

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Market Test of Experimental Product — )  
Collaborative Logistics )

Docket No. MT2009-1

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND  
VALPAK DEALERS' ASSOCIATION, INC.  
COMMENTS REGARDING MARKET TEST OF  
EXPERIMENTAL PRODUCT — COLLABORATIVE LOGISTICS  
(April 27, 2009)**

**BACKGROUND**

On April 1, 2009, the Postal Service filed a notice initiating a market test of an experimental product<sup>1</sup> under 39 U.S.C. section 3641. On April 7, 2009, the Commission issued Order No. 199, Notice and Order Concerning Market Test of Experimental Product, both seeking additional information from the Postal Service, and setting April 27, 2009 as the deadline for public comment. The market test is now set to be implemented by the Postal Service on May 7, 2009. *See* Response of the United States Postal Service to Order No. 199 Request for Supplemental Information (Apr. 20, 2009), p. 1.

The experimental product to be tested is called “Collaborative Logistics” — proposed to be defined as “transportation of an article or multiple articles on a pallet or other unit load, on a space-available basis, in postal transportation.” Postal Service Notice, p. 3. Actual terms and conditions of the product will be contained in individual contracts.

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<sup>1</sup> Notice of United States Postal Service of Market Test of Experimental Product — Collaborative Logistics, Apr. 1, 2009.

Interestingly, neither 39 U.S.C. section 3622 (dealing with market dominant products) nor section 3633 (dealing with competitive products) applies by its terms to market tests of experimental products, which are governed by 39 U.S.C. section 3641. *See* 39 U.S.C. § 3641(a)(2). However, the Postal Service is required to specify whether the experimental product is market dominant or competitive. *See* 39 U.S.C. § 3641(b)(3). In response to that requirement, the Postal Service designated the product in this market test as competitive.

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereafter "Valpak") submit these joint comments in response to Order No. 199.

## COMMENTS

Section 3641 requires the Postal Service to notify both the Commission and the public of market tests, but it implicitly requires the Commission to use the period after it receives notice before implementation to conduct a pre-implementation review to ensure compliance with each of the requirements of 39 U.S.C. section 3641(b), (d), and (e):

(b) Conditions. — A product may **not** be tested under this section unless it satisfies each of the following:

(1) Significantly different product. — The product is, from the viewpoint of the mail users, **significantly different** from all products offered by the Postal Service within the 2-year period preceding the start of the test.

(2) Market disruption. — The introduction or continued offering of the product will **not create an unfair or otherwise inappropriate competitive advantage** for the Postal Service or any mailer, particularly in regard to small business concerns (as defined under subsection (h)).

(3) Correct categorization. — The Postal Service **identifies** the product, for the purpose of a test under this section, as either market-dominant or competitive, **consistent with the criteria under section 3642(b)(1)**. Costs and revenues attributable to a

product identified as competitive shall be included in any determination under section 3633(3) (relating to provisions applicable to competitive products collectively). Any test that solely affects products currently classified as competitive, or which provides services ancillary to only competitive products, shall be presumed to be in the competitive product category without regard to whether a similar ancillary product exists for market-dominant products.

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(d) Duration. —

(1) In general. — A market test of a product under this section may be conducted over a period of not to exceed 24 months.

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(e) Dollar-amount limitation. —

(1) In general. — A **product may only be tested** under this section if the **total revenues** that are anticipated, or in fact received, by the Postal Service from such product do **not exceed \$10,000,000** in any year, subject to paragraph (2) and subsection (g).... [Emphasis added.]

Additionally, the Commission is vested with the authority to cancel a market test if it determines that the market test is not consistent with the requirements of section 3641. *See* 39 U.S.C. § 3641(f). Derivative of the power to cancel the experiment for failing to meet any of the statutory requirements is the authority to obtain information about the details of the market test and to evaluate that information according to such Postal Accountability and Enhancement Act (“PAEA”) requirements. *See* Order No. 199, p. 3.

Although Valpak takes no position on whether this particular market test is consistent with section 3641 or any other provision of Title 39, Valpak appreciates the Postal Service’s innovative attempt to earn revenue from unused capacity, which would appear to benefit all mailers.

Valpak's main interest in this proceeding derives from the fact that it is the first market test filed under PAEA, while no rules yet exist to govern the Commission's review<sup>2</sup>, and therefore the manner in which the Commission handles this market test will establish a precedent for the future. To ensure compliance with 39 U.S.C. section 3641(b), (d), and (e) and to achieve the improved transparency and accountability that PAEA requires (*see generally* Commission FY 2008 Annual Compliance Determination, p. 3), **aggregated cost, volume, and revenue data projected by Postal Service about each market test** need to be made available to the public and the Commission.

Indeed, PAEA requires that information regarding market tests of experimental products be included in the Annual Compliance Report. *See* 39 U.S.C. § 3652(c). This requirement has been incorporated by the Commission into its recently-finalized periodic reporting rules, where the Commission requires the Postal Service to submit in its ACR the following information for all market tests of experimental products — whether the product be categorized as market dominant or competitive:

For market tests of experimental products:

- (1) Estimate their **costs, volumes, and revenues individually,<sup>3</sup> and in aggregate**, by market dominant and by competitive product group;

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<sup>2</sup> However, the Commission does have rules about the information which the Postal Service must disclose in its Annual Compliance Report ("ACR") discussed *infra*. *See* Order No. 203 (Apr. 16, 2009); 39 C.F.R. § 3050.21(h).

<sup>3</sup> This requirement calls for reporting on (i) each individual market test, as well as for (ii) the aggregate of all market tests of market dominant products, and (iii) the aggregate of all market tests of competitive products. However, the regulations do not require the Postal Service to disclose the actual terms and conditions of any individual contracts.

- (2) Estimate the quality of service of each individual experimental product; and
- (3) Indicate whether offering the experimental product has created an **inappropriate competitive advantage** for the Postal Service or any mailer. [Order No. 203, p. 65, 39 C.F.R. § 3050.21(h) (emphasis added).]

The Commission must assure that information surrounding market tests complies with the requirements of 39 U.S.C. sections 3641(b), (d), and (e) and fulfills the necessary transparency and accountability to comply with PAEA and its implementing regulations, and this would require aggregate information being shared with the public. For example, without public awareness and input, neither the Postal Service nor the Commission may even know whether an experimental product has created an inappropriate competitive advantage for the Postal Service or any mailer under 39 U.S.C. § 3641(b)(2). Further, in this market test, where the Postal Service is selling space on trucks for various loads which may include palletized mail, it would appear important for the Postal Service to disclose to the public and the Commission how much of the revenue comes from mail loads, and how much from non-mail loads, to ensure compliance with 39 U.S.C. section 3641(b)(1). To ensure compliance with 39 U.S.C. section 3641(b)(3), even the Postal Service's categorization of the market test as a competitive product needs to be tested by the public and the Commission.

Lastly, Valpak believes that the Commission should require the Postal Service to include specified information about a market test in its Annual Compliance Report for each fiscal year in which it is in effect, even if the market test is not in effect for the entire fiscal year. For example, in its FY 2009 ACR, the Postal Service should include the relevant

estimates for Collaborative Logistics for May 7, 2009 through September 30, 2009, even though it would only have been in effect for a portion of the applicable fiscal year.<sup>4</sup>

Respectfully submitted,

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<sup>4</sup> This recommended approach is consistent with the Commission's requirement that the Postal Service provide Bank of America Corporation negotiated service agreement data during Docket No. ACR2008.