

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Nanci E. Langley, Vice Chairman;  
Mark Acton;  
Tony Hammond; and  
Robert G. Taub

Complaint of American Postal Workers  
Union, AFL-CIO

Docket No. C2012-2

ORDER DENYING AMERICAN POSTAL WORKERS UNION, AFL-CIO,  
MOTION FOR AN EMERGENCY ORDER

(Issued June 29, 2012)

I. INTRODUCTION

This Order resolves the American Postal Workers Union, AFL-CIO (APWU) Motion for an Emergency Order.<sup>1</sup> APWU requests that the Commission issue an order directing the Postal Service not to implement its proposed changes in service standards

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<sup>1</sup> American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, June 13, 2012 (Emergency Motion).

for First-Class Mail, Periodicals, and Standard Mail and certain operational changes<sup>2</sup> until the Commission has issued a final ruling on its complaint in this docket. *Id.* at 1. For the reasons set forth below, APWU's Emergency Motion is denied.

## II. BACKGROUND

On June 12, 2012, APWU filed this complaint case alleging, among other things, that the Postal Service improperly announced its intention to make nationwide service standard changes effective July 1, 2012, without receiving an advisory opinion from the Commission under 39 U.S.C. 3661.<sup>3</sup> The Complaint also alleges that the Postal Service violated section 3661 by failing to file its Docket No. N2012-1 request for a Commission advisory opinion a reasonable time before the effective date of its proposed changes. Complaint at 2.

On June 13, 2012, APWU filed this Emergency Motion seeking preliminary relief that bars the Postal Service from implementing its proposed changes prior to the Commission ruling on the Complaint. Emergency Motion at 6. APWU also requests that the Commission issue its ruling on the Emergency Motion in advance of the July 1, 2012 effective date. *Id.* at 1. On June 20, 2012, the Postal Service filed its opposition to the Emergency Motion.<sup>4</sup> On June 21, 2012, APWU filed a reply to the Postal Service's Opposition.<sup>5</sup> On June 22, 2012, the Postal Service filed a surreply to APWU's

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<sup>2</sup> The operational changes, as identified by APWU, are those "described in the USPS' September 21, 2011 Advance Notice of Proposed Rulemaking (ANPR) and December 15, 2011 Notice of Proposed Rule (NPR) that are subject of the Request for an Advisory Opinion (Request) in N2012-1 and the changes resulting from the New Rule published by the Postal Service in the Federal Register" on May 25, 2012. Emergency Motion at 1.

<sup>3</sup> Complaint of American Postal Workers Union, AFL-CIO, Regarding Violations of 39 U.S.C. 3661 and 3691, June 12, 2012 (Complaint). An errata to the Complaint was filed on June 13, 2012. See Complaint of American Postal Workers Union, AFL-CIO, Regarding Violations of 39 U.S.C. 3661 and 3691, June 13, 2012; American Postal Workers Union, AFL-CIO, Notice of Filing Revised Complaint [Errata], June 13, 2012.

<sup>4</sup> United States Postal Service Answer in Opposition to American Postal Workers Union, AFL-CIO Motion for an Emergency Order, June 20, 2012 (Opposition).

<sup>5</sup> American Postal Workers Union, AFL-CIO, Reply to USPS Opposition to APWU Motion for an Emergency Order, June 21, 2012 (APWU Reply). Four days after the fact, APWU filed a motion for leave

Reply.<sup>6</sup> The practice of submitting a reply to an opposition to a motion is not authorized under Commission procedural rules, and is particularly inappropriate when seeking expedited, emergency action. In this instance, the Commission has determined to be lenient and accept these pleadings; however, it gives notice that far more substantial justification will have to be provided before it will accept such pleadings in the future.

### III. ARGUMENTS AND FINDINGS

#### A. Applicable Legal Principles

For all intents and purposes, APWU's Emergency Motion is seeking a preliminary injunction to preserve the status quo pending the outcome of its Complaint.<sup>7</sup> The parties essentially agree on the well-settled test for issuing a preliminary injunction. Opposition at 10; Emergency Motion at 7.<sup>8</sup> To prevail, APWU must demonstrate that (1) it has a substantial likelihood of success on the merits; (2) it would suffer irreparable harm if the preliminary injunction is not granted; (3) the balance of the equities favor issuing an injunction; and (4) the issuance of an injunction is in the public interest. *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (1958); *Canales v. Paulson*, 2006 WL 2520611, \*3 (D.D.C.

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to file its Reply. American Postal Workers Union, AFL-CIO, Motion for Leave to File Reply to USPS Opposition, June 25, 2012.

<sup>6</sup> United States Postal Service Surreply in Opposition to American Postal Workers Union, AFL-CIO Motion for an Emergency Order, June 22, 2012 (Surreply). In connection with its Surreply, the Postal Service filed a motion for leave to file its Surreply. United States Postal Service Conditional Motion for Leave to File a Surreply in Opposition to American Postal Workers Union, AFL-CIO Motion for an Emergency Order, June 22, 2012.

<sup>7</sup> The Emergency Motion could also be considered a request for a temporary restraining order. In the D.C. Circuit, the tests for reviewing either a request for a temporary restraining order or a preliminary injunction are identical. See, e.g., *Howard Univ. v. Nat. Collegiate Athletic Ass'n*, 675 F. Supp. 652, 654 (D. D.C.1987).

<sup>8</sup> In support of this test, APWU cites the following cases: *Buchanan v. USPS*, 508 F.2d 259, 266 (5th Cir. 1975); *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-843 (D.C. Cir 1977).

2006). The Commission must balance the relative strength of the arguments in each of the four categories in determining whether to grant a preliminary injunction. See *id.*

Historically, these four factors have been evaluated on a “sliding scale” in the D.C. Circuit, such that a stronger showing on one factor could make up for a weaker showing on another. See *Davenport v. Int’l Bhd. of Teamsters*, 166 F.3d 356, 360-61 (D.C. Cir. 1991); see also *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-843 (D.C. Cir. 1977).<sup>9</sup> Below, the Commission addresses the arguments of the parties regarding the application of the four factors of the preliminary injunction test.

## B. Likelihood of Success on the Merits

### 1. APWU’s Arguments

APWU argues that there is a substantial likelihood that it will prevail on the merits of its Complaint for two reasons. First, it asserts that 39 U.S.C. 3661 requires the Postal Service to receive and consider a Commission advisory opinion before it can implement a change in the nature of postal services on a nationwide or substantially nationwide basis. Second, it contends that the service changes incorporated in the Postal Service’s May 25, 2012 *Federal Register* Notice<sup>10</sup> are separate and distinct from the changes described in the Postal Service’s request in Docket No. N2012-1. It asserts that if the May 25, 2012 changes become effective, the Postal Service will have made a change in the nature of postal services, which will generally affect service on a nationwide or substantially nationwide basis without seeking an advisory opinion from

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<sup>9</sup> The continued viability of that approach has been called into question as the United States Court of Appeals for the District of Columbia Circuit has suggested, without holding, that a likelihood of success on the merits is an independent, free-standing requirement for a preliminary injunction. See *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). Absent clear guidance from the Court of Appeals on this issue, the Commission will employ the “sliding scale” framework.

<sup>10</sup> 77 FR 37190 (May 25, 2012).

the Commission. Emergency Motion at 8.<sup>11</sup> Each argument is discussed in more detail below.

First, APWU contends that if the changes described in the Postal Service's May 25, 2012 *Federal Register* Notice are implemented before the Commission issues its Advisory Opinion, the Postal Service would have improperly affected a change in the nature of postal services, which will affect service on a nationwide or substantially nationwide basis without considering the Commission's section 3661(b) Advisory Opinion. *Id.* at 8. APWU asserts that such a result would "render the role of the Commission and its Advisory Opinion nugatory. Any Advisory Opinion issued after the changes were implemented would be meaningless and would not fulfill the purpose intended by Congress in enacting Section 3661." *Id.* at 9; APWU Reply at 3. In support of its argument, APWU cites *Buchanan v U.S. Postal Service* (508 F.2d 259 (5<sup>th</sup> Cir. 1975)); (*Buchanan*) which enjoined the Postal Service from implementing certain nationwide changes in postal service because it did not first request an advisory opinion. Emergency Motion at 9.

Second, APWU argues that the Postal Service's May 25, 2012 *Federal Register* Notice identifies a new, separate, and distinct proposed nationwide change in the nature of postal services. APWU asserts that the May 25 changes are not "a mere modification" of the Postal Service's proposal submitted to the Commission in December 2011 as Docket No. N2012-1 for two reasons. First, Commission Rule 74 requires the Postal Service to provide with requests for advisory opinions on changes in the nature of postal services, such information, data, and statements of reasons as are necessary to fully inform the Commission and parties of the nature, scope, significance, and impact of the proposed changes, as well as how the changes are in accordance with and conform to the policies of title 39. APWU Reply at 3. APWU asserts that the differences between the Postal Service's May 25, 2012 *Federal Register* Notice and the

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<sup>11</sup> APWU is careful to point out that its complaint allegations of violations of 39 U.S.C. 3691 are not serving a basis for its Emergency Motion. *Id.* at 1 n.1. As such, the Commission does not address that count of the Complaint in this Order on APWU's Emergency Motion.

Postal Service's filings in Docket No. N2012-1 have not been appropriately addressed, and that the Postal Service has not provided any evidence to enable participants and the Commission to evaluate whether the changes set forth in the Postal Service's May 25, 2012 *Federal Register* Notice comply with the policies of title 39.

APWU further contends that there is no evidence in the Docket No. N2012-1 record to support the Postal Service's link between the closure of approximately 48 facilities prior to the end of 2012 and the reduction in service standards set to begin on July 1, 2012, pursuant to the Postal Service's May 25, 2012 *Federal Register* Notice. As an example, APWU asserts that examination of the information provided in Docket No. N2012-1 did not discuss whether and why the Postal Service intended to provide better service to large mailers because overnight delivery was to be eliminated for all mailers. However, according to APWU, the Postal Service's May 25, 2012 *Federal Register* Notice continues overnight delivery for certain mailers.

## 2. Postal Service's Arguments

The Postal Service asserts that APWU's arguments that it will succeed on the merits are flawed. It contends that 39 U.S.C. 3661 does not require the Postal Service to "receive and consider" the Commission advisory opinion before implementing its network consolidation plan. Additionally, the Postal Service argues that the modifications to its original plan, as set forth in its May 25, 2012 *Federal Register* Notice, are not sufficiently different from the original proposal as to require the Postal Service to request a new advisory opinion.

## 3. Commission Analysis

APWU fails to provide any persuasive argument that 39 U.S.C. 3661 precludes the Postal Service from implementing any nationwide change in the nature of postal services until after the Commission issues its advisory opinion. Its contention is unsupported by analysis of the statutory language or its legislative history. APWU's reliance on *Buchanan* is misplaced. While *Buchanan* supports the proposition that the

Postal Service must file a request for an advisory opinion prior to making substantially nationwide changes in the nature of postal services, it does not address whether the Postal Service is barred from implementing its proposed changes prior to issuance and consideration of the advisory opinion.

APWU's alternative argument on the merits is that the changes contemplated in the Postal Service's May 25, 2012 *Federal Register* Notice are so different from the proposal filed in Docket No. N2012-1 that the Postal Service must, under 39 U.S.C. 3661, file a new request for an advisory opinion. The Postal Service's failure to do so, APWU argues, violates section 3661. As a related issue, APWU asserts that the Postal Service did not timely file a proper request for an advisory opinion for the changes described in its May 25, 2012 *Federal Register* Notice.

Docket No. N2012-1 commenced in December 2011 when the Postal Service filed its proposed Mail Processing Network Rationalization Service Changes. In its Request, the Postal Service indicated that the proposed services would not be implemented until after mid-April 2012 at the earliest. Request at 14. Accordingly, interested persons have been on notice since then of the potential timing of the service changes.

On May 25, 2012, the Postal Service announced its implementation plans, including a phasing of its consolidation efforts and deferring full implementation of the proposed service standards until February 2014. In its Motion, APWU contends that the May 25, 2012 *Federal Register* Notice is evidence of a change in the nature of postal services. To that end, it claims that "[t]he changes proposed by the USPS in the New Rule will reduce mail delivery service experienced by users of the mail throughout the country." Emergency Motion at 8. Even assuming this is so, implementation of the proposed changes, as initially contemplated, could not be accomplished instantaneously but would have to be rolled out over time. At this juncture, the lesser change represented by the phasing appears to be encompassed in the larger change represented by full implementation. In its Motion, APWU has failed to show that this is

not the case. Thus, based on the record before it, APWU has not shown that it is substantially likely to prevail on the merits.

The Postal Service suggests that the Commission has already decided this issue by requesting additional information on the Postal Service's May 25, 2012 *Federal Register* Notice within Docket No. N2012-1. See, e.g., Opposition at 5, 16-18. The additional procedures invoked by the Commission were designed to obtain more facts and evidence on the changes from the initial proposal in that docket. On the record before it now, however, the Commission is not prepared to make a final determination on whether the Postal Service's proposed changes are so different as to require the Postal Service to file a new request for an advisory opinion.

### C. Irreparable Harm to APWU

#### 1. APWU's Arguments

APWU asserts that it and others will suffer irreparable harm if the Emergency Motion is not granted for the following five reasons. Emergency Motion at 11. First, APWU submits that if the Postal Service implements the changes described in the Postal Service's May 25, 2012 *Federal Register* Notice, the public will be foreclosed from the opportunity to present in advance "their views on decisions of the Postal Service which will greatly impact them." *Id.* at 12-13. Second, it contends that the Commission will be foreclosed from providing meaningful advice under 39 U.S.C. 3661 on the changes proposed pursuant to the Postal Service's May 25, 2012 *Federal Register* Notice. Third, APWU argues that such harm is irreparable because implementation of the changes would negate the effect and value of any subsequently issued advisory opinion. Fourth, APWU also contends that the costs to the Postal Service of undoing the changes set forth in the May 25, 2012 *Federal Register* Notice would be prohibitive. Fifth, mailers would likely incur substantial costs if the Postal Service were to reverse the planned July 1, 2012 changes, and that therefore it would



be impractical to reverse the service standard changes in the event that the Commission's advisory opinion recommends against the proposed changes.<sup>12</sup>

## 2. Postal Service's Arguments

The Postal Service contends that APWU does not identify any irreparable harm that it is likely to suffer in the absence of the Commission granting its Emergency Motion. Opposition at 19.<sup>13</sup> First, the Postal Service asserts that the harm identified by APWU, frustration of the purpose of 39 U.S.C. 3661, does not really exist because the "public has already had meaningful opportunity to present views and opinions on the Postal Service's plans...." *Id.* at 19. Second, the Postal Service contends that the incurrence of additional costs by the Postal Service and mailers if it has to "undo the changes" are not irreparable because they are monetary in nature. *Id.* at 20. Finally, the Postal Service argues that the alleged harm resulting from adjustment of production and delivery schedules is illusory, since it is routine practice for any organization that conducts business as a mailer.

## 3. Commission Analysis

As relevant to this claim, APWU asserts that mailers will "incur substantial costs." Emergency Motion at 12. However, the Court of Appeals for the D.C. Circuit has stated that "injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Further, the Supreme Court noted that the "fact that compensatory relief would be available at a later date weighs heavily against finding irreparable harm." *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). APWU's

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<sup>12</sup> APWU suggests it would also change the nature of Docket No. N2012-1 from a proceeding on a proposed change to a proceeding on whether the changes that have already been implemented should be preserved.

<sup>13</sup> The Postal Service also contends that this Emergency Motion is an improper attempt by APWU to litigate a labor relations matter. *Id.* at 21-23.

other claims of irreparable harm, e.g., that the advisory opinion process will be rendered superfluous, are inapposite and are more properly evaluated under criterion 4, the public interest.

#### D. Balance of the Equities

##### 1. APWU Arguments

APWU asserts that the balance of potential harms weighs in its and other mailers favor and thus supports granting the Emergency Motion. Emergency Motion at 13-14. It contends that the harms to the Postal Service “are limited in that the USPS would not have to do anything and would only have to refrain from making changes until the Commission rules” on the Complaint. *Id.* at 13. APWU argues that while the Postal Service sought expedited action in Docket No. N2012-1, it did not suggest a revised procedural schedule that would have resulted in a Commission decision in the timeframe that the Postal Service desired. Furthermore, APWU asserts that it has filed testimony in Docket No. N2012-1 that demonstrates that the Postal Service could implement the operational changes it seeks without changing the current service standards to those set forth in the Postal Service’s May 25, 2012 *Federal Register* Notice. APWU believes that these factors demonstrate that granting the Emergency Motion will not have any significant impact on the Postal Service.

##### 2. Postal Service Arguments

The Postal Service contends that the balance of the equities weighs in its favor. First, it argues that delay would be a severe impediment to the Postal Service’s ability to ensure sustainable and comprehensive postal services for the public given its deteriorating financial condition. Opposition at 23. Second, it asserts that even a short-term delay would mean delay in implementation until 2013 and lead to significant overhaul to the Postal Service’s current operational plans. *Id.* at 24. Finally, it believes

that any risk of harm to APWU is mitigated by the Postal Service's decision to implement the service standard changes in phases. *Id.*

### 3. Commission Analysis

In balancing the equities, the Commission must consider the relative harms alleged by the parties. APWU asserts that the effects on the Postal Service would be "limited" because the Postal Service "would not have to do anything and would only have to refrain from making changes until the Commission rules on the APWU complaint." Emergency Motion at 13. The Postal Service disputes this assertion and persuasively argues that if the Commission issued an injunction, the resulting delay in implementation "would be a severe impediment to the Postal Service's ability to ensure sustainable and comprehensive postal services for the public." Opposition at 23. The Postal Service cites its financial losses and contends the losses will be exacerbated without implementation of its proposal.

The Commission finds that the potential harm to the Postal Service from a preliminary injunction outweighs the potential harm to mailers from not issuing a preliminary injunction.

#### E. Public Interest

##### 1. APWU's Arguments

APWU argues that the granting of its Emergency Motion is consistent with the public interest. Emergency Motion at 14. It states that the public interest is established by 39 U.S.C. 3661 and its due process requirements. *Id.* at 14-15. It asserts that the public interest strongly favors permitting a meaningful opportunity to examine and evaluate changes that the Postal Service proposes to make that will have a lasting and profound impact on the public. APWU contends that the granting of its Emergency Motion will ensure that the Postal Service does not prematurely enact changes without such an opportunity.

## 2. Postal Service's Argument

The Postal Service asserts that granting the Emergency Motion is not in the public interest. Opposition at 25. First, it contends that granting the Emergency Motion will keep the Postal Service from addressing its significant financial losses, which would make it difficult for it to provide the public with stable, sustainable, and comprehensive postal services. Second, it would frustrate the public interest in allowing the Postal Service to make appropriate management decisions in order to operate effectively. *Id.* at 26. Third, the Postal Service argues that “the proceedings in Docket No. N2012-1 have already satisfied [APWU’s identified 39 U.S.C. 3661] public interest.” *Id.*

## 3. Commission Analysis

APWU is correct in identifying the fact that there is a public interest in the public’s participation in the advisory opinion process as well as the Commission’s ultimate advisory opinion. At its core, section 3661 underscores the importance of meaningful public participation and Commission advice in the process leading up to management decisions on nationwide service changes. Section 3661 and the Commission’s implementing regulations require an initial Postal Service presentation and full opportunity for public input, and a review in a hearing on the record. The advisory opinion process envisions the Postal Service taking the advisory opinion into account in implementing its plans. The public interest is served when the full process is completed.

The fact that the docket has commenced and the Postal Service has obtained some useful feedback from the public thus far does not mean the public interest in Docket No. N2012-1 has been satisfied. That case remains ongoing. The participants in Docket No. N2012-1 have yet to submit their briefs and the Commission has yet to consider all of the evidence and arguments made in those briefs. It has also not yet issued its advisory opinion based on all of those submissions. The Commission expects that the Postal Service—as well as the public as a whole—will benefit

significantly from the remainder of the case as well as the Commission's advisory opinion.

It is axiomatic that a viable Postal Service is in the public interest. However, a finding by the Commission that the necessity of a viable Postal Service meets the public interest test in this case should not be construed as shielding proposed changes in the nature of postal services from appropriate review. While Congress did provide the Postal Service with management flexibility in 39 U.S.C. 404(a) with respect to much of its operations, Congress found that the public interest is served through the advisory opinion process of section 3661. Abrogation of the section 3661 process would be contrary to the public interest.

#### F. Conclusion

In summary, APWU has failed to demonstrate that it has a substantial likelihood of prevailing on the merits, that it will suffer irreparable harm, or that the balance of the equities in this matter weighs in its favor. As a result, the Motion for an Emergency Order is denied.

#### G. Commission Authority

The Postal Service asserts that the Commission does not have the legal authority to grant APWU's Emergency Motion because it does not have the power to grant preliminary injunction relief. Opposition at 6. It argues that when Congress intends to provide an agency with such authority, it expressly delegates the authority. *Id.* at 6. See *Trans-Pac. Freight Conference v. Fed. Mar. Bd.*, 302 F.2d 875 (D.C. Cir. 1962). It also argues that the "plain language" of 3662(c) supports limiting the Commission's authority in this situation since the relief discussed in that section is retrospective, not prospective.

In its Reply, APWU asserts that the Commission has authority to issue the relief requested and attempts to distinguish cases cited by the Postal Service to the contrary. APWU Reply at 1-3. It also cites and discusses *Persian Gulf Outward Freight Conf. v.*

*Fed. Mar. Comm.*, 375 F.2d 335, 338 (D.C. Cir. 1967), which it argues supports its position. The Postal Service attempts to distinguish the *Persian Gulf* case in its Surreply. Surreply at 2-3.

The legal issue of whether the Commission has the authority to grant a preliminary injunction has not been fully briefed. The Postal Service cites and discusses legal precedent that suggests the Commission does not have such authority in complaint proceedings. However, other case law addressing agencies with statutory schemes similar to the Commission suggest that the Commission may have such authority. In particular, under 39 U.S.C. 503, the Commission is authorized to “take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people.” 39 U.S.C. 503.

The Supreme Court has previously recognized in certain circumstances that similar such “necessary and proper” enabling legislation provides agencies with the authority to issue interim injunctive relief or “standstill orders.” See *U.S. v. Southwestern Cable*, 392 U.S. 157, 180-81 (1968).<sup>14</sup>

The Commission need not decide this legal issue because, as discussed above, the merits of the claim can easily be resolved. *Norton v. Matthews*, 427 U.S. 524, 532 (1976).

*It is ordered:*

1. The American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, filed June 13, 2012, is denied.
2. The American Postal Workers Union, AFL-CIO, Motion for Leave to File Reply to USPS Opposition, filed June 25, 2012, is granted.

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<sup>14</sup> See also Review of the Commission’s Program Access Rules and Examination of Program Tying Arrangements, 25 FCC Rcd. 746, 794-97 (Jan. 20, 2010).

3. The United States Postal Service Conditional Motion for Leave to File a Surreply in Opposition to American Postal Workers Union, AFL-CIO Motion for an Emergency Order, filed June 22, 2012, is granted.

By the Commission.

Shoshana M. Grove  
Secretary