

ORDER NO. 13

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

Before Commissioners:

Dan G. Blair, Chairman;  
Dawn A. Tisdale, Vice Chairman;  
Mark Acton; Ruth Y. Goldway; and  
Tony L. Hammond

Postal Rate and Fee Changes

Docket No. R2006-1

ORDER (1) GRANTING COALITION OF CATALOG MAILERS'  
MOTION FOR LATE INTERVENTION, (2) DENYING COALITION OF  
CATALOG MAILERS' MOTION TO REOPEN THE RECORD, AND  
(3) ESTABLISHING PROCEDURAL SCHEDULE

(Issued April 27, 2007)

I. INTRODUCTION AND SUMMARY

Pending before the Commission are two procedural motions filed by the Coalition of Catalog Mailers (CCM): CCM's motion for acceptance of its late notice of intervention and CCM's motion to reopen and supplement the record. For the reasons discussed in more detail below, the Commission grants CCM's motion for late intervention, but denies CCM's motion to reopen and supplement the record. This Order also establishes the procedural schedule to "expeditiously" resolve the remaining issues in this case.<sup>1</sup>

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<sup>1</sup> The Governors "ask the Commission to move as expeditiously as possible" on reconsideration. Decision of the Governors of the United States Postal Service on the Opinion and Recommended Decision of the Postal Regulatory Commission on Changes in Postal Rates and Fees, Docket No. R2006-1 at 2 (Governors' Decision).

## II. COALITION OF CATALOG MAILERS' MOTION FOR LATE INTERVENTION

On April 3, 2007, an ad hoc coalition of mailers, the Coalition of Catalog Mailers, filed a Notice of Intervention in this case.<sup>2</sup> Pursuant to Commission Rule of Practice and Procedure 20(c), CCM concurrently filed a motion for late acceptance of its Notice of Intervention.<sup>3</sup> Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (Valpak) filed an opposition to CCM's Intervention Motion.<sup>4</sup> Finding that the Intervention Motion and the Valpak Opposition to Intervention raise important and significant issues that may affect the outcome of this proceeding, the Presiding Officer certified the Intervention Motion to the full Commission for consideration and disposition. P.O. Ruling R2006-1/131 at 2.

CCM advances three arguments in support of its intervention at this late stage in the proceeding. First, CCM contends that the Commission's Recommended Decision contained rate increases for Standard Mail flats that had not been generally expected by either the parties in the rate case or by the catalog industry in general. Intervention Motion at 1. Second, CCM asserts that while some catalogers are members of trade associations that did participate in the rate case, those organizations participated on behalf of all Standard Mail mailers; not just flats mailers. *Id.* Third, CCM points out that it could not intervene earlier since it was formed only recently. *Id.* It notes that its membership did not individually intervene earlier because members did not anticipate that the Commission would propose flats rates in excess of the rates proposed by the Postal Service.

Valpak argues that CCM's allegations are not persuasive, and that CCM has not met its burden to demonstrate that late intervention is appropriate here. First, Valpak notes the lack of evidence supporting CCM's statement regarding the rates the parties in the case or the catalog industry in general expected. Additionally, Valpak argues that

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<sup>2</sup> Notice of Intervention by the Coalition of Catalog Mailers, April 3, 2007.

<sup>3</sup> Motion for Acceptance of Late Notice of Intervention by the Coalition of Catalog Mailers, April 3, 2007 (Intervention Motion).

<sup>4</sup> Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Opposition to Late Intervention by Coalition of Catalog Mailers, April 13, 2007 (Valpak Opposition to Intervention).

there is no support in the law or in 35 years of practice under the Postal Reorganization Act that limits the Commission's authority to the rates proposed by the Postal Service. The law requires the Commission to recommend rates supported by the record, which may be higher or lower than proposed by the Postal Service.

Second, Valpak takes issue with CCM's argument concerning CCM's members' associations with trade organizations that represent Standard Mail users. Valpak asserts that these are prestigious mail organizations that are well-represented before the Commission.

Third, Valpak argues that since CCM was not in existence for even one week at the time it filed its Intervention Motion, it cannot be considered an established mailer. Therefore, its only reason for intervention would be derivative of its members' interests as mailers, so their situation must be examined.

Valpak contends that all mailers have been on notice that rates could increase significantly. According to Valpak, the Postal Service's proposed rates were not the only ones in the record. Valpak witness Mitchell submitted testimony (VP-T-1) and interrogatory responses proposing rates higher than those ultimately recommended by the Commission. Those rates were rebutted by Postal Service witness Kiefer (USPS-RT-11). Additionally, Valpak points to language in the Commission's R2005-1 Opinion and Recommended Decision which warned that the next rate case "will probably result in unusually disproportionate increases and decreases in different rates ...." Valpak Opposition to Intervention at 5, citing PRC Op. R2005-1 at ii.

Valpak also argues the Commission should consider what CCM refrained from alleging or arguing. Valpak contends that CCM failed to allege that (1) no other party adequately represents its interests, and (2) no other party will be prejudiced by CCM's intervention. Valpak believes that Direct Marketing Association, Association for Postal Commerce, and Mail Order Association of America (MOAA) aggressively represent the interests of Standard Mail users. In particular, MOAA filed testimony to rebut witness Mitchell's letter/flat recommendations. Also, Valpak contends that if CCM were allowed to intervene after this docket has been fully litigated, it would force intervenors to incur

substantial additional legal and economic expenses to study, cross-examine and rebut CCM's allegations.<sup>5</sup> For the reasons discussed below, the Commission grants CCM's Intervention Motion.

*Discussion.* The Commission's Rules of Practice and Procedure provide guidance on when it is appropriate to grant motions for late intervention. Commission rule 20(c) states:

Notices of intervention shall be filed no later than the date fixed for such filing in any notice or order with respect to the proceeding issued by the Commission or its Secretary, unless in extraordinary circumstances for good cause shown, the Commission authorizes a late filing.

39 CFR § 3001.20(c). Accordingly, interventions must be timely or can only be approved on motion "in extraordinary circumstances for good cause shown." In Docket R2006-1, the deadline for intervention was May 31, 2006, well over ten months ago. PRC Order No. 1464 (May 5, 2006) at 13. Indeed, the Commission has already issued its Opinion and Recommended Decision. Further, as Valpak points out, the Commission issued warnings over the course of several years in its decisions, orders, and *Federal Register* notices to potential affected parties and their trade associations on the potential likelihood of rebalancing rates in the R2006-1 rate case. Moreover, witness testimony during the course of the proceeding presented rate proposals well in excess of those ultimately recommended by the Commission. These examples demonstrate that the postal community had legally sufficient notice of the possibility that rates recommended by the Commission would be greater than those proposed by the Postal Service. If this were the end of the matter, the Commission would be hard

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<sup>5</sup> Valpak identifies a prior case where the Commission allowed intervention after the Governors returned a Recommended Decision for Reconsideration. See Order No. 374 Granting Petition for Late Intervention, Docket No. R80-1 at 2, April 9, 1981. Valpak believes that case is distinguishable from the current situation since in that case the Commission found that (1) the petitioners' interests were not adequately represented, (2) no participant would be prejudiced by the intervention, and (3) the motion was unopposed.

pressed to find that CCM's arguments rise to the level of extraordinary circumstances for good cause.

That is not the end of the inquiry, however. Here, the Governors' Decision asks the Commission on reconsideration to "allow individual mailers and their associations to address any unique problems created by the Commission's recommendations." Governors' Decision at 12. This conveys the message that the Governors would like the Commission to specifically allow catalog groups the opportunity to be heard on the reconsideration issues. The Postal Service seems to concur with this understanding of the Governors Decision. It offers in its Statement on Reconsideration that "it is especially important to hear the views of Standard Mail mailers whose rates would be affected."<sup>6</sup> The Commission would like to give as much weight as possible to the Governors' views while remaining true to the principles of due process and fairness.

The Commission recognizes that for the Commission's reconsideration to be meaningful, affected mailers should be given an opportunity to be heard and have their views considered. Nonetheless, the Commission must carefully balance the Governors' and catalogers' concerns on giving affected parties an opportunity to be heard on reconsideration with the prejudicial effects on the other participants in the case. The Commission is specifically concerned that granting the Intervention Motion might unreasonably burden participants who fully participated and litigated the issues in this case on the record. These participants followed the orderly rules of practice and procedure set up by the Administrative Procedures Act and applicable regulations. For these laws and rules to have meaning, the Commission must ensure that CCM's "bite at the apple" does not cause undue prejudice to these participants. If potential participants are allowed to forego participation in cases, yet later be given the opportunity to reopen decided matters after-the-fact, it would undermine the entire administrative process. Accordingly, there must be strict limitations on receiving a "second bite at the apple."

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<sup>6</sup> Initial Statement of the United States Postal Service on Reconsideration, March 28, 2007, at 11 (Statement on Reconsideration).

Here, the Commission is persuaded that granting CCM's Intervention Motion will not materially affect those participants who fully participated in this case from the beginning. Valpak's arguments relating to prejudice primarily relate to CCM's Motion to Reopen the Record,<sup>7</sup> not its Intervention Motion. The Commission does not anticipate that, solely as a result of allowing CCM to intervene, it will require participants to file interrogatories, conduct oral cross-examination, or file rebuttal testimony. Indeed, the record is currently closed and further discovery and examination of witnesses is not allowed.<sup>8</sup> Interested participants may choose to file comments and reply comments on the issues raised by the Governors in their request for reconsideration regardless of whether CCM is permitted to intervene. Therefore, given the lack of substantial prejudicial effect on participants in connection with the Governors' strong statement on giving catalogers an opportunity to be heard, the Commission finds sufficient cause to grant CCM's Intervention Motion.

### III. COALITION OF CATALOG MAILERS' MOTION TO REOPEN THE RECORD

On April 12, 2007, CCM filed a Motion to Reopen and Supplement the Record. Valpak Direct Marketing Systems, Inc., Valpak Dealers' Association, Inc. (collectively, Valpak), Financial Services Roundtable, Major Mailers Association, National Association of Presort Mailers, and the National Postal Policy Council (collectively, Letter Mailers Group) filed oppositions to the relief requested in the Motion to Reopen the Record.<sup>9</sup> The Postal Service and MOAA filed pleadings that take no position on the Motion to Reopen the Record, but point to testimony currently in the record that they believe

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<sup>7</sup> Motion of Coalition of Catalog Mailers to Reopen and Supplement the Record, April 12, 2007 (Motion to Reopen the Record).

<sup>8</sup> The issues raised by CCM's Motion to Reopen the Record are another matter entirely, and are discussed in detail below in Section III of this Order.

<sup>9</sup> Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Opposition to Motion to Reopen and Supplement the Record By Coalition of Catalog Mailers, April 19, 2007 (Valpak Opposition to Reopen the Record); Response of Financial Services Roundtable, Major Mailers Association, National Association of Presort Mailers and National Postal Policy Council to Motion of Coalition of Catalog Mailers to Reopen the Record, April 19, 2007 (Letter Mailers Group Opposition to Reopen the Record).

supports rebalancing Standard Mail letter and flat rates.<sup>10</sup> MOAA also urges the Commission to quickly resolve the Motion to Reopen the Record and accelerate the procedural schedule for reconsidering whether some rebalancing between Standard Mail letter and flat rates might be appropriate. MOAA Response at 1. In addressing the Motion to Reopen the Record, the Presiding Officer found that it raises important and significant issues that may considerably increase the proceeding length and significantly raise the cost of litigation for all participants involved. Accordingly, the Presiding Officer certified the Motion to Reopen the Record to the full Commission for consideration and disposition. P.O. Ruling R2006-1/132 at 1-2.

CCM makes three arguments in support of its Motion to Reopen the Record. First, it contends that the Commission does not have a complete understanding of the transitional problems and economic waste created by higher-than-expected rate increases and that additional testimony should clarify that understanding. Second, it argues that fairness and equity weigh in favor of reopening the record since it believes that catalogers did not have a meaningful opportunity to enter evidence in the record before it was closed. CCM asserts that catalogers should not be expected to introduce testimony to rebut unannounced, unanticipated rates and that technical arguments raised during a proceeding do not motivate mailers to hire expensive lawyers and economists.

Third, it recognizes that reopening the record will prolong the case and, accordingly, it limits its proffered testimony to that of one witness. The proffered testimony would be limited to facts to support CCM's perceived need for transitional rate relief. CCM believes that under an expedited schedule, its additional evidence will add approximately 60 days to the case "unless other parties seek to expand this proceeding." Motion to Reopen the Record at 4, 9.

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<sup>10</sup> Mail Order Association of America Answer to Motion of Coalition of Catalog Mailers to Reopen and Supplement the Record, April 19, 2007 (MOAA Response); Response of the United States Postal Service to Motion of the Coalition of Catalog Mailers to Reopen and Supplement the Record, April 19, 2007.

In its Opposition to Reopen the Record, Valpak first incorporates by reference the arguments it made in its Opposition to Intervention. Those arguments are summarized above and need not be repeated here. Additionally, Valpak makes the following three arguments in opposition to CCM's Motion to Reopen the Record. First, Valpak asserts that if CCM's goal is truly "transitional rate relief" as it states quite a few times in its motion, then it is making its arguments to the wrong agency. In fact, it is the Board of Governors, not the Commission, that has authority to stay rate increases for a certain period of time.<sup>11</sup> See 39 U.S.C. § 3625. Second, Valpak contends that if CCM's assertions as to why it did not submit its proffered evidence earlier were accepted by the Commission, then the record of every case could be reopened "on the whim of a few aggrieved mailers." Valpak Opposition to Reopen the Record at 4. Third, the timeline proposed by CCM is "wholly unrealistic" according to Valpak. Valpak believes that resolution will take until August or September of 2007 unless due process rights of other participants are compromised. It notes that a timeline consistent with due process would be counterproductive to "transitional rate relief" since rates are currently scheduled to go into effect on May 14, 2007.<sup>12</sup>

The Letter Mailers Group argues that CCM's motion to reopen the record must be denied. It believes that CCM has not offered a sufficient justification for failing to submit its proffered evidence before the record was closed. It puts forth the following four arguments in support of its position. First, the Letter Mailers Group submits that CCM's members were on notice before the beginning of the rate case through the Commission's R2005-1 Opinion and Recommended Decision that this case was likely to result in large rate increases for flat-shaped Standard Mail. Second, the public, including CCM's members, received specific notice through publication in the *Federal*

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<sup>11</sup> The Letter Mailers Group also makes this argument in its pleading. See Letter Mailers Group Opposition to Reopen the Record at 2, 4 and 12-13. The Letter Mailers Group urges the Board of Governors to delay the May 14 effective date of the Standard Mail rate changes. *Id.* MOAA also agrees and urges the Commission to suggest this course of action to the Board of Governors. MOAA Response at 6.

<sup>12</sup> The Letter Mailers Group seems to contemplate an even longer timeline, noting that resolution should not be expected earlier than late summer or early fall. Letter Mailers Group Opposition to Reopen the Record at 5.

*Register* that the Commission could recommend rates that “differ[ed] from [the] proposed rates....” Letter Mailers Group Opposition to Reopen the Record at 9, citing PRC Order No. 1464 at 2. It contends that the degree of specificity CCM demands in advance for adequate notice is impossible — regulatory commissions cannot predict many months in advance of fully developing the evidentiary record on how they will rule. Third, CCM’s members also had notice and could have intervened when Valpak’s witness Mitchell proposed rates with virtually full passthroughs of shape-related costs. The Letter Mailers Group notes that had CCM offered the testimony that it now seeks to introduce at that earlier time, there would have been no prejudicial delay in the final resolution of the case. Fourth, the Letter Mailers Group argues that in any event CCM’s evidence is insufficient to grant it rate relief for flats since it fails to make a required showing that letter rates should be increased as an offset.

The Postal Service and MOAA responses do not take a position on CCM’s Motion to Reopen the Record. However, they do cite testimony currently in the record which they believe would provide enough support to allow the Commission to rebalance Standard Mail letter and flat rates on the existing record.<sup>13</sup> In particular, they point to the testimony of rebuttal witness Kiefer (USPS-RT-11) who rebuts the Standard Mail flats rates proposed by witness Mitchell. MOAA suggests that another course of action that could be undertaken on the current state of the record would be for the Commission to reassess its volume projections. MOAA also urges the Commission to quickly resolve the Motion to Reopen the Record and accelerate the procedural schedule for reconsidering whether some rebalancing between Standard Mail letter and flat rates might be appropriate. MOAA Response at 1. For the reasons discussed below, the Motion to Reopen the Record is denied.

*Discussion.* In noticing the request for reconsideration, the Commission issued PRC Order No. 8, containing a reminder that in order to reopen the record a participant “must provide thorough justification for its request, including specific identification of the

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<sup>13</sup> See MOAA Response at 2-4; Response of the United States Postal Service to Motion of the Coalition of Catalog Mailers to Reopen and Supplement the Record, April 19, 2007, at 1-2.

purported deficiencies in the current record for purposes of reconsideration and an explanation why that participant did not proffer the purportedly necessary materials during the hearing.” Order No. 8 at 2. Recently, in Docket No. MC2004-3, the Commission commented on when it is appropriate to reopen the record in one of its proceedings. The Commission stated that:

Typically, the Commission will reopen a record in a fully concluded and litigated docket only for the purpose of administrative corrections, or to make non-substantive changes. In extraordinary circumstances, the Commission could reopen a record if there is an acceptable demonstration of why material could not have been initially presented during the course of the proceeding, and why it should be considered late in the proceeding. The Commission might also reopen the record if the material was directly on point and there would be an injustice if the record were not reopened.

Order No. 1443 at 8.

Under the Postal Reorganization Act, omnibus rate proceedings are open to any person filing a timely notice of intervention. Throughout the years, the Commission has seen participation from all types of mailers — large and small, individual and business. In this case, a small Standard Mail user, The Flute Network, successfully convinced the Commission to recommend Standard Mail rates with a lower cost coverage than it might otherwise have suggested.<sup>14</sup>

The Commission believes that fairness and equity toward all participants are very important in any Commission proceeding and strives to create a level playing field and make decisions that promote such goals. While the Commission is sympathetic to CCM’s views regarding the size of the rate increases for flat-shaped mail, CCM members have had reasonable opportunity to present their case consistent with due process. Some CCM members are also members of associations that actively

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<sup>14</sup> PRC Op. R2006-1, ¶ 5391. Other smaller business mailers that participated in the R2006-1 rate case were GrayHair Software, Inc. and Growing Family, Inc.

participated in this case, sponsoring evidence on a wide variety of rate level and rate design issues.

The Commission must recognize significant countervailing considerations relating to the integrity of its process. In particular, the Commission is deeply concerned about the material prejudicial effect on the other participants from granting the motion as well as the considerable delay that will undoubtedly result from reopening the record. To adequately respond to CCM's proposed evidence, other participants are likely to face expending considerable additional resources to examine and/or rebut CCM's evidence, and possibly duplicate some of the efforts they put forth in the initial case before the record was closed. The Commission also finds significant that reopening the record will most likely take this case well into late summer or early fall which would run contrary to the stated goal of CCM — to obtain “transitional rate relief” — since the rates in question are scheduled to go into effect on May 14, 2007.

Consistent with the Governors' request “ask[ing] the Commission to move as expeditiously as possible,”<sup>15</sup> the Commission does not find that an adequate showing for reopening the record has been made. Further, a failure of due process for CCM will not result from keeping the record closed. To the contrary, as discussed above, the other participants would suffer from a lack of due process if the record were reopened in the manner suggested by CCM.

For these reasons, the Commission finds that on balance, CCM's request to supplement the record is outweighed by the material prejudicial effect towards the other participants and the needs of the Governors. CCM's Motion to Reopen the Record is denied.

Although the Commission does not reopen the record, CCM will have the full opportunity to present the arguments of its members to the Commission, based on the existing record. As discussed above, the Governors have asked the Commission to allow parties to present their views to “address any unique problems created by the Commission's recommendations.” Governors Decision at 12. This is not tantamount to

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<sup>15</sup> Governors' Decision at 2.

asking the Commission to reopen the record to develop information on basic production practices and procedures that come into play any time rates are altered. Both the Postal Service and MOAA contend the current record would support rebalancing, see USPS Response at 2, MOAA Response at 2-4, and CCM itself seems to imply that it believes the current record supports reducing flats rates. Motion to Reopen the Record at 8, n.8.<sup>16</sup>

#### IV. PROCEDURAL SCHEDULE

Presiding Officer's Ruling R2006-1/130 suspended the dates for filing comments on the reconsideration of Standard Mail flats rates pending a resolution of CCM's Intervention Motion and Motion to Reopen the Record. This Order resolves those issues. Accordingly, the Commission establishes dates for filing comments and reply comments on Standard Mail flats rates. The Commission sets May 4, 2007 as the deadline for filing initial comments and May 11, 2007 as the deadline for filing reply comments. The Commission believes that such a short timeframe is appropriate and consistent with due process here because the participants have known about the reconsideration since the issuance of the Governors' Decision on March 19, 2007. Moreover, the Commission issued PRC Order No. 8 on March 29, 2007, setting forth the initial deadline for comments on the Standard Mail flats reconsideration issue. It was not until April 5, 2007 — a week later — that the Commission suspended the comment filing deadline. Accordingly, participants have had ample time to prepare for the submission of these comments.

The Governors' Decision submitting the Standard Mail flats issue to the Commission for reconsideration states that they "urge the Commission to use the opportunity to mitigate the recommended increases for catalogs and other flat mailers."

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<sup>16</sup> The Commission is mindful of the fact that instead of denying CCM's Motion to Reopen the Record, it could have denied the Intervention Motion and potentially taken away CCM's opportunity to appeal the merits of the Commission's decision. See 39 U.S.C. § 3628, *see also*, Pennington v. USPS 627 F2d 534 (DC Cir. 1980). The Commission believes that consistent with its Congressional mandate, and fairness and equity, CCM is entitled to the opportunity to point out potential deficiencies in the

Governors' Decision at 12. In filing comments and reply comments on the reconsideration of Standard Mail flats, the participants are invited to comment on the following:

1. Ordinarily, postal rates are viewed as a zero sum situation. That is, if certain rates are reduced, other rates must increase to offset the loss in revenue. If the Commission were to decide that certain Standard Mail flats rates were too high and that adjustments were necessary, specifically,
  - a. which particular rate cells should be reduced, by how much, and why;
  - b. which particular rate cells should be increased, by how much, and why.
2. If rebalancing among flats rate cells only is appropriate, specifically,
  - a. which particular flats rate cells should be reduced, by how much, and why;
  - b. which particular flats rate cells should be increased, by how much and why;
  - c. should the Commission adjust the flats pound rate, by how much, and why.

*It is ordered:*

1. The Motion for Acceptance of Late Notice of Intervention by the Coalition of Catalog Mailers, filed April 3, 2007, is granted, subject to its compliance with previous ruling and orders issued in this proceeding.
2. The Motion of Coalition of Catalog Mailers to Reopen and Supplement the Record, filed April 12, 2007, is denied.
3. Initial comments on the reconsideration of Standard Mail flats are due no later than May 4, 2007.

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Commission's Recommended Decision and material in the record that may support its position on reconsideration.

4. Reply comments are due no later than May 11, 2007.

By the Commission.

Garry J. Sikora  
Acting Secretary