Postal Regulatory Commission
Submitted 10/25/2010 4:02:08 PM
Filing ID: 70603
Accepted 10/25/2010

BEFORE THE
POSTAL REGULATORY COMMISSION

SIX-DAY TO FIVE-DAY STREET DELIVERY AND RELATED SERVICE CHANGES, 2010	Docket No. N2010-1

REPLY BRIEF OF INTERVENOR NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

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October 25, 2010

SUBJECT INDEX

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Intervenor National Association of Letter Carriers, AFL-CIO ("NALC") respectfully submits this reply brief in response to the Initial Brief of the United States Postal Service ("USPS Br.") and in further opposition to USPS's proposed service changes in the above-referenced docket.

I. <u>THE COMMISSION SHOULD UNDERTAKE AN ACTIVE AND PROBING REVIEW OF USPS's PROPOSAL</u>

In an effort to escape probing review of its flawed proposal to abandon Saturday delivery, USPS argues that the Commission's role in this proceeding should be "'relatively passive,'" USPS Br. 33 (citation omitted), and that it should not "second-guess the judgment of postal management," *id*. at 34. To the contrary: both practical and legal considerations demand an active and probing review by the Commission.

First, as a practical matter, the Commission's advisory opinion will serve no purpose unless it digs into USPS's case and tests its rationales for abandoning six-day delivery. USPS correctly notes, USPS Br. 18, that the question raised in this proceeding -- whether USPS should eliminate Saturday delivery -- will in the end be decided by Congress. The real value of the Commission's advisory opinion therefore is to aid Congress in its decision-making. Indeed, USPS recognizes this by devoting pages of its brief to the argument that the Commission should not commit legal error by relying on field hearing testimony, because (in its view) doing so would deprive Congress "of the benefit of a legally sound advisory opinion to review as it considers the merits of any legislation." USPS Br. 19.

Congress already knows where USPS management stands on the issue of eliminating Saturday delivery.[1] A "'relatively passive'" analysis by the Commission that shies

[1] USPS executives have testified before Congress on the matter repeatedly in the last two years.

away from "second-guessing" management on this critical question of postal operations would add nothing to Congress' decision-making. What Congress needs, and what it undoubtedly expects, is an independent, searching analysis of management's proposal, based on the full record of this proceeding and the expertise and experience of the Commissioners and their staff.

Such an active and independent analysis by the Commission would be fully consistent with the governing statutory framework. The Postal Reorganization Act ("PRA") established the Commission (then the Postal Rate Commission) as an "active and independent participant" in postal affairs. *Mail Order Ass'n v. USPS*, 2 F.3d 408, 414, 422 (D.C. Cir. 1993) (noting that the Commission is not limited to giving a "thumbs up or thumbs down" on management proposals but has the task of "exercising independent discretion"); Sen. Report 91-912 (91st Cong. 2d Sess.) (1970), at 13 (the Commissioners "shall be independent of the Board of Governors"). Indeed, if the Commission did not exercise independent judgment in assessing the merits of proposed service changes, there would be no point in the statute's requirement that the Commission render an advisory opinion. *See* 39 U.S.C. §3661(b). The statute requires the Commission to weigh in on such matters precisely because the Commission provides valuable expertise and also a perspective different from that of USPS.

USPS's expertise is in managing the business, *see United Parcel Serv., Inc. v. USPS*, 604 F.2d 1370, 1379 (3d Cir. 1979); its focus is necessarily on getting the mail delivered, day in and day out. The Commission, by contrast, has a broader, more detached perspective, one that allows it to consider how management's decisions may impact the public. Indeed, the legislative history of the PRA emphasizes the importance of the Commission having a "degree of detachment" from the immediate concerns of management:

> … the independence of the Commission will serve a vitally important function by permitting [it] to view the overall impact of

> postal costs with *a degree of detachment which the committee considers vitally important* to preserve the public interest and public investment in the largest civilian agency of the Federal Government.

Sen. Report 91-912 (91st Cong. 2d Sess.) (1970), at 13 (emphasis added). The Commission's broader perspective also allows it to consider how management decisions may impact USPS's long-term viability -- and thus USPS's ability to fulfill its mission -- in ways that may not be immediately apparent from a simple balance sheet analysis.[2]

USPS has in prior Section 3661 proceedings urged the Commission to take a hands off approach, but the Commission has correctly rejected USPS's invitation to do so. *See, e.g.*, Advisory Opinion in N2006-1 (Dec. 19, 2006), at 11 (USPS arguing that the Commission should not "second-guess" its "sound business decision" but Commission disagreeing with "the Postal Service's restrictive view of the scope of the Commission's responsibilities"). USPS admits that the current docket presents the "most significant changes" under review in a Section 3661 proceeding since enactment of the PRA in 1970. USPS Br. 6. With so much at stake, this is not a case for the Commission to sit on the sidelines. It should exercise an independent and probing review of USPS's proposal.

II. ENDING SATURDAY DELIVERY WILL NOT SAVE USPS FROM THE CASH CRISIS CAUSED BY THE STATUTORY PRE-FUNDING REQUIREMENT

Despite its 114 pages, USPS's brief is more remarkable for what it fails to say than for what it says. The elephant in the room that USPS fails to acknowledge is its unique

[2] USPS errs by relying on *Governors of USPS v. U.S. Postal Rate Comm'n*, 654 F.2d 108 (D.C. Cir. 1981) (cited at USPS Br. 33), for the proposition that the Commission should take a passive role here. That case did not concern an advisory opinion under 39 U.S.C. §3661. Rather, it concerned a "recommendation" by the Commission under the now-repealed 39 U.S.C. §3624, a "recommendation" that bound USPS absent Commission reconsideration or judicial relief. *See* 654 F.2d at 110. The court, in a decision that long pre-dated the advent of the Postal *Regulatory* Commission, reasoned that since the Rate Commission did not "regulate" USPS, *see id*. at 115, it had a limited scope of authority when issuing decisions binding USPS.

statutory obligation to pay billions per year to pre-fund retiree health benefits. This obligation, which the Commission has determined to be the cause of USPS's liquidity crisis, *see* PRC Order No. 547, *Order Denying Request For Exigent Rate Adjustments* ("Exigent Rate Case Order"), Docket No. R2010-4 (Sept. 30, 2010), at 66, will cause USPS to run out of money by September 30, 2011, *see id*. at 63 (quoting testimony of CFO Corbett). Since USPS admits that implementation of five-day delivery "would not occur before July 2011 *at the earliest*," USPS Br. 44 (emphasis added), eliminating Saturday delivery cannot save USPS from its rapidly approaching insolvency. Only Congress can.

USPS's proposal to eliminate Saturday delivery suffers from the same logical flaw as its ill-fated exigent rate request. In denying USPS's rate request, the Commission explained that the statutory pre-funding requirement, not the recession, caused USPS's liquidity crisis, and that the requested rate hike would not have resolved that crisis. *See* Exigent Rate Case Order, at 3, 63, 66. Here, USPS fails to acknowledge that the financial boost it seeks from jettisoning Saturday delivery will make no difference to resolving its immediate cash crisis.

USPS also fails to acknowledge that *absent* the statutory pre-funding requirement, it would have no short-term financial crisis. USPS talks about its "total costs outstripping total revenues," USPS Br. 64, and claims that "something has to give," *id*. What USPS ignores is that but for the pre-funding requirement, FY 2007 through FY 2009 would have yielded a cumulative profit for USPS. *See* Brief of Intervenor National Association of Letter Carriers, AFL-CIO ("NALC Br."), at 11. USPS also ignores how, according to its latest financials, its "controllable operating loss" for FY 2010 is remarkably slim, *see id*. at 13 n.2 -- a sign of good performance given the continued drag of the recession.

In sum, if Congress fails to eliminate or ease the statutory pre-funding requirement, USPS's proposed service change will not save it. On the other hand, if Congress lifts the statutory pre-funding burden, USPS's financial health would be sufficiently robust as to preclude the need for the radical and risky surgery involved in truncating the delivery week.

III. THE RECORD CONTAINS NO EVIDENCE OF A LONG-TERM FUTURE DECLINE IN MAIL VOLUME

Because ending Saturday delivery will clearly make no difference to USPS's short-term financial crisis, USPS's case hinges on its claim that mail volume will decline in the long-term, largely due to electronic diversion, and that such diminished mail volume will be insufficient to support six days of delivery. *See* USPS-LR-N2010-1/1 (filed March 30, 2010), at 3 (USPS asserting as a key rationale for its proposal that "mail volume will continue to decrease well into the future.") (emphasis added); *see also* USPS Br. 2 (referencing "[d]evelopments in electronic communications technology" and asserting that "there is no basis for expecting a reversal of the underlying non-cyclical trends in postal volumes").

The problem is that there is no *record evidence* to support USPS's claim that the decades' long growth of mail volume has ended permanently and been replaced by a secular downward trend. In particular, nowhere in its voluminous brief does USPS identify any testimony by a competent witness to support this point.

USPS argues at length that the Commission is "barred from according evidentiary status" to statements made in the field hearings because such testimony was not subject to cross-examination. *See* USPS Br. 9-27. Whether that argument is correct or not, the Commission is certainly barred from according "evidentiary status" to statements never made before the Commission at all, in either the field hearings or the Washington D.C. hearings. In particular, no evidentiary status may be given to the hearsay assertions by the Boston Consulting Group on which USPS relies for its claim of a long-term decline in mail volume. *See, e.g.,* Tr. 471 (USPS witness Granholm testifying that "the [Boston Consulting Group] analysis clearly shows that volume will continue to decline."). The Boston Consulting Group never appeared before the Commission and was never subject to cross-examination.

Even if the record contained competent testimony regarding future mail trends, such testimony would have to be viewed with a healthy dose of skepticism. As NALC demonstrated in its initial brief, the history of mail volume projections shows that they amount to little more than speculation. *See* NALC Br. 15-20. Nothing in USPS's brief provides reason to conclude otherwise. Indeed, according to USPS, "'uncertainty' seems to be the only common element of virtually all recent economic forecasts." USPS Br. 69.

In sum, the lack of record evidence regarding future mail volume trends, and the inherent uncertainty of all future mail volume projections, preclude a finding that future mail volume will be insufficient to support six-day delivery.

IV. THERE IS NO CERTAINTY THAT USPS WILL GAIN MORE FROM ABANDONING SATURDAY DELIVERY THAN IT WOULD LOSE

USPS admits that there may be some uncertainty regarding how ending Saturday delivery will impact its finances, *see, e.g.,* USPS Br. 74, but it confidently asserts that regardless of any shortcomings or errors in its analysis, the "cost savings dwarf any revenue implications," *id*. at 77; *see also id*. 52 ("small or even large errors in estimating those costs do not change the bigger financial picture."). Indeed, USPS presents the matter with simple mathematical certainty: daily revenue must rise, it explains, if weekly revenue is divided by the number five rather than six. *See* USPS Br. 63. USPS is so confident that its plan will yield a positive financial result as to deem "additional study unwarranted and wasteful." USPS Br. 77.

USPS's confidence, however, is misplaced: it may well lose more than it gains from abandoning the Saturday market.

A. **<u>The Harm To USPS From Heightened Competition Could Far Exceed The Benefit Of Any Immediate Savings</u>**

As Dr. Crew explained, whatever the initial savings USPS would realize from abandoning the Saturday market, over time those savings could be swamped by the loss of business resulting from the growth of competition *See* NALC-T4, at 8-9. USPS presented no rebuttal testimony on this key point, *see, e.g.*, Tr. 3279-80 (Boatwright), and barely touches on it in its brief, merely pointing out that USPS already faces some competition and that ending Saturday delivery could cause an uptick in products like Priority Mail, *see* USPS Br. 71-72. USPS's failure to provide any meaningful rebuttal to Dr. Crew's central contention -- that mail volume loss caused by ending Saturday delivery could "snowball" as postal customers turn increasingly to the competition, NALC-T4, at 8 -- undermines USPS's conclusion that five-day delivery will inevitably enhance its financial position.

USPS's bookkeeper-like focus on immediate questions of dollars and cents also misses the less tangible, but no less real, danger that ending Saturday delivery will adversely impact USPS's brand and its connection to its customers. Although USPS quibbles with aspects of the testimony of NALC President Rolando, it cannot refute his central point: that since most residential customers who work during the week only see their letter carrier on Saturday, eliminating Saturday delivery would erode USPS's bond with such customers. *See* NALC-T1, at 4. Indeed, USPS's lead witness, who described letter carriers as "excellent ambassadors in promoting the agency's image," USPS-T1 (Pulcrano), at 3, conceded that residential customers who work during the week probably only see their letter carrier on Saturday, Tr. 155-56, and that the interaction between such customers and their letter carriers "would be substantially diminished" if Saturday delivery were eliminated, Tr. 156. Moreover, it was USPS itself that concluded, based on its own market research, that "curtailment of delivery service would most likely erode customer loyalty." USPS-LR-N2010-1/16 (filed June 15, 2010) (document entitled "Section Three, Marketplace," at 58). Nor can USPS deny that it is important for the long-term success of an enterprise to maintain a connection with customers: it was USPS's own expert witness who emphasized how it is "required" that a successful business establish an "emotional engagement" with customers. Tr. 3165 (Boatwright).

In the long-run, the damage to USPS's business from heightened competition, a weakened brand and a diminished connection to its customers could far exceed any savings realized by five-day delivery. Worse, it could pose a threat to the long-term viability of USPS. *See* NALC-T4 (Crew), at 9. This alone is grounds for the issuance of an opinion finding USPS's proposed service changes to be inconsistent with its statutory mission: a service change that could threaten USPS's viability cannot be consistent with USPS's responsibility for developing "adequate and efficient postal services." 39 U.S.C. §3661(a).

B. <u>USPS's Savings Projections Are Unreliable and Overly Optimistic</u>

Even apart from long-term considerations, it is still far from certain that USPS will save any meaningful amount of money by implementing five-day delivery, because its savings projections are unreliable and overly optimistic.

NALC explained in its opening brief how USPS's gross savings estimate was likely overstated, primarily due to USPS's failure to account for the likelihood that squeezing mail delivery into fewer days will require it to add new routes and/or pay more in letter carrier overtime. *See* NALC Br. 21-25. NALC explained, among other things, that it was unrealistic for USPS to assume that additional mail volume could be easily "absorbed" on Mondays, which already have high volume, or that there would be much room for "absorption" at all, since current delivery routes already have little or no excess capacity. *See id*. at 24. Nothing in USPS's brief refutes these points. USPS notes that the "absorption factor" alone accounts for about $500 million of its anticipated savings. *See* USPS Br. 49. So if NALC is right that USPS's projected "absorption" rates are too optimistic, that could shave up to half a billion dollars off USPS's gross savings estimate.

On the cost side, USPS offers no rebuttal to Dr. Crew's point that USPS may be grossly underestimating the cost of transitioning to five-day delivery, and that such transition costs will likely continue beyond the first year of implementation. *See* NALC-T4, at 9-11. Such transition costs would further whittle away at USPS's net savings.

Perhaps most unreliable of any aspect of USPS's case is its estimate that implementation of five-day delivery will cause no more than a 0.71% drop in mail volume. USPS does not -- and cannot -- dispute that this estimate is based on hypothetical questions posed to survey respondents during one, highly atypical moment in time -- late 2009 -- when the economy was staggering and mail volume was plummeting. *See* NALC Br. 27-28.

While acknowledging the inherent uncertainty in its estimate, USPS argues that the methodology used by Opinion Research Corporation ("ORC") reduced potential bias. *See* USPS Br. 75. In fact, the opposite is true: ORC's flawed approach exacerbated the inherent uncertainty of its findings. For example, because ORC failed to instruct respondents to use the same timeframe when estimating their future mail use with Saturday delivery versus without it, ORC precluded a true apples-to-apples comparison. *See* NALC Br. 29.[3] ORC created even

[3] USPS's brief says that respondents were "asked to provide their estimated volume by application and product *in the next twelve months* assuming five-day delivery." USPS Br. 59 (emphasis added). That is what the respondents *should* have been asked and what USPS, in retrospect, probably wishes they had been asked. What they were actually asked was to estimate their mail volume "in the first twelve months after the change in service is implemented," USPS-

more uncertainty and confusion by posing a compound question to respondents that asked about the likelihood of changes to *either* the *amount or* the *manner* of their future mail use. *See id*. 33; USPS-T8 (Elmore-Yalch), at 104 (Q10k).

Worst, after asking respondents for their best estimate of how their future mail use would change, ORC multiplied those estimates by a "likelihood" factor that systematically reduced the estimated volume change. *See* NALC Br. 32-33. Although USPS insists that likelihood scales are routinely used in market research, *see* USPS Br. 73-74, it fails to provide any evidence that competent researchers ever use them in the manner ORC did: not to give a range of uncertainty both above and below the estimate, but to guarantee a downward adjustment of what was already respondents' best estimates of how their mail use would change.[4]

Considered together, these multiple flaws in ORC's methodology render its findings so unreliable as to be nearly useless. In any event, ORC's prediction of five-day delivery causing a modest, one-time drop in mail volume is sufficiently uncertain as to preclude the Commission from finding, as USPS urges, that "the cost benefits from five-day delivery far outweigh the impact of the volume reductions." USPS Br. 75.[5]

T8 (Elmore-Yalch), at 104 (Q7) (underscoring in original) -- without *any* specification as to when that implementation might occur.

[4] USPS attempts to deflate Dr. Crew's criticisms of ORC's approach by counting the number of times Dr. Crew used the words "may," "could," or "might" in his testimony. USPS Br. 70. Dr. Crew's use of these words, however, merely shows that he recognized the inherent uncertainty of the impact of five-day delivery. However, Dr. Crew, a leading postal economist, expressed no uncertainty regarding the legitimacy of his analysis. His critique of ORC's flawed use of the "likelihood" factor, for example, was emphatic and unequivocal. *See, e.g.,* NALC-T4 (Crew), at 6 ("As far as I can recall, I have never seen anything like this, and I believe it is a serious flaw").

[5] Although Dr. Boatwright tried after the fact to provide a "confidence interval" for ORC's findings, his approach was flawed. *See* NALC Br. 30 n.8 & Technical Appendix.

In defending its failure to perform any rigorous economic analysis to backstop ORC's research, USPS claims that an econometric study would not have been feasible, because USPS has no historical data relevant to changes in delivery frequency. *See* USPS Br. 76. This argument ignores the fact that USPS could have estimated values for the reduction in service quality resulting from less frequent delivery. *See* NALC-T8 (Crew), at 7. It also ignores the fact that postal operators elsewhere have used econometric studies when seeking to assess demand elasticity in connection with contemplated service changes. *See id*.[6]

In sum, contrary to USPS's assertion, it is not at all certain that the financial benefits that USPS hopes to realize from abandoning the Saturday market will outweigh the losses, especially in the long-run.

V. THE BEST WAY FOR USPS TO POSITION ITSELF AGAINST COMPETITIVE CHALLENGES IS TO MEET THE NEEDS OF ITS CUSTOMERS

USPS asserts that it is not the Commission's role in a Section 3661 proceeding to search for better alternatives to the service changes that management has proposed. *See* USPS Br. 34. The Commission, however, should reject USPS's invitation to put on blinders. Especially in a case like this, where the proposed service changes have the potential to harm the long-term viability of the agency, the Commission not only can but should consider whether there exist alternative means for USPS to achieve its goals. Considering alternatives is particularly appropriate since USPS nowhere disputes that, as a practical matter, implementing five-day delivery would be irreversible. *See* NALC Br. 48.

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[6] USPS misses the point in asserting that data from other countries is inapplicable to USPS. *See* USPS Br. 76. Dr. Crew was not suggesting that data from other countries be used for an econometric study of the impact of five-day delivery in the U.S.; he cited studies from other countries simply to illustrate that, since it has been done elsewhere, USPS too could have performed an econometric study of the impact of contemplated service changes.

Here, the Commission need not rely on anything other than USPS's own statements and those of its experts to find that ending Saturday delivery is not a long-term solution to the challenges facing the organization. USPS expert witness Boatwright (USPS-RT-1) made clear in his testimony that he did not see ending Saturday delivery as a long-term solution:

> I do wish to state that I agree with witness Crew (NALC-T4, p. 12) that, in the bigger picture, the Postal Service should consider [its proposed service changes] to be a near-term rather than a long-term solution. In the long term, the Postal Service is best served by a focus on additional ways to add value to customers ....

USPS-RT-1, at 27. And USPS itself concluded, based on its own market research, that "[m]eeting customer needs and requirements is *the best answer* to retaining our position against competitive alternatives." USPS-LR-N2010-1/16 (document entitled "Section Three, Marketplace,") at 60 (emphasis added). The Commission can safely conclude -- because USPS *admits* it -- that the best way for USPS to meet the long-term challenge of electronic and other competition is not to cut service but to meet the needs of its customers.

USPS expert witness Boatwright testified, based on his review of customer comments, that "[p]eople value Saturday delivery. There's a sentiment of yes, I really like Saturday." Tr. 3185. Boatwright's conclusion is borne out by survey data, which show substantial public opposition to five-day delivery. For example, according to USPS, a 2009 survey that it sponsored with the Mailers' Technical Advisory Committee found that 32% of respondents opposed ending Saturday delivery. *See* USPS-LR-N2010-1/1, at 27. A national survey by Rasmussen Reports found that only 69% of Americans would rather cut mail delivery to five days than pay more in postage, *see id.*, meaning that a large chunk of the population -- maybe close to a third -- would want to keep Saturday delivery *even if it meant paying more* *postage*. And this finding was confirmed in a Maritz Research poll in which no less than 37% of residential customers said Saturday delivery was important. *See id*. at 28.[7]

The poll data make clear that many millions of USPS's customers want to keep Saturday delivery. Thousands of letters and emails that the Commission received from postal customers take the same position. If, as USPS concludes, meeting the needs of its customers is "the best answer" to competitive challenges, ending Saturday delivery is the wrong way to go.

CONCLUSION

For the foregoing reasons, and those set forth in NALC's initial brief, the Commission should issue an opinion opposing USPS's proposed service changes.

October 25, 2010

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[7] Attempting to minimize the opposition to its proposal, USPS argues that there was no "groundswell" of intervenors challenging it in this proceeding. USPS Br. 67. The Commission, however, cannot assess the extent of opposition to USPS's proposal by a nose count of those who appeared in the Washington D.C. hearing room. That average Americans who oppose five-day delivery can not afford to mount a legal challenge to it does not make their opposition any less real.