

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

MODERN RULES OF PROCEDURE FOR THE ISSUANCE OF ADVISORY OPINIONS IN NATURE OF SERVICE PROCEEDINGS	Docket No. RM2012-4
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UNITED STATES POSTAL SERVICE REPLY COMMENTS
(July 17, 2012)

The Commission has received comments in this proceeding from seven commenters (besides the Postal Service) who represent a broad array of stakeholders in proceedings under 39 U.S.C. § 3661 (“N-cases”): Congress, business mailers, individual consumers, labor, and the general public.¹ The Postal Service agrees with its fellow commenters’ points about the value of transparency and public input in such proceedings. The Postal Service supports certain of the commenters’ specific proposals, such as the elimination of field hearings,² the adoption of a clear 90-day default timeframe,³ and the reduction of adversity through more focused, proportionate information-gathering.⁴ However, other proposals and assertions by commenters would

¹ Comments of National Newspaper Association Witness on Proposed Rules for Nature of Service Proceedings (hereinafter “NNA Comments”), PRC Docket No. RM2012-4 (June 8, 2012); Comments of David B. Popkin (hereinafter “Popkin Comments”), PRC Docket No. RM2012-4 (June 18, 2012); Comments of the Public Representative in Response to Order No. 1309 (hereinafter “PR Comments”), PRC Docket No. RM2012-4 (June 18, 2012); Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Comments on Advance Notice of Proposed Rulemaking (hereinafter “Valpak Comments”), PRC Docket No. RM2012-4 (June 18, 2012); Letter from Senator Tom Carper to Postal Regulatory Commission (hereinafter “Sen. Carper Comments”), *filed in* PRC Docket No. RM2012-4 (June 18, 2012); APWU Initial Response to Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases under 39 U.S.C. § 3661 (hereinafter “APWU Comments”), PRC Docket No. RM2012-4 (June 19, 2012); Comments of Mark Jamison (hereinafter “Jamison Comments”), PRC Docket No. RM2012-4 (June 25, 2012).

² Compare Valpak Comments at 6-7 with United States Postal Service Initial Comments (hereinafter “USPS Comments”), PRC Docket No. RM2012-4 (June 18, 2012), at 25-27.

³ Compare Sen. Carper Letter at 1-2 with USPS Comments at 6-8.

⁴ Compare Sen. Carper Letter at 2 with USPS Comments at 12-25. In particular, harmonization of N-

actually increase uncertainty, burden, and delay in N-cases, contrary to the recognized need for more efficient procedures. In addition, the Postal Service wishes to clarify apparent confusion about the potential role of *Citizens Awareness Network v. United States*, 391 F.3d 338 (1st Cir. 2004), in the Commission's approach to N-cases.

I. The Role of *Citizens Awareness Network*

The Public Representative and Valpak raise questions about the Commission's invocation of *Citizens Awareness Network* in Order No. 1309.⁵ The most fundamental question, raised by both commenters, is the degree to which the proceedings at issue in that case are comparable to N-cases, which are required to be conducted in accordance with 5 U.S.C. §§ 556 and 557.⁶

Both commenters presume that the Nuclear Regulatory Commission's (NRC's) operating statute did not require hearings on the record under 5 U.S.C. §§ 556 and 557, as does 39 U.S.C. § 3661. Yet as *Citizens Awareness Network* makes abundantly clear, this distinction was a moot point for the court's reasoning and holding. The court expressly held that the NRC's streamlined reactor licensing procedures would satisfy the Administrative Procedure Act's (APA's) formal hearing requirements, whether or not the NRC's operating statute actually invoked those APA requirements.⁷ Thus, any

cases with other Commission proceedings, in which questions for the Postal Service are channeled through the Commission, would ease the adversarial nature of N-cases.

⁵ Order No. 1309, Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, PRC Docket No. RM2012-4 (April 10, 2012), at 6-7.

⁶ PR Comments at 11; Valpak Comments at 15.

⁷ *Citizens Awareness Network*, 391 F.3d at 343 n.1 (noting that, in the opinion, the court "use[s] the modifiers 'on the record' and 'formal' interchangeably to refer to adjudications conducted in accordance with sections 554, 556, and 557 of the APA"); *id.* at 348 ("For years, the courts of appeals have avoided the question of whether [42 U.S.C. §] 2239 requires reactor licensing hearings to be on the record. We too decline to resolve this issue. Because the new rules adopted by the [NRC] meet the requirements of the APA it does not matter what type of hearing the NRC is required to conduct in reactor licensing cases." (citations omitted)). Furthermore, the concurring opinion describes at length how the NRC came

arguable facial distinction between the NRC statute and 39 U.S.C. § 3661 should not distract from the lesson of *Citizens Awareness Network*: streamlined proceedings resembling the NRC's are compliant with 5 U.S.C. §§ 556 and 557, and so the APA would not bar the Commission from similarly streamlining its N-case procedures under its existing authority.

Valpak asserts that *Citizens Awareness Network* is “merely persuasive authority,” unless the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”), which hears appeals from Commission orders, “has issued an opinion similar to” *Citizens Awareness Network*.⁸ In fact, to the extent that *Citizens Awareness Network* stands for the proposition that the APA does not grant parties an absolute right to discovery, oral hearings, and cross-examination in formal proceedings, it aligns with numerous D.C. Circuit precedents.⁹ Thus, judicial precedent, both “binding” and

to rely on an argument that the relevant reactor licensing proceedings satisfied 5 U.S.C. §§ 556 and 557, rather than asserting that those APA provisions did not apply. *Id.* at 355-64 (Lipez, J., concurring).

⁸ Valpak Comments at 13 n.17.

⁹ *EchoStar Communs. Corp. v. FCC*, 292 F.3d 749, 756 (D.C. Cir. 2002) (holding that denial of discovery did not violate constitutional due process rights or 5 U.S.C. § 556(d), given party's failure to show that discovery was necessary to its ability to submit rebuttal case); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 217 (D.C. Cir. 1988) (holding that 5 U.S.C. § 556(d) does not require oral hearings or cross-examination as an absolute right and that “regulations’ provisions for discretionary allowance of cross-examination are [not] bound – or even likely – to violate” APA’s allowance for oral hearings “when required for a full and true disclosure of the facts”); *Cellular Mobile Sys. of Penn., Inc. v. FCC*, 782 F.2d 182, 197-99, 201 (D.C. Cir. 1985) (same with respect to cross-examination and surrebuttal, and drawing on Supreme Court precedent to note that Communications Act’s “full hearing” requirement was satisfied by “paper hearings” rather than a “full-blown trial-type evidentiary hearing,” where no party will be prejudiced); *Am. Pub. Gas Ass’n v. Fed. Power Comm’n*, 498 F.2d 718, 723 (D.C. Cir. 1974) (concluding that 5 U.S.C. § 556(d) did not bestow absolute right to oral cross-examination); *cf. Southwest Airlines Co. v. TSA*, 554 F.3d 1065, 1075 (D.C. Cir. 2009) (holding that constitutional due process required oral hearings only where necessary to assess witness veracity or credibility, and not where relevant issues, such as statutory construction, statistical methods, and cost accounting, “can be adequately resolved on written submissions”); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652 & n.5 (D.C. Cir. 1994) (holding that statutory reference to “hearings” can “connote informal, ‘paper’ proceedings” and can encompass discovery) (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 239 (1973); *Mail Order Ass’n v. USPS*, 2 F.3d 408, 414-15 (D.C. Cir. 1993); *Natural Res. Def. Council, Inc. v. NRC*, 680 F.2d 810, 812 (D.C. Cir. 1982)). *Accord* Drug Enforcement Admin., Beau Boshers, M.D.; Decision and Order, DEA Docket No. 10-35, 76 Fed. Reg. 19401, 19403 (April 7, 2011) (“It is well settled, however, that neither the Due Process Clause, nor the Administrative Procedure Act (nor DEA’s

“persuasive,” bolsters the Commission’s authority to streamline these proceedings in the ways suggested by the Postal Service in its initial comments. Among other things, the precedential D.C. Circuit opinions support the Postal Service’s view that, to the extent the Commission feels a need to maintain party discovery at all, the Commission can and should require parties to make a satisfactory, affirmative showing that their intended discovery or cross-examination will further the Commission’s task before being allowed to proceed.¹⁰

Valpak struggles to identify other potential distinctions between *Citizens Awareness Network* and this rulemaking, but in so doing, Valpak simply assumes its own conclusions without pointing to true distinctions.¹¹ For example, Valpak claims that

rules of procedure) require the Agency to provide a general right of discovery in administrative proceedings. While discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process, the party seeking discovery must rely on more than speculation and must show that the evidence is relevant, material, and that the denial of access to the documents is prejudicial.” (citing, *inter alia*, *EchoStar Communs.*, 292 F.3d at 756) (internal quotation marks omitted)).

¹⁰ USPS Comments at 19, 21-25; see *Cellular Mobile Sys.*, 782 F.2d at 199-200 & nn.41 & 42 (holding that petitioner’s requests for cross-examination were properly denied for lack of specificity, relevance to the proceeding’s outcome, and any “realistic attempt to demonstrate that written submissions were ineffectual”); *Am. Pub. Gas Ass’n*, 498 F.2d at 723 (holding that, assuming *arguendo* that APA formal hearing requirements applied, petitioners did not carry burden of showing that written discovery was ineffectual and that oral cross-examination was necessary for full and true disclosure of facts); *Boston Carrier, Inc. v. Interstate Commerce Comm’n*, 728 F.2d 1508, 1511 n.5 (D.C. Cir. 1984) (holding that agency did not abuse discretion by denying oral hearings, because petitioner did not meet requirements for specifying what evidence would be presented at hearing and why hearing was necessary, and because petitioner had not attempted to engage in written discovery); accord *Lodi Truck Serv. v. United States*, 706 F.2d 898, 901 & n.5 (9th Cir. 1983) (noting, in connection with denial of request for oral hearing, that 5 U.S.C. § 556(d) “expressly authorizes the [Interstate Commerce] Commission, when a party will not be prejudiced thereby, to ‘adopt procedures for the submission of all or part of the evidence in written form’”).

¹¹ These are not the only instances of circular logic in Valpak’s comments. For instance, Valpak expounds on Congress’s supposed intent to disincentivize service degradation through N-cases as a corollary to the price cap. Valpak Comments at 5. However, Congress left 39 U.S.C. § 3661 unchanged when it enacted the price cap in the Postal Accountability and Enhancement Act of 2006 (“PAEA”), Pub. L. No. 109-435, and no inferences can appropriately be drawn from this circumstance. There is nothing in the legislative history of the PAEA that would indicate what (if anything) resulted in the PAEA’s lack of alteration to 39 U.S.C. § 3661. See, e.g., *United States v. Bd. of Comm’rs of Sheffield*, 435 U.S. 110, 135 (1978) (noting that it is impermissible to draw inferences from the unexplained inaction of Congress). In particular, Valpak’s assertion that “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

the NRC licensing procedures at issue in *Citizens Awareness Network* were adjudications, whereas N-cases are rulemakings. It is unclear what difference Valpak's rulemaking-adjudication distinction makes. The requirements in 5 U.S.C. §§ 556 and 557 apply without regard to the nature of the administrative proceeding. Nothing about the opinion in *Citizens Awareness Network* limits its analysis of the APA's formal hearing requirements to adjudications.¹²

Nor is it clear why Valpak makes so much of the initiation of N-cases by the Postal Service, as opposed to the initiation of hearings in reactor licensing proceedings by participants other than the license applicant.¹³ This seems to confuse apples and oranges. *Proceedings* in either event are initiated by the regulated entity: the Postal Service or the nuclear facility. *Hearings* in either case can be initiated by other participants – or could be, in N-cases, if the Commission were to adopt the Postal Service's suggestion to make oral hearings a matter of demonstrated necessity rather than of automatic right.¹⁴

and why it was important, (iii) responding to questions from mailing interests, (iv) calling witnesses to defend its positions under cross-examination, (v) briefing fully interested parties, and (vi) allowing each member of the Commission to offer his expertise," Valpak Comments at 6, is incorrect because Valpak is merely describing the Commission's current N-case procedures. Title 39, U.S. Code, spells out no such procedural requirements, and, as described in the Postal Service's initial comments and these reply comments, 39 U.S.C. § 3661's cross-references to the APA do not give rise to ironclad requirements along those lines, either. Valpak errs in assuming that, because the Commission chose those procedures (with little explanation or the benefit of notice and comment) in implementation of its operating statute 40 years ago, see PR Comments at 6, all such procedures are *necessarily required* by statute. To the contrary, nothing suggests that Congress intended, through its inaction on 39 U.S.C. § 3661 while enacting the PAEA, thereby to undercut the discretion that the Commission has under the plain language of 39 U.S.C. § 3661 and the APA to adopt streamlined procedures.

¹² Even if Valpak's distinction had any bearing on the applicability of 5 U.S.C. § 556 and *Citizens Awareness Network*, the characterization of a Commission advisory opinion as a "rulemaking" is not so clear-cut as Valpak makes it seem. In any event, the Commission need not resolve this definitional matter here, because the rulemaking-adjudication distinction does not have the significance with which Valpak seeks to invest it.

¹³ Valpak Comments at 13.

¹⁴ USPS Comments at 20-25.

Valpak also tries to make hay out of other factors that, in reality, played no role in *Citizens Awareness Network* and provide no basis for limiting that opinion's applicability. For example, nothing in the opinion distinguishes "expectation interests" from "reliance interests".¹⁵ Nor is it clear how the scope of parties in reactor licensing proceedings is any less "limited" than those under 39 U.S.C. § 3661(c):¹⁶ in practice, "users of the mail" encompasses all businesses and individuals in the United States, and the phrase is used as a proverbial foot in the door by labor organizations, public policy organizations, and other N-case participants whose parochial interests as a mailer actually take a back seat to some other interest that is not tied to their capacity as a user of the mails. Even less clear is why any such distinction in party scope should matter to the applicability of *Citizens Awareness Network*. Moreover, *Citizens Awareness Network* involved a challenge to streamlined processes for the same partisan information-gathering tools used in N-cases (written discovery and oral hearings): the availability, or lack thereof, of depositions and requests for admission played no role in the opinion and is not a salient basis for distinguishing the Commission's N-case procedures.¹⁷

Finally, while it may be true that the Commission's advisory opinion must be based on "substantial evidence,"¹⁸ this standard does not require some maximal quantum of party discovery, only that the Commission's advisory opinion reflect the materials in the record upon which it relies. The standard can easily be met with the sort of Commission-led information-gathering used in other Commission proceedings,

¹⁵ See Valpak Comments at 14.

¹⁶ See *id.* at 13-14.

¹⁷ See *id.* at 16.

¹⁸ See *id.* at 15-16.

as the Postal Service recommends,¹⁹ augmented by party comments and submissions. The Public Representative has aptly described an N-case's objective as "accuracy and adequacy, but not perfection or exhaustion of all possible avenues of inquiry."²⁰

Streamlining the Commission's N-case procedures would not place its advisory opinions in *per se* violation of the substantial evidence requirement. Indeed, *Citizens Awareness Network* and the D.C. Circuit precedents cited above fully support the Commission's authority to streamline its procedures significantly while cleaving to the APA's parameters.²¹

II. Discovery

a. The Role of Due Process

As an initial matter, some commenters express concern about "due process" or "procedural due process" in connection with the streamlining of N-case procedures.²² As the Postal Service previously made clear, however, the Constitution's guarantee of due process does not apply to all administrative proceedings, only to those in which a party's protected liberty or property interest is at stake. The advisory opinions that result from N-cases do not, of themselves, deprive any party of a protected liberty or

¹⁹ USPS Comments at 12-16.

²⁰ PR Comments at 4.

²¹ See *Cellular Mobile Sys. of Penn., Inc. v. FCC*, 782 F.2d 182, 211-12, 214 (D.C. Cir. 1985) (holding FCC's denial of party's claims to "reflect[] sound and reasoned decisionmaking and [to be] supported by substantial evidence," even where agency used streamlined procedures).

²² APWU Comments at 5; Valpak Comments at 4, 9-12; NNA Comments at 3. Valpak's warning that a 90-day timeframe would violate procedural due process is somewhat perplexing, as Valpak simultaneously acknowledges that Congress could legislate such a time limit. Valpak Comments at 10. Obviously, if the Constitution does not bar a given measure enacted by Congress, it does not bar the same measure enacted by an agency acting within its statutory authority.

property interest, and so N-cases do not begin to cross the threshold for constitutional due process considerations.²³

Moreover, even if constitutional due process applied to N-cases, the balancing test for procedural due process is broad enough to accommodate more limited discovery rights than those currently prevalent in N-cases. Indeed, no party has challenged the lack of party discovery in other Commission proceedings – including those that produce binding effects and theoretically could be argued to affect protected liberty or property interests – as inconsistent with procedural due process. Nor does it seem likely that the well-established limits on discovery under the Federal Rules of Civil Procedure would be found to violate due process. As noted in the previous section, courts – including the D.C. Circuit – have routinely upheld administrative proceedings with less generous discovery as not inconsistent with constitutional due process rights.²⁴

b. APWU’s Discovery Recommendations

APWU’s unworkable, tepid proposal for limiting party discovery demonstrates that any such limitation must apply across the board, as the Postal Service recommends. APWU suggests that limited participants be capped at 25 interrogatories, including subparts, similar to the limit in Federal Rule of Civil Procedure 33(a)(1); full

²³ USPS Comments at 4 n.11 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). This fact is supported by the summary nature of other agencies’ advisory opinion processes, *id.* at 7 n.13, 15 n.34, and distinguishes N-cases from the product and pricing proceedings cited by Valpak. Valpak Comments at 11-12. Those proceedings result in the Commission’s actual approval or disapproval of prices and product features, and so they have a greater hypothetical potential to affect a mailer’s interest than does non-binding advice for the Postal Service’s ultimate decision (leaving aside the question of whether a mailer could ever have an actual protected “interest”, within the meaning of the Due Process Clause, in a particular mail service).

²⁴ Valpak’s main example of “due process rights” in Commission proceedings concerns mailers’ ability to submit comments. Valpak Comments at 12. No party, including the Postal Service, has proposed that the Commission bar parties from submitting comments in N-cases.

participants would continue to enjoy unfettered discovery rights.²⁵ APWU acknowledges that such a system is prone to abuse, as every party could file as a full participant to preserve broader discovery rights, but APWU offers no solution to this problem.²⁶

If the suggestion's own proponent is at a loss for a fix that would protect its nuanced approach from abuse, then it is unclear why such complexity should be preferable over a simple across-the-board limit. Channeling information requests through the Commission would be much more effective than a two-tier system that (a) affects only a subset of those engaging in burdensome, time-consuming discovery and (b) admits of no feasible incentive for participants to choose the lesser-discovery track. This would ensure that relevant discovery requests are answered and that the Postal Service has to respond only to a unified set of discovery instead of multiple sets of discovery. If party discovery must be retained (and the Postal Service would maintain that it need not), a limit like that used in even the most complex civil litigation under the Federal Rules of Civil Procedure should serve the Commission equally well with respect to any participant in an N-case, and APWU offers no compelling rationale to the contrary.²⁷

²⁵ APWU Comments at 5.

²⁶ *Id.*

²⁷ Numerical limits on party discovery could bring with them a need for the Commission to remain vigilant against bad-faith attempts at circumvention, such as where one party might enlist others to submit additional discovery requests on its behalf. If the civil justice system is any guide, such attempts might be rare. However, the mere prospect of circumvention and the attendant need for safeguards or contentious motions practice offer another reason why it would be simpler and more effective for all concerned if the Commission were to act as a gatekeeper for information requests.

APWU makes two other proposals that would only increase discovery time and burden. First, APWU proposes to shorten discovery response deadlines.²⁸ Then, APWU proposes that the Commission penalize any late responses – which would likely be more frequent with shorter deadlines – with even more discovery.²⁹ Taken together (and combined with an essential lack of any greater limitation on discovery proponents, per the APWU proposal discussed above), this would mean that the Postal Service would be subject to *more* discovery and N-cases would take even longer.³⁰

It is unclear how APWU's penalty system would work. If the Postal Service is late on one response, it seems disproportionate and unfair to let other parties heap a further, unlimited amount of discovery on the Postal Service during some extension period. Rather than making N-cases more efficient and less adversarial, this would mire them in an endless spiral of discovery. Such proposals only make sense if one adopts APWU's (and Valpak's) Manichaeian view of N-cases, whereby the incredible collective commitment of time and resources to discovery is solely the fault of the party burdened with responding to most discovery (the Postal Service) and could not possibly have anything to do with the amount, breadth, relevance, or redundancy of discovery being propounded. Such a lopsided view naturally leads only to proposals that would be counterproductive in addressing the acknowledged problems that currently bedevil N-cases and that led to the instant docket.

²⁸ *Id.* at 6.

²⁹ *Id.* at 7-8.

³⁰ The Postal Service's struggles with the timeliness of discovery responses in recent N-cases derive essentially from statutory change and the Postal Service's current financial position. The Postal Service simply cannot retain a large cadre of people to coordinate cross-functional and universal discovery as it did for omnibus rate cases. The Postal Service's staffing is very lean, as should be expected given the financial strains under which the entire organization labors; both management and labor ranks have been curtailed.

The Postal Service does not deny that a certain proportion of discovery requests have historically required more than the allotted time for good-faith internal research and response. The appropriate reaction is not to make the deadlines even harder to meet in such cases, however. That being said, shorter timeframes might be manageable if – and *only* if – they are combined with the Commission serving as a one-stop gatekeeper for information requests, as in other Commission proceedings. The Commission can determine an amount of response time that is more likely to be reasonably tailored to the nature and extent of a given information request than an across-the-board response period applied to all party discovery requests (especially in view of the Commission’s awareness of postal data systems and their functional capacities designed to serve business purposes alone). If party discovery is retained, however, shorter timeframes would only maintain or increase the frustration of all concerned with N-case discovery, not diminish it.

III. N-Case Timeframe and Advance Briefings

Valpak proposes that the Commission replace the 90-day “floor” for N-cases with a vague instruction to the Postal Service to file a “reasonable time” in advance of a planned effective date.³¹ Contrary to Valpak’s supposition, however, the protraction of an N-case is controlled less by the Postal Service’s responsiveness to particular discovery requests or its desire to rebut opposition testimony, and more by the Commission’s toleration of limitless discovery into matters not central to the Commission’s statutory task. If, historically, “five months [is] the minimum possible for

³¹ Valpak Comments at 10-11.

an important N-docket,”³² it seems so only because the Commission has not adopted measures within its statutory power that could bring N-cases in line with the 90-day timeframe found in other Commission proceedings (e.g., acting as a gatekeeper for information requests, and acting primarily on “paper hearings” with oral cross-examination only pursuant to a truly compelling need demonstrated to serve the Commission’s own statutory end). Moreover, as the Postal Service has explained in another context, an open-ended timeframe would create more legal and practical problems than it would solve.³³

Valpak and APWU claim that N-cases could be streamlined if only the Postal Service provided some sort of advance briefing and gave parties a “head start” in preparing their discovery and witnesses.³⁴ Absent any actual limits to N-case procedures, however, it is not a foregone conclusion that allowing parties more time would actually reduce the amount of time spent on discovery and witness presentation or focus them upon information the Commission itself may need. Perhaps Valpak and APWU’s unspoken message is that substantial limits on discovery and witness

³² *Id.* at 10 (emphasis deleted).

³³ See Motion of the United States Postal Service to Dismiss Complaint, PRC Docket No. C2012-2 (July 2, 2012), at 14-15 (“If 90 days were only a floor and not a ceiling, and if the Commission were empowered to declare after the filing what a ‘reasonable time’ is, then the Postal Service would never have any way of knowing, for any given service change, how far in advance it would be required to submit its request. The Postal Service thus would have no way of complying with the statute. Additionally, such a rule would frustrate the Postal Service’s ability to plan and budget for such changes because it could not know in advance when the changes would be implemented or the financial impact that such changes would be expected to have. As a regulated entity that is expected to comply with a statutory or regulatory directive, the Postal Service is entitled to know in advance what it is required to do. A rule requiring the Postal Service to file a request 90 days before implementation (or more, if it chooses) achieves that notice and certainty while being consistent with the text of Section 3661 and its implementing regulations. [A] position [that] allows the Commission to wait until after a filing before deciding how much time is reasonable, does not.” (footnote and paragraph break omitted)).

³⁴ Valpak Comments at 8-9; APWU Comments at 2-3.

presentation would be acceptable to them if only they had more information going into an N-case.³⁵

It must be recognized, though, that parties to an N-case already have ample access to baseline information about Postal Service operations, in the form of Annual Compliance Reports, Annual Compliance Determinations, Sarbanes-Oxley Act disclosures, and other periodic reports. The extent to which information is routinely made available has grown significantly since implementation of the PAEA.³⁶ Moreover, the Postal Service often does provide independent advance public notice of its plans to change the nature of postal services,³⁷ with the availability of additional detail often tied to interests of specific mailers, or types of mailers, through such organizations as the Mailers' Technical Advisory Committee and such resources as the Postal Service's Rapid Information Bulletin Board System (RIBBS™).

APWU also argues, in an echo of its Complaint and unsuccessful Motion for an Emergency Order in Docket No. C2012-2, that the Commission should extend an N-case's procedural schedule if the Postal Service makes "[s]ubstantial revisions to [its] initial proposal."³⁸ This way, APWU claims, "the Postal Service would be incented to file

³⁵ Significantly, APWU proposes to extend N-case schedules as punishment for any delay that it would blame on the Postal Service, APWU Comments at 3, but APWU does not explicitly make the inverse proposition: that the Commission could truncate N-case schedules in exchange for more up-front information from the Postal Service.

³⁶ See 39 C.F.R. Parts 3050, 3055.

³⁷ APWU and Valpak's complaint on this score seems at tension with APWU's acknowledgment that the Postal Service announced its plans more than two months in advance of its actual filing in Docket No. N2012-1. APWU Comments at 1-2.

³⁸ *Id.* at 3; see also American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, PRC Docket No. C2012-2 (June 13, 2012), at 9-11; Complaint of American Postal Workers Union, AFL-CIO Regarding Violations of 39 U.S.C. 3661 and 3691, PRC Docket No. C2012-2 (June 12, 2012). The Commission denied the APWU motion in Order No. 1387, Order Denying American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, PRC Docket No. C2012-2 (June 29, 2012), in part because APWU had not shown that it was substantially likely to prevail on the merits of that claim.

its proposal only when it is final.”³⁹ The Postal Service has already explained why this approach to N-cases makes no sense.⁴⁰ In short, the advisory nature of N-cases makes them fundamentally dynamic, and the Postal Service should not be restrained from adjusting its service change concept in response to feedback and new information. The pace of modern business life does not allow the Postal Service to put its decision-making “on hold” between the full articulation of its service change plan and any subsequent advisory opinion; circumstances and information evolve continuously. A delay-based “punishment” would create a perverse incentive for the Postal Service *not* to heed such feedback. If the Postal Service were required to present a truly “final” service change proposal before filing an N-case or to be locked into an outdated proposal, then the public give-and-take of an N-case would serve little purpose.⁴¹

IV. Other Commenter Recommendations

APWU attempts to extrapolate a general, delay-inducing problem from an isolated instance in which an individual Postal Service witness did not have sufficient technical or policy expertise to answer a question immediately.⁴² This is a reach. For one thing, the Postal Service has tended to sponsor witnesses who can speak to the policy decisions behind a proposed service change, or else to answer any pertinent questions on an institutional basis. For another, it is hard to understand how any

³⁹ APWU Comments at 3.

⁴⁰ Motion of the United States Postal Service to Dismiss Complaint, PRC Docket No. C2012-2 (July 2, 2012), at 18-19; United States Postal Service Answer in Opposition to American Postal Workers, AFL-CIO Motion for an Emergency Order, Docket No. C2012-2 (June 20, 2012), at 16-19.

⁴¹ Opinions apparently differ as to whether the Postal Service adjusts its proposals too much or too little in response to N-case feedback. Mr. Jamison levels the opposite criticism from that of APWU, in that the Postal Service “ask[s] for the advisory opinion only after they have already determined what they intend [] to do.” Jamison Comments at 2.

⁴² APWU Comments at 8-9.

perceived deficiency in a particular oral cross-examination accounts for the protracted schedules of all N-cases to date. No doubt APWU would be equally (or more) frustrated if, as it apparently proposes, the Commission and parties to an N-case had to rely upon the Postmaster General to answer detailed technical and policy questions that his subordinate officers or organizational units may be better-positioned to address. The focused, analytical nature of an N-case is not comparable to a Congressional hearing, where questions can range over any aspect of postal operations, finances, and policy, and where members of the Legislative Branch expect a head of agency to represent that agency in an overtly political venue.

With respect to APWU's discussion of non-public treatment,⁴³ it is not evident that the Commission's procedures for protecting sensitive information actually contribute to the protracted schedules of N-cases. These are the same procedures used in other Commission proceedings, including in complex proceedings concluded within 90 days or less. Contrary to APWU's assertion, the Postal Service no longer routinely seeks non-public treatment of documents based solely on the presence of finance numbers.⁴⁴ The Commission's current confidentiality rules already require the Postal Service to bear the burden of showing, up front, that it is seeking protection only for "information that actually poses a commercial harm if disclosed and has not otherwise been disclosed in the public domain."⁴⁵ Although it is not apparent that the Commission's procedures for non-public treatment contribute substantially to the delay and burden

⁴³ *Id.* at 6-7.

⁴⁴ See, e.g., Library Reference USPS-LR-N2012-2/1, Summary Spreadsheet, Microsoft Excel file "Summary.xls", PRC Docket No. N2012-2 (May 25, 2012).

⁴⁵ APWU Comments at 7; see 39 C.F.R. § 3007.21.

that marks N-cases, the Postal Service would not be averse to further exploration, in an appropriate venue, of ways in which those procedures could be made more efficient.

The Postal Service respectfully submits the comments above for the Commission's consideration.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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