion under 39 U.S.C. 3661 is within the Postal Service's unreviewable discretion. Valpak Brief at 3-8. However, as the *Buchanan* court held, whether a 3661 proceeding is required is based on a reviewable objective standard. See *Buchanan v. USPS*, 508 F.2d 259, 265 (5th Cir. 1975). Many other courts have also reviewed the Postal Service's failure to obtain an advisory opinion and objectively interpreted the scope of 39 U.S.C. 3661. See e.g., *Shane v. Buck*, 658 F. Supp. 908, 911-12 (D. Utah 1985); *NAACP v. USPS*, 398 F. Supp. 562, 564-65 (N.D. Ga. 1975); *Martin v. Sloan*, 432 F. Supp. 616, 616-17 (W.D.N.C. 1977); *Wilson v. USPS*, 441 F. Supp. 803, 808 (C.D. Ca. 1977). Additionally, the Commission has repeatedly held that if the Postal Service fails to request an advisory opinion pursuant to 39 U.S.C. 3661 when one is required, that may be grounds for a complaint under 39 U.S.C. 3662. See C2005-1, Order on Complaint on Express Mail, April 18, 2006, at 13; PRC Order No. 1307 at 8-10; PRC Order No. 1312 at 4-6; PRC Order No. 1239 at 10; PRC Order No. 1320; see also Docket No. C2001-3, Commission Report – Complaint on First-Class Mail Standards Service, April 17, 2006, at 1 (finding that "the Service had an obligation under section 3661(b) to seek an advisory opinion prior to implementing [certain] changes, and failed to do so."). Accordingly, the Postal Service does not determine the scope of the Commission's 3661 jurisdiction. The standard applied to determine if a change in the nature of postal services is substantially nationwide is an objective one; it is not within the Postal Service's unreviewable discretion.

branches exist in the best number and arrangement to provide effective service to the postal users within the geographic area,” was substantially nationwide in scope. Notably, the *Buchanan* court did not discuss the number of branch and station post offices at issue in its substantially nationwide analysis. Instead, in applying the “broad geographic area” standard, the court upheld the district court’s preliminary injunction against the Postal Service finding that there was a sufficient showing of likelihood of success on the merits that the retail network realignment program was substantially nationwide in scope. *Id.* at 266-67.

Here, as in *Buchanan*, the Commission should not find the number of branch and station post offices at issue in the case to be relevant to its substantially nationwide analysis. Rather, as in *Buchanan*, the Postal Service is evaluating many geographical areas around the country to determine whether station and branch post offices exist in the best number and arrangement to provide effective service to the postal users. In Docket No. N2009-1, the most recently filed list of candidate station and branch post offices span a “broad geographic area” – many cities, states, and regions across the United States.⁴ Accordingly, under *Buchanan*, the Initiative is substantially nationwide in scope.

B. Commission Precedent Supports a Finding that the Initiative is Substantially Nationwide in Scope

Commission precedent also demonstrates that the Initiative is substantially nationwide in scope. As part of its argument, the Postal Service does cite to the applicable Commission precedent, but for the obvious proposition that “there may be circumstances where a detailed examination of the facts is necessary to assess

⁴ See all versions of USPS-LR-N2009-1/4. Approximately 48 hours prior to the deadline for filing reply briefs, the Postal Service filed yet another “errata” changing the number of station and branch post offices currently on the potential closure list. This “current” list has 168 facilities on it. However, the list of facilities under consideration for potential closure can be expanded or added to “at a later ... [or] future time.” Tr. 2/359-60.

whether jurisdiction attaches under section 3661.”⁵ The Postal Service then incredibly leaps to the unsupported conclusion that the Commission’s N75-1 Advisory Opinion supports the proposition that the Commission should find that it does not have jurisdiction over the Initiative under 39 U.S.C. 3661. Postal Service Brief at 7-8.

The Public Representative commends the Postal Service for citing to the relevant Commission precedent that extensively addresses the issue of whether a change in the nature of postal services is substantially nationwide. In fact, the Commission precedent cited by the Postal Service deals with the identical jurisdictional question at issue in the instant case on fact remarkably similar to those of the N2009-1 Initiative. Rather than glossing over applicable Commission precedent; however, the Public Representative submits that a careful, detailed analysis of the N75-1 case is warranted based on the analogous factual and legal background between the instant case and the N75-1 Advisory Opinion. This factual and legal analysis demonstrates that the Commission should hold, as it did in its N75-1 Advisory Opinion, that the N2009-1 Initiative is substantially nationwide in scope.

Below, this section begins with an analysis and review of the striking similarities between the facts of Docket No. N75-1 and the instant case. Then, the section examines the substantially nationwide jurisdictional issues raised in Docket No. N75-1. Next, the section addresses how the resolution of those jurisdictional issues forecloses any possibility of the N2009-1 Initiative not being substantially nationwide in scope. Finally, the Public Representative establishes that the Postal Service’s narrow reading of the N75-1 Advisory Opinion is incorrect, and does not support the Service’s position. In fact, it supports the opposite conclusion – that the Initiative’s scope is substantially nationwide.

⁵ Postal Service Brief at 4 *citing* Docket No. N75-1, Advisory Opinion Concerning a Proposed Change in the Nature of Postal Services at 70, April 22, 1976 (N75-1 Advisory Opinion).

1. Facts Regarding the N75-1 Advisory Opinion

In 1974, the Postal Service proposed the “Retail Analysis Program for Facilities Deployment” (RAP). N75-1 Advisory Opinion at 1. RAP proposed to adopt market analysis techniques for the location, staffing, and work hour scheduling of postal retail facilities. *Id.* Interested parties sued the Postal Service to enjoin implementation of RAP pending hearings before the Postal Rate Commission and the issuance of an advisory opinion pursuant to 39 U.S.C. 3661. *Id.* at 5. The District Court issued a preliminary injunction, and the Postal Service appealed, lost on appeal, and finally agreed to submit a proposal to the Commission for an advisory opinion on RAP. *Id.* at 6.

The Postal Service’s RAP proposal requested a Commission opinion finding that RAP was not subject to the requirements of 39 U.S.C. 3661, or, in the alternative, that the Commission issue an advisory opinion on RAP. *Id.* The Commission designated an Administrative Law Judge (ALJ) to preside over the proceeding. *Id.* at 7. The ALJ issued an initial decision where he articulated a significance test for 39 U.S.C. 3661 jurisdiction. Using that test, the ALJ found that the Commission had jurisdiction over RAP. *Id.* at 7-8. The Commission adopted the ALJ’s “significance” test and finding of jurisdiction in its N75-1 Advisory Opinion. *Id.* at 8-9.

2. Substantially Nationwide Analysis in the N75-1 Advisory Opinion

In its N75-1 Advisory Opinion, the Commission found that jurisdiction “is not determined either by the Postal Service’s views of our jurisdiction or the particular contents of or omissions from the Service’s formal filings.” *Id.* at 12. Rather, the Commission is to apply the standards articulated in title 39.

In determining that RAP was subject to the jurisdiction of 39 U.S.C. 3661, the ALJ examined its purpose. It found that RAP’s purpose was “to introduce a form of decision-making for retail operations based upon a new methodology, the implementation of which creates the prospect that retail facilities and operations will be

significantly changed,” and to provide “a means for determining the type of facility to be offered for the conduct of postal business...and the services available at such facility.” *Id.* at 18. The ALJ found that where the RAP methodology was applied, there was a direct effect on the retail customers served by those installations. *Id.*

The Postal Service objected to the ALJ’s initial findings, arguing to the Commission that there was not a great enough quantitative impact to constitute a change on a substantially nationwide basis, and that RAP only improves efficiency while continuing to maintain adequate service. *Id.* at 19.

The Commission rejected the Postal Service’s argument and instead held:

[T]he change in the nature of postal services inherent in the RAP program is a significant change in the availability of basic postal services to the representative postal customer.

* * *

The fact that an action or program is “evolutionary” and affects a relatively few postal consumers at a time, or redistributes the services currently provided by the Postal Service rather than bringing about a net increase or cutback, does not except that action or program from the purview of the statute. It is the experience of the individual postal consumer, the recipient of the complex of services provided by the Postal Service and the intended beneficiary of the policies incorporated by § 3661, that must be assayed in determining whether an action or program involves a change in the nature of postal services.

Id. at 20. The Commission drew a distinction between the changes evidenced in the record and those which may flow from application of RAP in the future. *Id.* The Commission considered three representative examples where RAP significantly affected service: Birmingham, Alabama; Flushing, New York; and Dallas, Texas. *Id.* at 24-25. The changes proposed in Birmingham included a reduction in the number of facilities from 57 retail outlets to 34 retail outlets. The changes for Flushing would result in a net gain of six retail facilities. In the case of Dallas, RAP would create a net gain of three facilities and relocation of seven existing facilities. The operating hours of the retail

facilities were also adjusted, as well as the services offered (such as post office boxes and contract employees instead of Postal Service employees). *Id.* at 23-26. The Commission determined that these representative service changes “effect[ed] a ‘change in the nature of postal services.’” *Id.* at 26.

Additionally, the ALJ found that the program was “nationwide or substantially nationwide” because it was: “evidenced by its hierarchical dissemination from Postal Service headquarters and its implementation at multiple locations...throughout the country.” *Id.* The Postal Service disputed these ALJ findings because “[t]he facts of the record are...plainly insufficient to show the requisite general impact.” *Id.* at 27. The Postal Service claimed that the changes were scattered and local, not “nationwide or substantially nationwide.” *Id.*

The Commission again rejected the Postal Service’s arguments and adopted the ALJ’s reasoning. *Id.* at 28. The Commission found that the illustrative examples showing a significant impact on representative groups were enough to show that RAP generally affected postal services. *Id.* Further, the Commission rejected the Postal Service’s “net effect” argument and held that the correct perspective is that of the representative customer. *Id.* at 28-29. The Commission held that the program was substantially nationwide because RAP’s methodology is applied across the nation as a universal program. *Id.* As a result, the Commission found that RAP constituted a change in the nature of postal services generally affecting service on a substantially nationwide basis and was, therefore, within the Commission’s jurisdiction under 39 U.S.C. 3661. *Id.* at 29-32.

3. Application of the N75-1 Advisory Opinion Precedent to This Case

With respect to the Initiative at issue in this docket, the Postal Service repeats many of its arguments that were previously rejected in Docket No. N75-1. Here, the Postal Service argues that since it only has 241 station and branch post offices on its list, the changes under consideration cannot possibly be substantially nationwide in

scope. Postal Service Brief at 6. The Postal Service also asserts that the “net effect” of the Initiative could only be to close 241 of the nationwide total 32,000 retail facilities and is therefore not substantially nationwide because it has minimal impact. *Id.* at 7-10.⁶ Further, the Postal Service claims that the impact the Initiative has on every state and the fact that it is headquarters-driven does not make it substantially nationwide. *Id.* at 10. However, the Postal Service concedes the impact the Initiative may have on individual representative customers if their station or branch post office is closed.

As discussed above, in the N75-1 Advisory Opinion, the Commission addressed and rejected each of the Postal Service’s arguments for a substantially similar retail realignment program. The Commission explicitly rejected the “net effect” argument that the closing of a relatively small number of retail facilities would not impact service nationally and therefore was not a substantially nationwide change in the nature of postal services. Rather, the Commission adopted the “effect on representative customers” as the appropriate inquiry. On these facts, the Postal Service concedes that the Initiative may affect individual representative customers who have their station or branch post office closed. *Id.* at 9.⁷ Likewise, the Commission explicitly found a program reviewing retail service outlets for closure, consolidation, or recategorization to be substantially nationwide because it was disseminated from Postal Service headquarters and implemented in varied areas around the nation.

Accordingly, because the Postal Service’s arguments that the Initiative does not “generally affect service on a nationwide or substantially nationwide basis” have already been explicitly rejected by the Commission in a strikingly similar retail facility realignment case, the Commission should find that it has jurisdiction under 39 U.S.C. 3661 to issue an advisory opinion on the Initiative.

⁶ Well after it filed its initial brief in this case, the Postal Service filed another “errata” to its list of facilities “currently” on the potential closure list. This “current” list has 168 facilities on it. However, the list of facilities under consideration for potential closure can be expanded or added to “at a later ... [or] future time.” Tr. 2/359-60.

⁷ In what appears to be an attempt to minimize this impact, the Postal Service embarks on a soliloquy on the human condition and its aversion to change. *Id.*

III. IN THE ALTERNATIVE, THE RECORD SUPPORTS THE ISSUANCE OF A CONDITIONAL ADVISORY OPINION

Given the state of the factual record before the Commission, the National League of Postmasters (League) advocates the issuance of a conditional advisory opinion. The League suggests that whether the Initiative is substantially nationwide in scope depends on the number of station and branch post offices that will ultimately be closed as a result of the Initiative. It asserts that such information cannot be determined on this factual record. Accordingly, the League submits that the best course of action is for the Commission, with the record before it, to issue a conditional advisory opinion.

If the Commission cannot find that the Initiative is substantially nationwide in scope based on the analysis performed above in Part II, the Public Representative supports the League's suggestion that Commission issue a conditional advisory opinion on the Initiative. At the very least, the factual record supports a finding that around 200 post offices may be closed as a result of the Initiative. However, the Commission has not yet been provided with sufficient information to make a definitive determination on the exact number of station and branch post offices that will end up being closed.⁸

Intuitively, in the absence of sufficient facts to find the Initiative substantially nationwide, the issuance of a conditional advisory opinion makes sense.⁹ A Commission "conditional advisory opinion" would be conditional on whether the Initiative ultimately is substantially nationwide in scope. If the Initiative is finally determined to be substantially nationwide, then the Postal Service has received its statutorily mandated advisory opinion from the Commission and the general public's fundamental right to

⁸ The number of station and branch post offices on the potential closure list is constantly changing. See, e.g., USPS-LR-N2009-1/4 (December 14, 2009). The number of facilities being evaluated for potential closure can always be expanded or added to "at a later ... [or] future time." Tr. 2/359-60.

⁹ If the Commission does not feel comfortable issuing a conditional advisory opinion, it can issue its advice under the general advisory authority of the Commission when requested by the Postal Service. See Request at 7 ("Should the Commission develop constructive advice in furtherance of the Initiative at the conclusion of this docket, its view would be welcomed.").

hearing is satisfied.¹⁰ If the Initiative is found not to be substantially nationwide, the Postal Service may ignore the advisory opinion. A conditional opinion ensures that the time, money, and other resources already expended by the participants, the general public, and the Commission in providing helpful comments and suggestions on improvements to the process are not in vain.

It is a vastly more efficient use of resources to obtain a conditional advisory opinion on the current record than to later determine that the Initiative had a substantially nationwide effect and find that the Postal Service violated the law by not obtaining an advisory opinion. See e.g., Public Representative Brief at 20 (regarding failure of the Postal Service to obtain an advisory opinion on its collection box removal initiative). It may also keep the Postal Service from having to return to the Commission for an additional advisory opinion if it decides to expand the current list of retail facilities in the near future. Additionally, the Public Representative is concerned that the Commission may be forced to order corrective action in a future Annual Compliance Determination based on the fact that the Postal Service was not in compliance with section 3661 for this or other related initiatives.

IV. PUBLIC POLICY DOES NOT SUPPORT DIVESTING THE COMMISSION OF JURISDICTION

The current Initiative, as described by Postal Service witnesses, is a process that the Postal Service has devised, and plans to implement without input from the Commission. Tr. 2/361. At the conclusion of the process, the Postal Service plans to look back and possibly make improvements. *Id.* In fact, the Postal Service publicly stated that it plans to use the Commission's advisory opinion in this docket to improve that process.¹¹

¹⁰ *Buchanan v. USPS*, 375 F. Supp. 1014, 1019 (N.D. Ala. 1974), *affirmed in part*, 508 F.2d 259 (5th Cir. 1975) (stating that the opportunity for a hearing on the proposed change is a fundamental right).

¹¹ Postal Service counsel helpfully "offered testimony" that the Postal Service plans to look back after completing the process and use the Commission's advisory opinion in making improvements to the process going forward. Tr. 2/592.

The Postal Service's claim that applying the Initiative process thus far has divested the Commission of jurisdiction is disingenuous. The Postal Service has expended its own resources as well as public and Commission resources in developing an evidentiary record for the Initiative. Prior to making its argument that the Commission is divested of jurisdiction, the Postal Service conceded that it would not use an advisory opinion in formulating or implementing the Initiative. In fact, the Postal Service stated that it would only use the Commission's advisory opinion to revise the process for future iterations, and that renders the Postal Service's entire argument moot. If the advisory opinion in this docket is not used to shape the contours of the Initiative process, the results of that process should not be able to divest the Commission of jurisdiction.

The Commission should take the opportunity presented by this case and issue its guidance on improvements to the process for the future. The Commission has invested a great deal of time and considerable thought to the Postal Service's Initiative, and Commission guidance will provide valuable benefit and insight for upcoming, future iterations.

V. THE PUBLIC REPRESENTATIVE SUPPORTS VALPAK'S SUGGESTED ADDITIONS TO THE INITIATIVE PROCESS

Valpak suggests that the Initiative's discontinuance study process could be improved by studying, as part of the Initiative, the feasibility of bringing alternate access to the neighborhoods affected by the potential closure. Valpak Brief at 29-32. The Public Representative supports this suggestion.

Under the current process, the establishment of a replacement contract postal unit is not part of the discontinuance study process. Tr. 2/286-88. In fact, the Postal Service views contract postal unit replacement service as well as all other types of replacement service as completely unrelated to the closure process. Tr. 2/287-88. This overly narrow view of the closure process must be changed in favor of a more holistic approach. The Initiative should explore all potential direct and indirect effects on

individuals. As part of that approach, the Postal Service needs to make a conscious effort to explore, as part of the decision of whether to close facilities, the feasibility of bringing alternate access to potentially affected individuals and businesses. Quite simply, if adequate alternate arrangements cannot be made, the facility should not be closed.

As the Public Representative discussed in his Initial Brief, there are many services currently provided by station and branch post offices that are not adequately provided by many of the alternate access channels. Public Representative Brief at 27-32. The Postal Service needs to make a concerted effort to better harmonize the services, prices, and fees of services offered at current alternate access channels (and any new alternate access channels) with those offerings of services, prices, and fees at station and branch post offices.

VI. CONCLUSION

For the reasons discussed above, and for the reasons set forth in the Public Representative's Initial Brief, the Commission should advise the Postal Service that the Station and Branch Optimization and Consolidation Initiative does not conform to the policies of title 39. Further, as discussed in the Public Representative's Initial Brief, the Commission should require a final accounting of the Initiative and initiate subsequent proceedings.

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