

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Modern Rules of Procedure)
for the Issuance of Advisory Opinions)
in Nature of Service Proceedings)

Docket No. RM2012-4

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
COMMENTS ON ADVANCE NOTICE OF
PROPOSED RULEMAKING
(June 18, 2012)**

On April 10, 2012, the Commission issued Order No. 1309, "Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases under 39 U.S.C. 3661." This Order invited comments "on (1) whether changes to the current procedures and regulations are warranted; (2) if so, what those changes would be; and (3) such other relevant subjects as commenters may wish to address." The Order set June 18, 2012 as the deadline for comments and set July 17, 2012 as the deadline for reply comments. *See 77 Fed. Reg. 23176* (Apr. 18, 2012).

HISTORICAL BACKGROUND

With the enactment of the Postal Reorganization Act of 1970 ("PRA"), Congress established a requirement that, prior to making any significant service changes, the Postal Service must submit a request for an **Advisory Opinion** to the Postal Rate Commission. Although the Postal Accountability and Enhancement Act ("PAEA") made many changes to Title 39, it left this provision practically untouched, merely updating the Commission's name:

(b) When the Postal Service determines that there should be a **change in the nature of postal services** which will generally affect service on a nationwide or substantially nationwide basis, it

shall submit a **proposal**, within a **reasonable time prior** to the effective date of such proposal, to the Postal Regulatory Commission requesting an **advisory opinion** on the change.

(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(b)-(c) (emphasis added).]

This statute's requirement for a "**hearing on the record under [5 U.S.C.] sections 556 and 557**" triggers what is often referred to as a **formal rulemaking**. The legal implications of this statutory requirement are discussed in Sections I and VI, *infra*.

As the Commission noted in Order No. 1309, during the 36 years between the enactments of the PRA and PAEA, there were only five requests for advisory opinions (which the Commission refers to as "N-cases" and which also are called "N-dockets"). By way of contrast, the Commission notes that there have been four N-cases in the five years since passage of PAEA. (Since Order 1309 was issued in this docket in April, Docket No. N2012-2 was commenced with the filing of the Postal Service's request on May 25, 2012, bringing to five the total number of N-dockets filed during the five and one-half years since PAEA.) One reason why N-dockets may have proliferated are discussed in Section I.

Valpak has participated in each of the three completed N-cases under PAEA, submitting Initial and Reply Briefs in each of those dockets, and has generally been supportive of the Postal Service's proposals.

1. Docket No. N2009-1, Station and Branch Optimization and Consolidation Initiative, 2009 — Duration: 8 months
[Valpak Initial Brief](#)
[Valpak Reply Brief](#)
[Advisory Opinion](#) — Mar. 10, 2010
2. Docket No. N2010-1, Six-Day to Five-Day Street Delivery and Related Service Changes, 2010 — Duration: 12 months
[Valpak Initial Brief](#)
[Valpak Reply Brief](#)
[Advisory Opinion](#) — Mar. 24, 2011
3. Docket No. N2011-1, Retail Access Optimization Initiative, 2011 — Duration: 5 months
[Valpak Initial Brief](#)
[Valpak Reply Brief](#)
[Advisory Opinion](#) — Dec. 23, 2011
4. Docket No. N2012-1, Mail Processing Network Rationalization Service Changes, 2012 — pending 5 months, since December 5, 2011
5. Docket No. N2012-2, Post Office Structure Plan — pending less than 1 month, since May 25, 2012

Several developments may have triggered issuance of the current this Advance Notice, but Congress' critical reaction to the length of time it took the Commission to issue its Advisory Opinion in Docket No. N2010-1 may have been a primary impetus. In that docket, the Commission issued its Advisory Opinion just a few days shy of one year from the filing of the Postal Service's request.¹ Largely in reaction to that delay, proposals have been made that would **require** advisory opinions to be issued within 90 days of a request.²

¹ The Commission's Advisory Opinion on 5-day delivery was roundly criticized by the Postal Service on a number of grounds. <http://postcom.org/public/2011/USPS%20Report%20re%20PRC%20Advisory%20Opinion%20final.pdf>

² See, e.g., S. 1789, 21st Century Postal Service Act, section 208.

Thereafter, the Commission's Section 701 report to Congress recommended that Congress provide an option for the Postal Service to request expedited Commission consideration of time-sensitive N-dockets. The Postal Service's comments attached to the Section 701 report indicated that it preferred requiring that advisory opinions to be issued within 90 days of a Postal Service request.³

More recently, in Docket No. N2012-1, after the presiding officer issued the procedural schedule, under which the Advisory Opinion could not be issued until after the planned date to begin implementing service changes, the Postal Service requested reconsideration. The Commission rejected that request, explaining that section 3661's invocation of the Administrative Procedure Act ("APA") and the Commission's rules contain "procedural steps that once triggered require somewhat rigid increments of time." Order No. 1183 (Jan. 31, 2012). The Commission was clearly right. While there is no question that the increasingly serious financial problems faced by the Postal Service necessitate aggressive cost cutting, the minimum requirements of due process must be met for the reasons set out below.

³

http://www.prc.gov/Docs/75/75994/701_Report-092211.pdf

COMMENTS**I. The “Nature of Postal Service” Dockets Involve Matters of Great Importance to Mailers.**

The requirement for a “hearing on the record under [5 U.S.C.] sections 556 and 557” specifies that the Commission conduct what is generally referred to as a formal rulemaking.⁴ See discussion in Section VI, *infra*. This requirement was originally contained in PRA, which also required formal rulemakings for other types of proceedings, such as changes in rates and classifications under former 39 U.S.C. sections 3622 and 3623, respectively. See former 39 U.S.C. § 3624(a).⁵ However, after PAEA was enacted, section 3661(b)-(c) is the only provision remaining in Title 39 that still requires formal rulemaking. By continuing to require formal rulemakings for N-dockets, Congress obviously viewed these dockets as highly significant. Indeed, Congress understood that in implementing PAEA’s price cap regime, where the Postal Service is revenue constrained, the Postal Service would have a perverse incentive to save money by degrading service. This may be the very reason that N-dockets have been more prevalent after PAEA than before PAEA.

⁴ “Informal rulemakings,” such as the present docket, are subject to the procedural requirements of 5 U.S.C. section 553.

⁵ The Postal Rate Commission shall promptly consider a request made under section 3622 and 3623 of this title, except that the Commission shall not recommend a decision until the opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mails, and an officer of the Commission who shall be required to represent the interest of the general public. [Emphasis added.]

PAEA is clear that the Postal Service would not be able to degrade service without (i) giving widespread notice, (ii) being required to explain in detail what it was proposing and why it was important, (iii) responding to questions from mailing interests, (iv) calling witnesses to defend its position under cross-examination, (v) briefing fully interested parties, and (vi) allowing each member of the Commission to offer his expertise. In PAEA, Congress was willing to allow the Postal Service to adjust prices or modify classifications without a formal rulemaking — but not to degrade service.

Accordingly, the guide for the Commission in this docket should not be the Postal Service's impatience with Commission hearings, or even Congress' impatience with Commission delay in one particular docket. Central to the Commission's review should be (i) the importance of the statutory objective of having the Commission serve as a check on the Postal Service's temptation to degrade service under a price cap regime, and (ii) the specific procedural requirements imposed by Congress on the Commission by the governing statute.

II. The Commission Must Not Be Seen to Drag Out N-dockets with Field Hearings where It Would Prefer That the Postal Service Not Implement the Proposed Change.

When the Postal Service initiates an N-docket, the Commission has an obligation to evaluate it and issue a timely Advisory Opinion after following required procedures. One activity which is time consuming, and which does not produce record evidence, is field hearings.

In Docket No. N2009-1, involving the Station and Branch Optimization Initiative, the Commission conducted two field hearings on the Postal Service's proposal.⁶ In Docket No. N2010-1 involving Saturday mail delivery, seven field hearings were held.⁷ In neither instance did these field hearings result in the Commission obtaining any information that the Commission could rely on in the development of its Advisory Opinion. The reasons why the Commission could not rely on field hearings are explained in Valpak Initial Comments, Docket No. N2010-1, pp. 17-21.⁸ In Docket No. N2009-1, the Commission admitted that the information gleaned from those field hearings were not used:

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).⁹]

The practice of holding field hearings in N-dockets should be discontinued.

⁶ See, e.g., Field Hearing Transcript, First Field Hearing, Independence Ohio, September 16, 2009. <http://www.prc.gov/Docs/65/65030/Ohio%20Field%20Hearing%20Transcript.pdf>. A hearing was also held in Bronx, NY/Jersey City, NJ.

⁷ See, e.g., Memorandum from Shoshana Grove to Senator Carper, February 17, 2012. http://www.prc.gov/Docs/80/80614/D_PRCFieldHearingsTravelFNL_2506.pdf

⁸ <http://www.prc.gov/Docs/70/70513/VP%20N2010-1%20Initial%20Brief.pdf>

⁹ http://www.prc.gov/Docs/67/67174/Advisory_Opinion_031010.pdf

III. Timing of the Postal Service's Filing of a Proposal to Change Service Is Exclusively in the Control of the Postal Service, not the Commission.

It is important to note that 39 U.S.C. section 3661(b) imposes responsibility on the Postal Service to file its proposal for a service change in sufficient time for proper evaluation by mailers and the Commission.

(b) When the Postal Service determines that there should be a **change in the nature of postal services** which will generally affect service on a nationwide or substantially nationwide basis, it shall **submit a proposal**, within a **reasonable time prior** to the effective date of such proposal, to the Postal Regulatory Commission requesting an **advisory opinion** on the change.

The Postal Service knows full well that N-dockets are subject to an adversarial-type proceeding, and that such proceedings typically require far more than 90 days. If the Postal Service desires to obtain a decision by the Commission by some future date, it should be able to initiate its filing so that the Commission has sufficient time to conduct the required formal rulemaking. If the Postal Service waits until the last minute and beyond to file an N-docket case, it has only itself to blame if the Commission does not meet the Postal Service's arbitrary schedule.

Even if financial necessity is driving N-dockets, that financial exigency should not be a surprise to the Postal Service. For a period of years, the Postal Service has explained its financial distress to anyone who would listen, and it cannot now persuasively state that the N-dockets it has initiated are new ideas that have not been considered already for many years. Further, even if there were a true exigency, there would be no reason that the Postal Service should not disclose what it can in advance — for example, that it is contemplating filing a proposal for a specific service change, the date the proposal is likely to be filed, the date

implementation is sought, etc. N-dockets do not spring full blown from the brow of Zeus. It can be assumed that the Postal Service decides to prepare an N-docket, and then begins preparation of its filing, months before the filing is actually made. Ultimately, the proposed filing must be approved by the Governors before it actually is filed.¹⁰ The Postal Service has a long record of playing its cards close to its vest before a filing is made, defending its lack of transparency by reciting the truism that the Governors have the final say. However, some pre-filing disclosure is possible. That way, mailing interests could recruit suitable expert witnesses, begin evaluation of such information as has been disclosed, develop questions to pose to the Postal Service, and generally get a head-start on the docket. There is no reason for the Postal Service not to share what it knows as soon as it knows, especially if it wants cooperation in achieving expedition. Should the Postal Service elect not to do so, it undoubtedly understands that such failure will likely add significant time to the procedural schedule.

IV. The Postal Service's Desire to Have Advisory Opinions Resolved in 90 Days Seeks the Impossible, and Is Inconsistent with Procedural Due Process.

The Postal Service response to the Commission's PAEA Section 701 report to Congress speaks favorably of a 90-day period for the issuance of an Advisory Opinion.

Senator Carper has suggested in his bill that the Commission should be explicitly required to issue an advisory opinion on

¹⁰ The lack of specific approval of the prices and dates in the Valassis NSA in Docket No. R2012-14 gives rise to a question as to whether the Governors are fulfilling their role, or have delegated unlawfully their statutory responsibilities to postal management. *See* Valpak Initial Comments, Docket No. MC2012-14, pp. 3-6.

large-scale service changes under 39 U.S.C. § 3661 within 90 days, and that the formal hearing requirement should be removed from the advisory opinion process.... Although the Commission historically has not issued advisory opinions within 90 days, this timeframe would be consistent with the current Commission rules governing advisory opinion procedures, which require the Postal Service to file its request at least 90 days before the service change's planned effective date. 39 C.F.R. section 3001.72.... This clear time frame and lifting of disproportionate administrative requirements would provide the expedition needed in advisory opinion proceedings, while ensuring a level of Commission analysis consistent with its work in other areas. Senator Carper's approach is clearly preferable to that set forth by the Commission in the draft report [allowing for requests for expedition]. [Comments of U.S. Postal Service, variously numbered pp. 22-23, 23-24.¹¹]

While it is always possible that Congress could impose a 90-day requirement, such a schedule is neither desirable, nor achievable under current law.

While Valpak generally has supported the Postal Service in previous N-dockets,¹² and has believed that the proposed changes were necessary, such support does not cause Valpak to diminish its enthusiasm for opposing changes inconsistent with procedural due process. Valpak would consider a period of about five months to be the **minimum** possible for an important N-docket, and more if the Postal Service files a sketchy case or desires to file surrebuttal testimony. This degree of expedition was achieved in Docket No. N2011-1, Retail Access Optimization Initiative.

¹¹ http://www.prc.gov/PRC-DOCS/UploadedDocuments/701_Report-092211_270_5.pdf

¹² See, e.g., Valpak Initial Comments, Docket Nos. N2009-1, N2010-1, and N2011-1.

The Postal Service exclusively controls the date on which the docket is initiated (*see* section II, *supra*), the extent to which it presents information about its proposal, the completeness of its responses to interrogatories, Commission (or Chairman's) information requests and Notices of Inquiry, and the presentation of any surrebuttal testimony. Mailer preparation takes time. Discovery takes time. Cross-examination takes time.

Commission Order No. 1309 speaks of "protecting the rights of all participants, including affected mail users." *Id.*, p. 1. Valpak would encourage the Commission to ensure that the due process rights of all participants are protected. Therefore, Valpak would recommend that the Commission modify Rule 3001.72 to remove the reference to 90 days and conform it to the statutory requirement that a request be filed "within a reasonable time prior to the effective date of such proposal." 39 U.S.C. § 3661(b). If that change is made, it would recognize the idea that not all N-dockets are created equal, some possibly permitting resolution within a few months, and some being more complex and requiring more time. Furthermore, such a change would remove the incentive for the Postal Service to wait until the last minute to submit its request, hopefully avoiding more situations where the Postal Service desires to implement proposed changes prior to issuance of the Commission's advisory opinion.

V. The Commission Consistently Has Recognized Due Process Rights of Mailers and Other Interested Parties in a Variety of Contexts.

Since enactment of PAEA, the Commission has been sensitive to providing mailers and others with meaningful due process rights in all contexts. For example, in adopting final rules governing market dominant products, competitive products, and product lists, the Commission

recognized the need to afford due process rights to mailers and other participants. *See* Docket No. RM2007-1, Order No. 43, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, pp. 4-17.¹³ Similarly, in adopting rules for Complaint Procedures, the Commission was concerned about due process for all participants.¹⁴

Similarly, during certain NSA-related dockets filed prior to PAEA, the beneficiaries of NSAs have attempted to limit artificially issues so as to deprive mailers meaningful due process rights, but the Commission has not been sympathetic to efforts to limit comments filed by mailers. *See, e.g.*, Docket No. MC2004-3, Bank One Corporation,¹⁵ Presiding Officer's Ruling in Regard to Limitation of Issues (Aug. 13, 2004); Docket No. MC2004-4, Discover Financial Services, Inc., Presiding Officer's Ruling in Regard to Limitation of Issues (Aug. 11, 2004).¹⁶

N-dockets, the one remaining type of formal rulemaking, should receive even greater respect from the Commission, understanding that mailers and mailing interests have serious interests to defend, and that due process rights should be fully protected.

VI. APA Requirements and the Applicability of Citizens Awareness Network Case

The Commission's Order states that "it is appropriate ... to **re-examine** its historic practice of conducting N-cases as trial-type proceedings, according participants extensive

¹³ <http://www.prc.gov/Docs/58/58026/FinalRuleswithTOC.pdf>, pp. 4-17.

¹⁴ <http://www.prc.gov/Docs/62/62762/Order195.pdf>, pp. 1-2.

¹⁵ <http://www.prc.gov/Docs/41/41364/POR2.pdf>, p. 6.

¹⁶ <http://www.prc.gov/Docs/41/41327/POR2.pdf>, p. 5.

discovery and **oral cross-examination** opportunities in all cases.” Order No. 1309, p. 6 (emphasis added). The Commission refers to an eight-year-old case from the U.S. Court of Appeals for the First Circuit (Citizens Awareness Network v. United States, 391 F.3d 338 (1st Cir. 2004))¹⁷ for “the general proposition that agencies have flexibility to tailor their procedures to make hearing processes more efficient.” Order No. 1309, p. 7.

Citizens Awareness has limited applicability here because the procedural change being implemented by the NRC concerned reactor licensing proceedings, a hearing on which could be triggered by a “request by any person whose interest may be affected.” Citizens Awareness, 391 F.3d at 343. Thus, the NRC was faced with a practical problem of requiring a full-blown trial-type hearing no matter how strong or weak the interest of the person seeking the hearing. That is not the case here. N-case hearings can be **initiated only by the Postal Service**. 39 U.S.C. § 3661(b). Even then, the Postal Service must make an initial determination “that there should be a change in the nature of postal services which will generally affect service on a nationwide, or substantially nationwide basis,” and “submit a proposal” supporting that determination for review by the Commission. *Id.*

Moreover, under 39 U.S.C. section 3661(b), only “the Postal Service, **users of the mail**, and an officer of the Commission [representing] the interests of the general public” are party participants in the required hearing before the Commission. 39 U.S.C. § 3661(c)

¹⁷ The First Circuit’s decision in Citizens Awareness is not, and likely will never be, controlling authority over the Commission’s rules. Judicial review of the Commission’s final orders is governed by 39 U.S.C. section 3663, which requires that petitions for review be filed in the U.S. Court of Appeals for the D.C. Circuit. Thus, unless the D.C. Circuit has issued an opinion similar to that expressed in Citizens Awareness, then the Citizens Awareness decision is merely persuasive authority for the Commission’s formulation of new rules.

(emphasis added). Having so **limited the parties**, the Commission here is not faced with the same problems with discovery and cross-examination as was the NRC.

The Commission cites Citizens Awareness to support the general proposition that “it was a valid exercise of agency discretion ... to expedite ... proceedings by changing its long-standing procedural regulations to eliminate discovery and restrict cross-examination.” Order No. 1309, p. 6 (emphasis added). Not mentioned, however, is the court’s rationale, namely, that the NRC case involved the expectation interests of “citizen-intervenors.” Citizens Awareness, 391 F.3d at 349-51. In contrast, in an N-docket, the users of the mail do not have a unilateral expectation interest, but rather a reliance interest upon the postal services that may be adversely affected by the change being proposed by the Postal Service. The opportunity for discovery and cross-examination may be vital for such mailers. Instead of recognizing the difference of the interest of the mailers in an N-case, the Commission appears to equate the interest of those users to that of an “affected citizen” in a nuclear licensing proceeding, citing Citizens Awareness for the proposition that “it is appropriate for the Commission to re-examine its historic practice of conducting N-cases as trial-type proceedings, according participants extensive discovery and oral cross-examination opportunities in **all** cases.”¹⁸ *Id.* (emphasis added).

¹⁸ The concurring opinion in Citizens Awareness noted a problem with referring to administrative proceedings in loose language: “Other terms, too, are sometimes used to refer to such procedures — ‘trial-type’ and ‘quasi-judicial.’ These vague and indefinite terms are particularly mischievous because they evoke images of courtroom trials, and they have contributed to the false impression that the APA’s requirement of on-the-record hearings involves procedures more akin to civil trials than is actually the case.” 391 F.3d at 356 (Lipez, J. concurring).

Citizens Awareness is also cited by the Commission for the proposition that the APA “lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules....” Order No. 1309, p. 6. However, unlike the adjudication hearing required by statute of the NRC in Citizens Awareness, the **N-docket** is required to be a formal rulemaking “**on the record.**” (Emphasis added.) *Compare* Citizens Awareness, 391 F.3d at 348 *with* 39 U.S.C. § 3661(b).

Formal rulemakings require meaningful cross-examinations, but the Commission also is considering restricting cross-examination. Order No. 1309, p. 6. APA requires that in formal hearings under section 556, “A party is entitled ... to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d). The right to cross-examination is specifically recognized. There is a statutory minimum of “as may be required for a full and true disclosure.” The Commission already puts a practical limit on cross-examination, generally requiring that it be probative, material, and not repetitious. Furthermore, Commission rules allow the Commission or a presiding officer to limit “the cross-examination of a witness to that required for a full and true disclosure of the facts necessary for the disposition of the proceeding and to avoid irrelevant, immaterial, or unduly repetitious testimony.” Rule 3001.30(f). Commission practice and precedent already have established an appropriate framework for cross-examination that protects the due process rights of participants.

Further, 39 U.S.C. section 3661(c) requires “a certification by each Commissioner agreeing with [an advisory] opinion that in his judgment the opinion conforms to the policies established under this title.” Such an opinion and certification can be set aside if it is

“unsupported by **substantial evidence.**” 5 U.S.C. § 706(2)(E) (emphasis added). But how could the required “substantial evidence” be adduced except by a hearing which preserves meaningful discovery and cross-examination? The Commission has been, and will continue to be, assisted in developing the record by the active participation by intervenors in N-dockets.

Because of the Postal Service’s institutional habit of providing the **bare minimum** of information required by the Commission’s rules (which is usually less information than is required to make a determination or order that would provide an adequate record for judicial review), it is necessary, as a practical matter, to provide an opportunity for interested participants to conduct sufficient discovery analogous to the right of cross-examination “as may be required for a full and true disclosure of the facts.” Although the Postal Service bears the burden of proof in any N-case, it is the Commission that will bear the responsibility to show Congress that its Advisory Opinion is based on the whole record and complies with the applicable statutory polices. *See* 5 U.S.C. § 556(d).

It should be noted that “full-dress discovery” (Citizens Awareness, 391 F.3d at 350) is not usually expected, but neither is it generally provided by the Commission. For example, one of the most important tools in judicially based litigation is conducting **depositions**. To counsel’s recollection, there has only been one instance where a deposition was conducted, and that in the course of a complaint proceeding (Docket No. C2008-3). **Requests for admission** have been rare — even though they could be useful to the parties and the Commission. No party expects all provisions of Title V of the Federal Rules of Civil Procedure to apply directly in Commission proceedings.

Citizens Awareness also was described as an agency “**adjudication**,” which is different from an agency “**rulemaking**.” 5 U.S.C. section 551 provides the definitions of the different types of proceedings. A rulemaking is “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). Furthermore:

“rule” means the whole or a part of an agency statement of general or particular applicability and **future effect** designed to implement, interpret, or prescribe **law or policy** or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. [5 U.S.C. § 551(4) (emphasis added).]

An “adjudication” is mainly a residual type of agency process, essentially being anything that is not a rulemaking, but it does include a licensing hearing. *See* 5 U.S.C. § 551(6)-(7). While both formal rulemakings and formal adjudications generally are governed by 5 U.S.C. sections 556 and 557, the purposes of the two types of proceedings remain different, and some provisions of section 556 are applicable only to rulemakings while others are applicable only to adjudications. A Commission Advisory Opinion under section 3661 is for the purpose of a prospective “change in the nature of postal services,” and the Advisory Opinion must “conform[] to the policies” of Title 39. Thus, an N-case is of “future effect designed to ... interpret ... law or policy.” Such proceedings are therefore rulemakings. For the further reason that Citizens Awareness was a case involving an agency adjudication, it is not determinative here.

CONCLUSION

Although “efficiency and timely resolution of nature of service cases” is a permissible and laudable goal, as the Commission itself has acknowledged, it cannot sacrifice “the rights of all participants, including affected mail users.” Order No. 1309, p. 1.

Respectfully submitted,

William J. Olson
Herbert W. Titus
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.