

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

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

Docket No. N2010-1

REPLY BRIEF
AMERICAN POSTAL WORKERS UNION, AFL-CIO
(October 25, 2010)

The American Postal Workers Union, AFL-CIO (APWU), hereby submits the following Reply Brief to address certain arguments of the United States Postal Service (USPS or Postal Service) and Valpak Direct Market Association, Inc. and Valpak Dealers' Association, Inc. (Valpak).

I. The Procedural Objections of the Postal Service and Valpak are Untimely, Without Merit and Must Be Struck from the Record of the Proceeding.

In their Initial Briefs, the Postal Service and Valpak contend that the Commission must not consider the testimony received during the seven field hearings in its Section 3661 Advisory Opinion.¹ For the reasons expressed in APWU's Motion to Strike Portions of USPS Brief (Motion to Strike) filed October 19, 2010, hereby incorporated by reference, and for the reasons detailed below, the Commission should reject the procedural complaints of the Postal Service and Valpak as untimely and without merit. Further, the Commission should strike from the record of this docket Sections III.B through III.F, on pages 7-27 of the Postal Service Initial Brief and Section IV on pages 17-21 of Valpak's brief.

¹ Initial Brief of United States Postal Service, pp. 7-27 (October 15, 2010); Initial Brief of Valpak Direct Market Association, Inc. and Valpak Dealers' Association, Inc., pp. 17-21 (October 15, 2010).

A. The Procedural Objections Are Untimely.

As explained in APWU's Motion to Strike, the extraordinarily late challenge to the contents of the evidentiary record by the Postal Service and Valpak² is barred by the doctrines of estoppel and waiver. As thoroughly detailed in our Motion, USPS had months to address the inclusion of the field hearing testimony in the record but did nothing. Similarly, Valpak intervened in this Docket on April 23, 2010, and attended the Prehearing Conference four days later. It was at this Prehearing Conference that Chairman Goldway first indicated that the field hearing testimony would be included in the evidentiary record.³ Yet, despite its alleged concern for the integrity of the record, Valpak did not object to this declaration. The statement that field hearing testimony would be included as part of the record was repeated during at least six of the field hearings held between May 17, 2010 and June 23, 2010.⁴ Again, Valpak did nothing. For over five months, Valpak has known that the Commission intended to make the field hearing testimony part of the record but, like the Postal Service, made no objection to this treatment. Accordingly, it is barred from objecting now.

Like the Postal Service, Valpak also did not object to Presiding Officer's Ruling No. N2010-1/26, issued August 23, 2010, granting Medco Health Solutions' (Medco) request to withdraw its rebuttal testimony after the Postal Service submitted numerous irrelevant and burdensome interrogatories. This Ruling reiterated that field hearing

² APWU filed its Motion to Strike Portions of USPS Initial Brief on October 19, 2010. This Motion dealt exclusively with the arguments within the Postal Service's Initial Brief. APWU intended to file a substantially similar Motion to strike the section of Valpak's Initial Brief that mirrored the objectionable portions of the Postal Service brief. However, the following day, October 20, 2010, POR No. N2010-1/34 was issued stating: "the best way for the Commission to thoroughly consider the arguments raised by the Postal Service and APWU are as part of the briefs." POR 34 at p. 2. In accordance with this Ruling, APWU refrained from filing a Motion regarding Valpak's Initial Brief. Nonetheless, the arguments raised in APWU's Motion to Strike Portions of USPS Initial Brief apply equally to Valpak.

³ Tr. 1/39.

⁴ Transcripts of the Field Hearings were made available to the public via the PRC's electronic docket on May 25, 2010 (Sacramento, CA and Las Vegas, NV); June 3, 2010 (Dallas, TX); July 8, 2010 (Chicago, IL); July 22, 2010 (Memphis, TN); August 23, 2010 (Buffalo, NY) and August 24, 2010 (Rapid City, SD). Thus, even if Valpak did not attend the field hearings, it had access to these Transcripts and the Commission's position regarding the treatment of the field hearing testimony since May 2010.

testimony was part of the record.⁵ If the Postal Service or Valpak truly wanted to contest this ruling, they were required to follow the procedures detailed in Rule 32 of the Commission's Rules of Practice to appeal the Presiding Officer's Ruling. Neither the Postal Service nor Valpak timely appealed this ruling. Instead, each waited until the very end of the docket, after the record was closed, to raise an issue that, according to the Postal Service and Valpak, affects the lawfulness of the Commission's Advisory Opinion⁶ and jeopardizes "the essence and purpose of an on-the-record hearing under 5 U.S.C. Section 556."⁷ However, waiting until the 11th hour to address something of this import raises questions as to the validity and true motive of the objections. At this point, were the Commission to agree with the claims of USPS and Valpak, its only course of action would be to remove the field hearing testimony from the record. Parties testifying at the field hearings, docket participants and the interests of the public would be prejudiced. No party can now offer additional testimony to replace the field hearing statements and the Postal Service succeeds in having a more favorable record before the Commission, and ultimately Congress. The Commission must not allow this last minute attempt to manipulate the record to the detriment of other participants and the general public.

B. The Procedural Objections Also Lack Merit.

Not only are the Postal Service and Valpak objections to the field hearing testimony untimely, they are also without merit. USPS and Valpak speak at length to the requirements of the Administrative Procedure Act (APA), specifically with regard to the cross examination of witnesses. The Postal Service asserts that the opportunity to cross-examine is an "explicit mandate" of Section 556 of Title 5.⁸ Similarly, Valpak argues "the right to cross examination cannot be ignored."⁹ Both parties claim that were the Commission to rely on testimony not subject to cross examination, its Advisory

⁵ POR No. N2010-1/26 (August 23, 2010).

⁶ USPS Initial Brief at p. 8.

⁷ Valpak Initial Brief at p. 21.

⁸ USPS Initial Brief at p. 14.

⁹ Valpak Initial Brief at p. 19.

Opinion would “constitute a clear violation of the APA.”¹⁰ However, both parties are wrong; the APA does not mandate cross examination in all instances.

As the U.S. Court of Appeals for the District of Columbia Circuit reasoned, “[c]ross examination is ... not an automatic right conferred by the APA; instead, its necessity must be established under specific circumstances by the party seeking it.” *Cellular Mobile Systems of Pennsylvania, Inc. v. F.C.C.*, 782 F.2d 182, 198 (D.C. Cir. 1985); see also *American Public Gas Ass’n v. FPC*, 498 F.2d 718 (D.C. Cir. 1974) (“Even in a formal adjudicatory hearing under the APA ... cross examination is not always a right”). Additionally, the party seeking to cross-examine bears the burden of showing that it is necessary. *American Public Gas Ass’n*, 498 F.2d at 723. Neither the Postal Service nor Valpak have established that cross-examination of field hearing participants is necessary to ascertain the “full and true disclosure of the facts.” In fact, neither the Postal Service nor Valpak ever even asked for the opportunity to cross-examine field hearing witnesses. Nor did they submit any statement to challenge or rebut the field hearing testimony. Incredibly, though the Presiding Officer’s ruling allowing Medco to withdraw its formal testimony was clear that the field hearing testimony of Medco Witness Tom Underkoffler would be part of the evidentiary record, the Postal Service not only did not appeal this ruling, it did not request that Medco be required to respond to its interrogatories as it could and should have done. Neither Valpak nor the Postal Service even attempted to prove, much less actually proved the necessity of cross examination of field hearing witnesses. Thus, their late objections to the inclusion of testimony not subject to cross-examination must be rejected.

Furthermore, the Postal Service’s reliance on judicial precedent involving PRC rate setting decisions is not persuasive that due process requirements mandate cross-examination in this case. Both of the cases relied on by the Postal Service involve Commission decisions in pre-PAEA rate cases.¹¹ Under the Postal Reorganization Act, the Commission’s Recommended Decisions had a binding effect on the Postal Service and impacted what future behavior the Postal Service could take with regards to rate setting. If the Postal Service disagreed with the Commission’s Decision, its recourse

¹⁰ Id.

¹¹ 39 U.S.C. §3624; repealed Pub. L. 109-435, Title II § 201(b), December 20, 2006.

was limited. Thus, in these rate cases, the Postal Service had cognizable due process rights warranting more robust discovery, including cross examination. In contrast, Advisory Opinions issued under Section 3661 do not similarly implicate the Postal Service's due process rights. The present docket culminates in a non-binding advisory opinion by the Commission. The Postal Service is free to take the advice of the Commission or disregard it. The rights and future behavior of the Postal Service are generally unaffected by the Opinion unless the Postal Service, in its sole discretion, decides to make changes pursuant to the Commission's advice.

In its N75-1 Advisory Opinion, the Commission noted that one of the principal functions of § 3661 was "to allow the public to contribute views, objections and insights to the planning and execution of services changes."¹² Thirty-five years later, POR No. N2010-1/26 echoes this statement: "[a] primary goal of this proceeding is to develop a full and accurate record of the public's views about the proposed change in the nature of postal services, so that the Commission can provide the Postal Service with the best possible advice."¹³ Including the field hearing testimony furthers this goal and is invaluable. This is especially true where, as here, the Postal Service provided insufficient proof that it examined the effects of its 5-day delivery plan on all types of mail users throughout the country.¹⁴ The Commission is aware of testimony that was subject to cross and that which was not and can weigh each accordingly. However, to completely disregard the statements made at the field hearings would not only reward the Postal Service for sitting on its objections while punishing those parties who relied on the unchallenged proclamations of the PRC over the last five months, it would also permit the Postal Service to claim that opposition to the 5-day delivery proposal not recognized by it and any adverse effects of the plan not reported by it, do not exist.¹⁵

¹² N75-1 PRC Advisory Opinion, at pp. 65-66 (April 22, 1976).

¹³ POR No. N2010-1/26 at p. 2 (August 23, 2010).

¹⁴ APWU Initial Brief, pp 4-7 (October 18, 2010); see also NNA Initial Brief (October 15, 2010), PR Initial Brief (October 15, 2010), GCA Initial Brief (October 15, 2010), and NALC Initial Brief (October 15, 2010).

¹⁵ Notwithstanding the arguments to the contrary, were the Commission to agree with the Postal Service and Valpak that the factual statements of the field hearing testimony be excluded from the record, this testimony should still be considered by the Commission in determining the weight accorded to the evidentiary testimony of the parties. Moreover, it bears reminding the Postal Service that the field hearing participants are all postal customers, not adversaries to be

For example, Medco submitted the testimony of Thomas Moriarty primarily “to clear up any confusion that may have arisen from the remarks in this docket of USPS witness Sam Pulcrano,” who during oral cross examination indicated that he did not think Medco opposed five-day delivery.¹⁶ Aware that the Commission considered the field hearing statement of its Director of Logistics Tom Underkoffler part of the record, Medco later withdrew the repetitive testimony of Thomas Moriarty.¹⁷ Both the statement of Mr. Underkoffler and the testimony of Mr. Moriarty made it clear that Medco did not support five-day delivery and believed it and its consumers would be adversely impacted.¹⁸ Were the Commission now to exclude Mr. Underkoffler’s statement, the Postal Service aptly recognizes that this would result “in a virtual absence of evidence relevant to the issue of the alleged adverse impact of the elimination of Saturday street delivery on recipients of mail order pharmaceutical shipments.”¹⁹ Additionally, the only testimony on Medco’s opinion of 5-day delivery would be the erroneous statement of Mr. Pulcrano. Not only are these results absurd, they are clearly contrary to the “full and true disclosure of the facts” sought by the APA, 5 U.S.C. § 556.

The assertion of the Postal Service and Valpak that the Commission is required to disregard the field hearing testimony in formulating its Advisory Opinion must be rejected. These objections are untimely and without merit. Endorsing them would prejudice the intervenors, field hearing participants and the public. It would also delay the proceedings to allow for the submission of additional testimony to protect the interest of all parties and to ensure the full and true disclosure of facts.²⁰

thoroughly tested and discredited. The participants’ testimony, at base, is an expression of mail users’ opinions of 5-day delivery and what they regard the impact of it to be. As recognized by the Postal Service, this information has value. Likewise, there is value in having the Commission review this information and provide suggestions on what, if anything, the Postal Service should do to address it.

¹⁶ Motion of Medco to Withdraw Testimony of Thomas Moriarty (August 13, 2010).

¹⁷ Id.

¹⁸ Transcript Testimony of PRC Field Hearing in Las Vegas, pp. 11-17 (May 10, 2010); Rebuttal Testimony of Thomas M. Moriarty (revised August 4, 2010)

¹⁹ USPS Initial Brief at p. 27.

²⁰ APWU Motion to Strike Portions of USPS Initial Brief at pp. 3-4 (October 19, 2010).

C. The Objections Risk Tainting the Commission's Opinion and Must be Struck from the Record of these Proceedings

The Commission should be skeptical of the motives of the Postal Service and Valpak in raising these concerns this late in the proceedings. The distinct lack of concern by the parties over the status of the field hearing testimony up until now raises legitimate questions as to whether the parties are driven to preemptively discredit a potentially unfavorable Opinion instead of genuinely motivated to protect the integrity of the record. The Postal Service and Valpak had five months to make these arguments but they chose to wait until the last minute where a solution that addresses the concerns and interests of all parties is not feasible. If their true concern was the integrity of the record, they should have acted sooner. Had they done so, the Commission would have been able to deal constructively with their objections, allowing all parties to express their views and respond according to the Commission's ultimate decision. Raised now, all these objections stand to do is undermine the decision of the Commission by tainting the evidence. As noted, the Commission's Opinion is not binding and only Congress can eliminate the longstanding 6-day delivery requirement. Thus, it is conceivable the true motive behind these objections is to minimize the credibility of an unfavorable opinion before Congress in hopes of securing Congressional permission to dramatically cut service. Therefore, not only should the Commission reject the arguments in Sections III.B through III.F, pages 7-27, of the Postal Service's Initial Brief, and Section IV, pages 17-21, of Valpak's Initial Brief, to avoid the tainting of the decision due to these dubious claims, it should also strike these arguments in their entirety in a ruling separate from its Advisory Opinion.

II. The Postal Service's Assertion of Commission Bias is a Desperate Attempt to Undermine the Decision

In its Initial Brief, the Postal Service alleges that the Chairman of the Commission may have prejudged the merits of the Postal Service's 5-day delivery proposal.²¹ This is a serious allegation. If true, concerns related to the fairness of the process and the objectivity of the Commission's Advisory Opinion will arise. Thus, to protect the process

²¹ USPS Initial Brief at p. 28-31.

and ensure a fair and useful Opinion, genuine concerns of Commission bias must be raised immediately. Both the APA and the Commission's Rules of Practice and Procedure provide a means to disqualify a presiding officer upon a "timely," "good faith" showing of personal bias.²²

The Postal Service did not address or attempt to mitigate the Chairman's alleged bias at any point prior to its Initial Brief. This raises strong doubts about whether the Postal Service is acting in good faith by addressing it now, at end of the process when it is too late to effectively repair any potential or perceived prejudicial effect the alleged bias may have on the Commission's decision. Despite the Postal Service's contention that it is "seriously concerned about the fundamental quality of the advice it will receive" in part because of the possibility the factual conclusions were pre-decided,²³ it has done nothing to alleviate this concern.

The Postal Service asserts that statements made by the Chairman prior to the filing of the Postal Service's Request for an Advisory Opinion, show a prejudgment on issues that are at "the very heart of the justification for the request in this docket."²⁴ Yet when on April 4, 2010, Chairman Goldway appointed herself the Presiding Officer in this docket, the Postal Service did not object. As Presiding Officer, Chairman Goldway is responsible for, among other things, regulating the course of the proceeding and ruling on evidentiary and procedural matters, all areas that could ultimately affect the Commission's Opinion. However, the Postal Service did not seek to have her

²² PRC Rules of Practice and Procedure Rule 23(d):

Disqualification. A presiding officer may withdraw from a proceeding when he/she deems himself disqualified, or may be withdrawn by the Commission for good cause found after timely affidavits alleging personal bias or other disqualifications have been filed. 39 C.F.R. § 3001.23.

5 USC § 556(b) states in pertinent part:

A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case."

²³ USPS Initial Brief at p. 31.

²⁴ USPS Initial Brief at p. 29.

disqualified under Rule 23(d). In fact, the Postal Service was so concerned about the Chairman's bias, that up until its Initial Brief, it did absolutely nothing to address it.

Even now, while lamenting the potential bias of the Chairman and its impact on the Commission's Advisory Opinion, the Postal Service's Initial Brief never suggests that Chairman Goldway be disqualified. The Postal Service's lack of urgency with regard to the Chairman's alleged bias raise serious doubts as to whether the Postal Service is truly concerned. The Postal Service's objections at this late date, when the record is closed and no reasonable actions can be taken to mitigate any actual or apparent bias, appear disingenuous at best. At worst, the Postal Service's allegations seem a desperate attempt to taint the decision and/or undermine the influence of the Chairman on her colleagues. Such blatant maneuvering to hedge its bet against an unfavorable Advisory Opinion, subverts the purpose of Section 3661, detracts from the validity of the Commission's Advisory Opinion and consequently, should be denounced by the Commission.

III. The Postal Service Has Not Established that its 5-Day Delivery Plan Complies with the Policies of Title 39.

The Postal Service has provided inadequate evidentiary support for its proposal to eliminate Saturday delivery. Worse, it seeks to leverage the gaps in its evidence to support its claim that its 5-day delivery proposal complies with the policies of Title 39. For example, the Postal Service claims that "the qualitative market research did not generate indications of potential disparate impacts on rural customers."²⁵ However, the Postal Service never examined a truly representative sample of rural customers; thus, it is unsurprising that its research included no evidence of disparate impacts on this population.

The Postal Service further contends that "the service changes planned here are not improperly discriminatory and reflect that no undue or unreasonable preferences have been granted" in violation of 39 U.S.C. § 403(c).²⁶ Intervenors and field hearing participants have provided ample reason to be concerned that the proposal will

²⁵ USPS Initial Brief at p. 39.

²⁶ USPS Initial Brief at p. 66.

negatively impact a range of mail users, some of whom may not be able to adapt without exceptional expense. The Postal Service admits that it did not investigate the impacts on many of these users. It did not study the impact on newspaper publishers, resident and business mailers in Alaska and Hawaii, or pharmacy benefit management companies, among others.²⁷ Yet the Postal Service would have the Commission credit its finding “that most consumers and small commercial organizations said the elimination of Saturday delivery to street addresses would have little impact on their consumer or commercial requirements.”²⁸ The Commission’s responsibilities under Section 3661 require it to reject conclusions based on questionable methodologies and incomplete study.

The Commission’s “advisory opinion jurisdiction under § 3661 requires a comprehensive examination of the consistency of actions and programs proposed by the Postal Service with the relevant policies to be found throughout title 39.”²⁹ This includes analyzing the “potential effects of the action or program in question” and evaluating whether “the methodological details of the program are sufficiently sound to enable it to achieve its stated objectives.”³⁰ In its Initial Brief, the Postal Service asserts that it has provided adequate and reliable information to permit the Commission to advise that the elimination of Saturday delivery complies with the policies of Title 39 and argues the intervenor testimony in opposition should be given little weight. The Commission should not be distracted by arguments that the Intervenor and field hearing testimonies include allegations of adverse impacts that have not been fully substantiated or quantified. The burden rests with the Postal Service to establish its compliance with Title 39. The intervenor and field hearing testimonies, at minimum, raise legitimate questions as to the completeness and accuracy of the Postal Service’s evidence in support of its plan that the Commission must consider.

As explained in detail in APWU’s Initial Brief, the Postal Service relied on suspect methodologies and assumptions to project volume and revenue loss and did not consider the impacts on all consumers. Given that a substantial portion of the

²⁷ APWU Initial Brief at pp. 4-7.

²⁸ USPS Initial Brief at p. 57.

²⁹ N75-1 Advisory Opinion at p. 33 (April 22, 1976).

³⁰ N75-1 Advisory Opinion at p 9, 22.

information provided by the Postal Service in support of its plan is either incomplete or unreliable, neither the Postal Service nor the Commission can reasonably predict that the elimination of Saturday delivery will actually enable the Postal Service to achieve future financial stability instead of precipitating a continuous and permanent loss of volume and revenue. The latter would likely result in ever increasing reductions of postal services, in violation of the Postal Service's mandate to provide adequate and efficient services that bind the nation. Thus, the Commission cannot advise that the elimination of Saturday delivery complies with Title 39 when the information supporting this plan is suspect.

IV. Conclusion

The proposal to eliminate 6-day delivery is unnecessary and unsupported by the evidence in this docket. The Postal Service seeks to strengthen its case by eliminating relevant and useful field hearing testimony that challenges the Postal Service's weak assertions of broad public support for its planned changes and undermines the claim that the Postal Service has adequately considered the impacts of this plan on all postal users. The Commission should reject any call to remove the field hearing testimony from the record as untimely and without merit. Further, to avoid tainting the Commission's Advisory Opinion, these arguments should be struck in their entirety as requested above and in the APWU's Motion to Strike Portions of the USPS Initial Brief. The Postal Service's last minute allegations of Commission bias should also be rejected as a desperate attempt to preemptively undermine any negative conclusions regarding the Postal Service's proposal in the Commission's Opinion.

For the reasons explained above and in APWU's Initial Brief, the Commission should issue a strong, detailed opinion that advises the Postal Service to abandon its five-day delivery proposal because the proposed service changes are unnecessary and do not comply with the policies of Title 39.

Respectfully submitted,

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