

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

Six-Day to Five-Day Street Delivery
and Related Service Changes

)
)

Docket No. N2010-1

REPLY BRIEF

OF

**VALPAK DIRECT MARKETING SYSTEMS, INC., AND
VALPAK DEALERS' ASSOCIATION, INC.**

(October 25, 2010)

William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc.,
and Valpak Dealers' Association, Inc.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
ARGUMENT	
I. THE COMMISSION SHOULD REJECT INVITATIONS TO REST ITS ADVISORY OPINION ON SPECULATION AS TO FUTURE CONGRESSIONAL ACTION.	1
II. THE COMMISSION’S ADVISORY OPINION MUST BE BASED ON THE STATUTORY STANDARD SET OUT IN PAEA — THE POLICIES OF TITLE 39 — NOT ON OTHER POLICIES ADVANCED IN INITIAL BRIEFS. ...	5
III. DISPARATE IMPACT ON MEMBERS OF THE PUBLIC DOES NOT CONSTITUTE UNDUE DISCRIMINATION.....	6
IV. FIELD HEARINGS STATEMENTS DO NOT CONSTITUTE RECORD EVIDENCE.....	7
V. IN URGING COMMISSION RELIANCE ON FIELD HEARING STATEMENTS AS RECORD EVIDENCE, APWU WOULD HAVE THE COMMISSION COMMIT REVERSIBLE ERROR BY IGNORING STATUTE, REGULATION, AND PRECEDENT.	8
VI. NNA MISTAKENLY REPRESENTS THAT SATURDAY DELIVERY IS PART OF THE UNIVERSAL SERVICE OBLIGATION.	17

INTRODUCTION

Under the Procedural Schedule attached to Presiding Officer's Ruling No. N2010-1/29 (Sep. 13, 2010), Initial Briefs were required to be filed by October 15, 2010, and Reply Briefs by October 21, 2010.

Nine parties filed timely Initial Briefs: Douglas F. Carlson, Greeting Card Association ("GCA"), National Association of Letter Carriers ("NALC"), National Newspaper Association ("NNA"), National Postal Mail Handlers Union ("NPMHU"), David B. Popkin, Public Representative ("PR"), United States Postal Service, and Valpak Direct Marketing Systems, Inc. and Valpak Dealers Association, Inc. (collectively "Valpak").

One party, the Association of Postal Workers Union ("APWU"), filed a brief out of time, resulting in the extension of the deadline for filing Reply Briefs to October 25, 2010. *See* Presiding Officer's Ruling No. N2010-1/33 (Oct. 19, 2010).

Additionally, under Presiding Officer's Ruling No. N2010-1/34 (Oct. 20, 2010), parties may address issues raised in the APWU Motion to Strike filed on October 19, 2010. Valpak's response to those issues is contained in Section V, *infra*.

ARGUMENT

I. THE COMMISSION SHOULD REJECT INVITATIONS TO REST ITS ADVISORY OPINION ON SPECULATION AS TO FUTURE CONGRESSIONAL ACTION.

Five initial briefs appear to ask the Commission to issue its Advisory Opinion based on the hope that Congress may change its mind and act in the near future to reduce various financial burdens on the Postal Service, thereby lessening the need for cost reduction strategies such as the proposed move to 5-day delivery.

1. **APWU** urges the Commission to reject the 5-day proposal, believing the Postal Service financial problems to be overstated, and viewing any problems as the result of the Postal Accountability and Enhancement Act (“**PAEA**”) requirement to prefund fully the Retiree Health Benefits Fund (“**RHBF**”) on an accelerated basis. It believes that since the problem is a legislative one, then the fix should be legislative, and should be assumed to take place:

The Commission’s Advisory Opinion should make clear the Postal Service and the mailing public would be **better** served by seeking **relief** from the **retiree health benefit prefunding obligation** and by working to recover the overpayments to the **Civil Service Retirement System Fund** than reducing delivery services. [APWU Initial Brief, p. 4 (emphasis added).]

2. **GCA** apparently believes that the **RHBF** requirement and overpayment of pension obligations are the only causes of the Postal Service financial problems:

Eliminating **Saturday delivery** will not cure the unreasonable schedule on which the Service has been required to prepay **retiree health benefits**, nor restore previous overpayments on postal **pension obligations**. It is true that these necessary corrections are not within the Postal Service’s unilateral discretion. That, however, does not make pure cost-cutting — assuming for the moment that ending Saturday delivery would save significant sums — any **more appropriate** as a solution. [GCA Initial Brief, p. 38 (footnote omitted, emphasis added).]

3. **NALC** argues along the same lines:

USPS’s current distress is a short-term liquidity crisis caused by the unique statutory requirement that it pre-fund **health benefits** for future retirees, and aggravated by the effects of a severe recession.... USPS’ short-term liquidity crisis is not caused by six-day delivery.... [NALC Initial Brief, p. 9 (emphasis added).]

4. **NPMHU** states:

If the Postal Service were not subject to the financial obligations imposed by the congressionally-required annual payments to the **Retiree Health Benefits Fund** (“RHBF”), the dramatic change in service contemplated by the USPS proposal would not be necessary. Likewise, **if** Congress and/or the Obama Administration were to conclude ... that the Postal Service overpaid ... into the **Civil Service Retirement System** ... the dramatic reduction in service contained in the Postal Service’s proposal **would be “unnecessary....”** [NPMHU Statement of Position, p. 4 (emphasis added).]

5. The **Public Representative** observes that “enactment of [favorable] legislation” on RHBF and the Civil Service Retirement System (“CSRS”) “would significantly reduce the Postal Service’s current financial problems.” PR Initial Brief, p. 8.

It would be difficult to find a mailer, mail association, or postal union which does not support the Postal Service’s effort to obtain relief for the totally unrealistic statutory requirement that the Postal Service fund the Postal Service Retiree Health Benefits Fund imposed by 5 U.S.C. section 8648. Moreover, virtually all postal stakeholders appear to agree that the Postal Service has overfunded the Civil Service Retirement System fund. However, achieving either form of relief cannot be presumed.

As discussed in Valpak’s Initial Brief (pp. 3-4), on September 30, 2010, Congress turned down the Postal Service’s request for deferment of its annual \$5.5 billion contribution into the RHBF, and the Office of Personnel Management issued a letter dated September 24, 2010, concluding that it did not have authority to adjust the Postal Service’s contributions into the Civil Service Retirement System. Even if prospects for Congressional relief once looked rosy, and they decidedly do not now, demonstrating why the Commission is not authorized to

craft its advisory opinion based on wishes and speculation, but on the requirements of current law. Requests in these five Initial Briefs to ignore current law and to presume that Congress will rescue the Postal Service in the future should be disregarded.¹

These Initial Briefs miss the main point of the Postal Service's proposal: adjusting delivery to the long-term decline in mail volume. *See* Testimony of Witness Corbett (USPS-T-2), pp. 8-14. Postal management is addressing the right-sizing of its business in light of volume changes. *See* Valpak Initial Brief, pp. 6-12. Operational adjustments are needed irrespective of speculation about legislative fixes. Even if Congress were to fix CSRS and RHBFB, the Postal Service would still be under an obligation to operate in an efficient manner.

¹ Of course, the Congressional appropriations riders requiring 6-day delivery is a Congressional restriction of a different type. First, they expire on September 30 at the end of each fiscal year, and the current restriction would expire even sooner, as it is part of a Continuing Resolution which funds government agencies through December 3, 2010. http://appropriations.house.gov/images/stories/pdf/Full/FY11_CR_Highlights_-_09.29.2010.pdf. Second, Congress is awaiting the Commission's Advisory Opinion to determine whether to lift the restriction for the future. The Senate Appropriations Committee Report for the FY 2011 appropriations bill that includes the Postal Service stated that the Committee felt it should retain the 6-day restriction — until after the Commission's advisory opinion: Before Congress makes any alteration in the postal delivery frequency status quo, the Committee believes it is prudent to allow the Postal Regulatory Commission's process to continue, rather than pre-empt, or make less meaningful, the Commission's work toward an Advisory Opinion. [Senate Report 111-238, Financial Services and General Government Appropriations Bill, 2011, p. 130.]

II. THE COMMISSION’S ADVISORY OPINION MUST BE BASED ON THE STATUTORY STANDARD SET OUT IN PAEA — THE POLICIES OF TITLE 39 — NOT ON OTHER POLICIES ADVANCED IN INITIAL BRIEFS.

Although 39 U.S.C. section 3661 requires that the Commission evaluate the Postal Service’s proposal for compliance with “the policies established under [39 U.S.C.],” various parties urge the Commission to adopt a different standard.

GCA argues that the Postal Service’s case is faulty because it “ignored” the experience of other countries “in moving from six to five-day delivery.” It then provides three examples of countries that **chose not to** reduce delivery frequency after considering the cost savings in those countries. GCA Initial Brief, pp. 36-37. Of course, GCA never provided rebuttal testimony about these matters, introducing them for the first time in its brief. GCA apparently seeks to read new standards into 39 U.S.C. section 3661(c), but no policy in Title 39 requires that a change in the nature of postal services be based upon, or even require the consideration of, the experiences in other countries, and GCA cites no such policy.

GCA and NALC seem to argue that the Commission’s advisory opinion should recommend against 5-day delivery for the same reasons that the Commission rejected the Postal Service exigent rate request in Docket No. R2010-4. *See* GCA Initial Brief, pp. 4, 38; NALC Initial Brief, pp. 9-15. This argument is off the mark. The Commission’s decision in Docket No. R2010-4 appears to have been grounded in the specific language (*i.e.*, “due to”) of 39 U.S.C. section 3622(d)(1)(E), and this statute does not govern advisory opinions under 39 U.S.C. section 3661 of the sort being addressed in the instant case. The Commission advisory opinion in this docket must be based on the “policies” of title 39. The subsection applicable to

an exigent rate request is inapplicable to the postal Service's request in this docket, as it in no way relates to delivery frequency.

III. DISPARATE IMPACT ON MEMBERS OF THE PUBLIC DOES NOT CONSTITUTE UNDUE DISCRIMINATION.

Various parties would have the Commission issue an advisory opinion in opposition to 5-day delivery because of specific interests that may be effected by the elimination of Saturday delivery more than the rest of society. *See, e.g.*, NALC Initial Brief, pp. 43-47; NNA Initial Brief, pp. 22-25; PR Initial Brief, pp. 9-17. Without citing any record support, NPMHU asserts that 5-day delivery “would unfairly impact vulnerable populations, such as the homebound, the elderly, and millions of small businesses that depend more heavily on Saturday street deliveries.” NPMHU Statement of Position, p. 2. NNA's Initial Brief invoked the prohibition against “undue or unreasonable discrimination” provision of 39 U.S.C. section 403(c). *See* NNA Initial Brief, p. 22.

In truth, elimination of Saturday delivery will impact all households equally — all will lose Saturday delivery. The argument being made is not that this particular change in home delivery will be discriminatory in that different households would be treated differently, but that some households may value Saturday delivery more than others. Certainly this always would be true — that the consumer preference for Saturday delivery would vary by household. However, having a distribution around a mean in terms of perceived value of the service does not constitute evidence of “undue or unreasonable discrimination.” There is no evidence that certain mailers are being targeted by the Postal Service for disparate treatment.

The Commission's task is not to determine whether any member of the public is more affected than another, but rather to consider whether the Postal Service's proposal is consistent with the policies of Title 39. Valpak identified some of the relevant factors in its Initial Brief. *See* Valpak Initial Brief, pp. 13-15. It is a fact of life, not a flaw in the proposal, that any "change in the nature of postal services ... on a nationwide or substantially nationwide basis" is going to affect some customers more than others. Even if there were record evidence of such a possible effect resulting from 5-day delivery, therefore, such evidence would provide no basis for recommending against the proposal.

IV. FIELD HEARINGS STATEMENTS DO NOT CONSTITUTE RECORD EVIDENCE.

NNA's Initial Brief invoked statements made at five of the Commission's field hearings as though they constituted record evidence. (Other parties' initial briefs also cited field hearing statements to a lesser degree, apparently assuming they constituted record evidence.)

Both the Postal Service and Valpak explained why statements offered at field hearings are not reliable evidence, and do not constitute record evidence upon which the Commission can rely for its advisory opinion. *See* Valpak Initial Brief, pp. 17-21, and Postal Service Initial Brief, pp. 9-19.

Importantly, if the Commission were to rely on statements offered at field hearings as it is urged to do in NNA's Initial Brief, the Commission's advisory opinion would be subject to reversal on appeal. The appellate review provisions of the Administrative Procedure Act ("APA") have a higher standard for formal rulemakings under 5 U.S.C. section 556 than for other types of proceedings:

The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... **unsupported by substantial evidence** in a case subject to sections 556 and 557 of [title 5].... [5 U.S.C. § 706 (emphasis added).]

If a reviewing court were to determine that the field hearing statements, where the Postal Service and intervenors were not afforded the right to cross-examination under 5 U.S.C. section 556(d), were treated as record evidence, and the Commission were to rely on those statements in issuing its advisory opinion, it would make it difficult, if not impossible, for the reviewing court to determine that the advisory opinion was supported by substantial evidence.

V. IN URGING COMMISSION RELIANCE ON FIELD HEARING STATEMENTS AS RECORD EVIDENCE, APWU WOULD HAVE THE COMMISSION COMMIT REVERSIBLE ERROR BY IGNORING STATUTE, REGULATION, AND PRECEDENT.

On October 15, 2010, Initial Briefs were submitted to the Commission for its consideration in this docket. On October 19, 2010, the American Postal Workers Union filed a “Motion to Strike Portions of USPS Initial Brief,” asking the Commission to strike that portion of the Postal Service’s Initial Brief arguing against including in the evidentiary record field hearing testimony and testimony from Medco Health Solutions. In the alternative, APWU requested that its motion be considered a “partial response” to the Postal Service’s Initial Brief. (APWU’s motion ignored arguments advanced in Valpak’s Initial Brief which were in accord with those advanced by the Postal Service, as no effort was made to strike those arguments. *See* Valpak Initial Brief, pp. 17-21.)

On October 20, 2010, before the filing of any responses to the APWU motion, Presiding Officer’s Ruling No. N2010-1/34 was entered, granting APWU’s alternative request, determining that the APWU motion would be considered as a response to the Postal Service’s

Initial Brief and inviting “[o]ther parties ... to weigh in on the issues raised in the Motion.”

Id., p. 2. For the reasons discussed in this section, APWU’s position that any objection to the use of field hearing statements has been waived is erroneous. It is important to trace the development of this issue from the beginning of the instant docket.

A. Background.

1. **Prehearing Conference.** At the April 27, 2010, prehearing conference in this docket, Chairman Goldway discussed the Commission’s intention to hold a series of “field hearings,” stating:

Furthermore, witnesses at each of these hearings will testify under oath, and the hearings will be transcribed. The transcripts for each hearing will be made available as quickly as practicable. **Field hearings** were quite helpful during the Commission’s consideration of the Postal Service’s Stations and Branch Optimization and Consolidation Initiative and **caused no procedural or due process problems.**

Any Intervenor seeking to **clarify or comment on evidence received during our field hearings** may do so during **the rebuttal phase of this case.** If the Postal Service wishes to clarify or comment on such evidence, it may do so as part of a surrebuttal. [Tr. 1/39, ll. 8-21 (emphasis added).]

In this statement, Chairman Goldway implied that the Commission would be using the same procedure that it had used in **Docket No. N2009-1** (“Station and Branch Optimization and Consolidation Initiative, 2009”), where, as she stated, there were no “procedural or due process problems.”

The Commission’s Advisory Opinion in Docket No. N2009-1 recognized the APA issue and, ruled, in effect, that field hearing statements did **not constitute record evidence:**

The Postal Service questions the evidentiary status or the weight that may be given to testimony obtained through field

hearings. Tr. 4/804. The field hearings serve to inform the Commission of the concerns of members of the public that rely on the mail, but whose views may not have been fully represented in Washington, D.C. as well as some who already felt directly impacted by the Initiative. **Assertions of fact presented therein have not been relied upon in this Advisory Opinion unless otherwise supported by the official record.** [Docket No. N2009-1, Advisory Opinion, p. 5 n.8 (emphasis added).]

2. First Field Hearing. The first field hearing was held in Las Vegas, Nevada on May 10, 2010. Although the field hearings were introduced by lengthy introductory comments by the Presiding Officer, and by other Commissioners, there was no indication whatsoever that the statements received there would be considered record evidence.

3. Second Field Hearing. Presiding Officer Goldway was not physically present at the Sacramento, California hearing, and Vice Chairman Hammond introduced the witnesses, stating:

These hearings are being transcribed, and the witnesses' testimony and responses to any questions from the Commission **will become part of the evidentiary record** in this case. Other participants will have the opportunity to review the transcripts of this hearing and offer comments if they so choose during the rebuttal phase of the case. [See, *e.g.*, Transcript of Sacramento, California Field Hearing (May 12, 2010), pp. 10-11 (emphasis added).]

APWU appears to cite this particular introductory language, at the second hearing, as public notice to all intervenors that a change in the established procedure of not treating statements at field hearings as record evidence was being made.² *See* APWU Motion to Strike, p. 2. However, since it was then understood that the field hearings did not constitute record

² The transcript of the May 12, 2010 hearing was posted to the Commission website on May 25, 2010.

evidence, there was no particular reason for intervenors to comb through the transcript of each field hearing seeking clues for fundamental changes of this sort. Certainly, failure to read or react to the transcript of a field hearing does not constitute waiver of a statutory, regulatory, or precedential right to have the case decided on record evidence. (Importantly, even the introductory statement did not rule that the field hearings were then part of the evidentiary record, but rather that they “will become” part of the evidentiary record. APWU identifies no time that the Commission actually has acted to make these statements part of the evidentiary record.) Transcripts have been posted on the Commission’s website without any accompanying comment or description.

4. Presiding Officer’s Ruling No. N2010-1/26. According to APWU’s Initial Brief, the next occasion in which the issue was addressed was when the Presiding Officer granted Medco’s motion to withdraw its testimony:

Duplicative testimony does not benefit the evidentiary record, and Medco properly recognizes the **Commission’s determination** to treat testimony received at field hearings as part of the evidentiary record in this docket. [POR No. N2010-1/26, p. 2.]

Here, the Presiding Officer referenced a “determination” that appears never to have been made in this docket. APMU identifies no such “Commission determination” in this docket that field hearing statements constituted record evidence — and the introductory statement of the Vice Chairman at the second field hearing certainly could not be considered a “Commission determination.”

5. Statutory Requirement. Of course, the Commission is not free to make up the rules as it goes, as it is acting pursuant to statutory requirements to have a hearing on the

record and to base its advisory opinion on record evidence. PAEA requires the Commission's advisory opinion in this docket to be developed in the following manner:

(c) The Commission shall not issue its opinion on any proposal until an opportunity for **hearing on the record under sections 556 and 557 of title 5** has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title. [39 U.S.C. § 3661(c) (emphasis added).]

Section 3661(c) proceedings appears to be the only formal rulemaking provision currently in Title 39.

An APA "hearing on the record" vests specific rights in the parties, including the following:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct **such cross-examination as may be required for a full and true disclosure of the facts**. [5 U.S.C. § 556(d) (emphasis added).]

Although a party may waive its right to cross-examination, there can be no waiver when no opportunity to cross-examine has been provided.

6. Regulatory Requirement. Commission rules provide that:

Statements filed pursuant to this section shall be made a part of the Commission's files in the proceeding. The Secretary shall maintain a file of such statements which shall be **segregated from the evidentiary record** in the proceeding, and shall be open to public inspection during the Commission's office hours. A statement or exhibit thereto filed pursuant to this section **shall not be accepted in the 'record,'** as defined by §3001.5(k) except to the extent that it is (1) otherwise formally introduced in evidence,

or (2) a proper subject of official notice, pursuant to §3001.31(j).
[39 C.F.R. § 3001.20b(c) (emphasis added).]

Under this rule, it would appear clear that statements, written or oral, under oath or not, given at hearings or not, would be considered and addressed by the Commission in the same manner as opinions and arguments submitted in comments and briefs. It does not change the nature of these “statements” to call them “testimony” — as that would require that they be subject to cross-examination under Commission rules. *See* 39 C.F.R. § 3001.30(e)(1). Only record evidence of the sort that meets the APA test shall be “accepted in the ‘record...’” 39 C.F.R. § 3001.20b(c).

B. Analysis.

APWU’s arguments that the Commission should consider the field hearing statements are essentially two:

1. that the issue raised in the Postal Service’s Initial Brief is “exceedingly untimely” (APWU Motion, p. 1), and that — by failing to challenge the Presiding Officer’s statements made at the field hearings as well as in a Presiding Officer’s Ruling (POR No. N2010-1/26) — “the Postal Service is barred by the doctrines of **waiver and estoppel** from raising these arguments now.” *Id.*, p. 2 (emphasis added). APWU apparently believes that, in order to preserve the issue, the Postal Service was required to appeal the POR to the Commission within five days of the ruling; and

2. that “parties participating in this docket and the general public would be **prejudiced**” if the Postal Service is allowed to object to the field hearings and Medco testimony. *Id.*, p. 3 (emphasis added). According to APWU, had it been known that the Commission was required to follow the Administrative Procedure Act (requiring record evidence to be subject to cross-examination), APWU (and other parties) would have not “made the strategic decision to forgo expensive testimony repetitive of these hearings.” APWU Motion, p. 3. However, now that the record is closed and it is too late to add additional testimony to the record, APWU argues that it and other parties would be prejudiced if the Commission cannot consider such testimony in arriving at its decision.

The arguments advanced by APWU are faulty both logically and legally.

1. APWU's Waiver/Estoppel Argument. To the extent that APMU argues that the first public notice of the change of policy occurred immediately prior to the **second hearing**, its argument has these weaknesses:

(a) it was understood from the Prehearing Conference that Valpak attended that the same procedure employed in Docket No. N2009-1 — where field hearing statements were not given evidentiary status — would be used by used in this docket and Valpak neither participated in any of the field hearings, nor carefully monitored the transcripts of the hearings, based on the reasonable belief they were not record evidence;

(b) the introductory remarks at the prehearing conference were a statement of future intention, not a statement of an action already taken;

(c) the Commission never appears to have acted on the Vice Chairman's expressed intention or to have made the field hearing statements part of the evidentiary record;

(d) the introductory remarks were not even made by the Docket's Presiding Officer — but by the Vice Chairman. It was not a ruling on anything, and it is difficult to see how it would have been appealable; and

(e) the APWU argument relates to introductory remarks at the second field hearing on May 12, 2010, and therefore could not vest record evidentiary status to the statement of the Director of Logistics for Medco Health Solutions at the first hearing (*see* Transcript of Las Vegas, Nevada Field Hearing (May 10, 2010), pp. 11-17). (The Medco statement was referenced in the PR Initial Brief, pp. 16-17; APWU Initial Brief, p. 7.)

To the extent that APWU argues that the requirement to appeal was triggered by the Presiding Officer's Ruling allowing the withdrawal of the Medco testimony (POR No. N2010-1/26, Aug. 23, 2010), it needs to be understood that the essence of the ruling related to a narrow issue — permission for Medco to withdraw its rebuttal testimony. The statement in POR No. N2010-1/26 relating to inclusion of field hearing statements in the evidentiary record was merely *obiter dictum*, an appeal from which might not even have been allowed.

In any event, APWU cites no authority for the proposition for what it assumes, *sub silentio* — that the Commission need only obey PAEA and its own rules if parties demand that it do so, and that failing to do so, then participants waive the statutory requirements of PAEA and the APA, as well as its own rules. The essence of the objections to inclusion of the field hearing testimony is that there was no opportunity to cross-examine the persons making the statements. Although APWU argues that the right to cross-examine has been waived, that is not so, as the Commission never provided an opportunity for cross-examination. It is not the duty of participants to demand the opportunity to cross-examine; it is the duty of the Commission to provide it.

The Commission should not accept APWU's invitation to rule that statements should be considered evidence merely because they are given under oath and that the absence of cross-examination can be overlooked. Surely, moreover, the right to offer rebuttal testimony did not cure that error. The two rights in question — to cross-examine and to offer rebuttal testimony — are separate and distinct, and the failure to provide the opportunity for cross-examination under 5 U.S.C. section 556(d) is not offset or excused by the existence of other rights. Rebuttal testimony can provide valuable evidence, including evidence countering testimony of

other witnesses, but it is materially different in substance and effect from evidence that may be elicited through cross-examination.

2. APWU's argument regarding prejudice. APWU contends that, had it known that the field hearing testimony would not become part of the record, it would have offered testimony of other witnesses.

To the extent APWU claims that it was prejudiced by the Postal Service's inaction on the Medco Presiding Officer's Ruling in not filing rebuttal testimony on additional issues, the claim rings hollow, as such testimony was required to have been filed by August 3, 2010, when the Medco testimony was filed. APWU cannot now claim that it was prejudiced in not filing additional testimony on August 3, 2010 because the Postal Service failed to challenge a ruling made on August 24, 2010.

Additionally, parties claiming prejudice generally are required to explain specifically how they were prejudiced. APWU has made no proffer, and apparently gave no indication, regarding the specifics such possible testimony that it would have introduced. Although APWU essentially contends that the Postal Service failed to protect itself by not making known earlier its objection to inclusion of the field hearing testimony in the record, it is APWU that failed legally to protect itself in this matter. Clearly, the issue of whether the field hearing testimony should be included in the record is a legal question that is being properly briefed and argued at this stage of the proceeding. If there has been prejudice resulting from the timing of this issue, it should have been specifically proffered by APWU. In any event, the appropriate remedy now is not contaminating the evidentiary record by the inclusion of non-record statements.

VI. NNA MISTAKENLY REPRESENTS THAT SATURDAY DELIVERY IS PART OF THE UNIVERSAL SERVICE OBLIGATION.

NNA's Initial Brief referred to the Commission's 2008 "Report on Universal Postal Service and the Postal Monopoly" in support of its argument that delivery frequency is part of the universal service obligation ("USO") and that any change in the USO requires a deeper look than that given thus far in this docket. NAA's brief implies that the USO could require 6-day delivery. *See* NNA Initial Brief, pp. 10-11. What NNA fails to mention is that the Commission's USO Report already determined that 5-day delivery (not 6-day) is the minimum delivery frequency required by the USO:

It is the Commission's judgment that a minimum frequency of delivery for a postal operator that is obligated to provide universal coverage of delivery address is **5 days** per week. [USO Report, p. 123 (emphasis added).]

The Commission's prior determination that the USO requires only 5-day delivery governs this docket as well, NNA's Initial Brief notwithstanding.

Respectfully submitted,

William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc.,
and Valpak Dealers' Association, Inc.