

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

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**Six-Day to Five-Day Street Delivery  
And Related Service Changes, 2010**

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**Docket No. N2010-1**

**AMERICAN POSTAL WORKERS UNION, AFL-CIO  
MOTION TO STRIKE PORTIONS OF USPS INITIAL BRIEF  
(October 19, 2010)**

The American Postal Workers Union, AFL-CIO (APWU) hereby moves to strike Sections III.B through III.F, pages 7-27, from the United States Postal Service Initial Brief filed October 15, 2010. If the Postal Regulatory Commission determines that a Motion to Strike is not warranted in these circumstances, the APWU respectfully requests that in the alternative, this filing be considered a Partial Response to the Initial Brief of USPS.

Rule 21(c) of the Commission's Rules of Practice and Procedure state that Motions to Strike "are requests for extraordinary relief." APWU believes that the present circumstances demand such relief to maintain the integrity of the record in this docket and to preserve the interests of all parties and the public. Sections III.B through III.F of the Postal Service's Initial Brief are an attempt to reform the evidentiary record in this case at the last minute to eliminate unfavorable testimony elicited by the Commission at field hearings. Such an outcome would be highly prejudicial to other participants this late in the proceedings, after the close of the record and should not be allowed.

The Postal Service objects to the Commission's inclusion of the field hearing testimony in the evidentiary record and specifically attacks the inclusion of testimony from Medco Health Solutions. Before addressing the merits of the Postal Service's claims, which are questionable, it must be noted from the outset, the Postal Service's argument suffers a fatal procedural flaw; it is exceedingly untimely.

The Postal Service had ample opportunity to challenge the admission of the field hearing testimony but failed to do so. As acknowledged by the Postal Service, the Commission indicated at the second field hearing, held in Sacramento, California, on May 12, 2010, that the statements made at this hearing and all other field hearings would become a part of the evidentiary record.<sup>1</sup> Thus, as of May 12, 2010, over five months ago, the Postal Service was on notice of the evidentiary status of the field hearing testimony and did nothing. Moreover, this statement was not made in passing isolation. The Commission repeated the claim that the field hearings would be included in the evidentiary record at every subsequent hearing. See Transcript Dallas, TX Field Hearing, May 17, 2010, page 11; Transcript Chicago, IL Field Hearing, June 21, 2010, page 27; Transcript Memphis, TN Field Hearing, May 19, 2010, pages 16-17; Transcript Buffalo, NY Field Hearing, June 28, 2010, page 16; and Transcript Rapid City, SD Field Hearing, June 23, 2010, pages 8-9.

Even if the Postal Service believed it could not challenge the statement of the Commission made at the field hearings, the Commission issued an official ruling on August 23, 2010, permitting Medco Health Solutions to withdraw its testimony and not respond to discovery requests of the Postal Service, and declaring, once again, that field hearing testimony would be a part of the record.<sup>2</sup> Again, the Postal Service remained silent. In so doing, the Postal Service is barred by the doctrines of waiver and estoppel from raising these arguments now.

This is not to say the Postal Service is never allowed to object to a Presiding Officer's ruling. To the contrary, the Commission's Rules of Practice provide effective means for appealing an adverse ruling of a Presiding Officer. Specifically, Rule 32(b)(1) states:

(1) Before the issuance of an initial decision pursuant to §3001.39(a) or the certification of the record to the Commission pursuant to §3001.38(a), rulings of the presiding officer may be appealed when the presiding officer certifies in writing that an interlocutory appeal is warranted. The presiding officer shall not certify an appeal unless the officer finds that (i) the ruling involves an important question of law or policy concerning which there is substantial ground for difference of opinion and (ii) an immediate appeal from the ruling will materially

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<sup>1</sup> Sacramento CA Field Hearing Transcript at 10 (May 10, 2010); USPS Initial Brief at p. 11-12 (October 15, 2010).

<sup>2</sup> Presiding Officer's Ruling No. N2010-1/26, August 23, 2010.

advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy.<sup>3</sup>

The Postal Service's objection to the field hearing testimony should have been properly brought as an appeal to Presiding Officer's Ruling N2010-1/26, as it involves an important question of law and "would advance the ultimate termination of the proceedings" and in the instant case, "subsequent review will be an inadequate remedy." A party seeking to have an appeal certified pursuant to Rule 32(b)(1) is required to request certification "within 5 days after the presiding officer's ruling has been issued."<sup>4</sup> Thus, the Postal Service was required by the Rules of Practice to initiate an appeal certification request regarding this ruling by August 30, 2010. The Postal Service did not file such a request; therefore, its objections to POR No.N2010-1/26 raised for the first time in its Initial Brief should be rejected.

Were the Commission to permit the Postal Service to raise the issues found in Section III.B – F and ultimately agree with the Postal Service on these points, other parties participating in this docket and the general public would be prejudiced. Had the Postal Service raised its objections properly under Rule 32, interested parties may have filed responsive pleadings addressing the veracity of the Postal Service's claims. More importantly, those parties could have adjusted their strategy in this case to comport with the ultimate decision of the Commission. For example, were the Commission to exclude the Field Hearing testimony in response to a valid appeal under Rule 32, APWU likely would have sought to offer witnesses during the rebuttal stage to testify to, among other issues raised at the Field Hearings, the negative consequence of 5-day delivery on pharmaceutical benefits managers and their customers.

However, this did not occur. Instead, APWU, and likely other parties, relied on the clear direction from the Commission, time and again, that field hearing testimony would be a part of the evidentiary record, and made the strategic decision to forgo expensive testimony repetitive of these hearings. The Postal Service's delay at bringing its objection to the attention of the Commission and other participants, risks leaving a dearth in the record were the Commission to give credence to the Postal Service's

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<sup>3</sup> 39 C.F.R. § 3001.32.

<sup>4</sup> 39 C.F.R. § 3001.32(b)(2).

argument. Parties are now unable to offer additional testimony to fill the hole left by the exclusion of the Field Hearing Testimony; the record is closed, all evidence has been submitted. Were the Commission to agree with the Postal Service, however erroneously, to protect the interests of the participants, it would be required to re-open the record, permit the filing of additional testimony, and allow for discovery and hearings. This would prolong the Advisory Opinion significantly, a result the Postal Service should want to avoid.

Not only did the Postal Service have ample time to object to the inclusion of the Field Hearing testimony, the Postal Service also had the ability to submit rebuttal to this testimony but did not. The Postal Service also could have requested the Commission require Medco to respond to its interrogatories given that its representative's statement was to be a part of the record after it withdrew its testimony, but it did nothing of the sort. The Postal Service had numerous opportunities to raise the concerns found in Section III of its Initial Brief, but it repeatedly neglected to do so. It must not be permitted, at this late hour, to eliminate scores of relevant testimony from the record.

The Postal Service had months to raise with the Commission the issues contained in Section III.B – III.F of its Initial Brief and chose not to do so. The Postal Service must not now be allowed to benefit from its untimely effort to supposedly preserve the integrity of the evidentiary record, to the detriment of other parties. Therefore, to ensure that no party is unduly prejudiced by the late elimination of relevant evidence from the record, and to prevent the unnecessary delay of the Advisory Opinion, the Postal Service's objections raised in Section III.B – III.F should be stricken in their entirety.

Respectfully submitted,

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