Postal Regulatory Commission
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BEFORE THE
POSTAL REGULARTORY COMMISION
WASHINGTON, D.C. 20268-0001

Annual Compliance Report, 2009 Docket No. ACR2009

REPLY COMMENTS OF NOW YOU KNOW MEDIA, INC.

1. Pursuant to 39 U.S.C. Sec. 403(c) and Sec. 404a, Now You Know Media, Inc. (NYKM) submits these reply comments regarding Docket No. ACR2009. NYKM disagrees with those who did not object to the 2009 Standard Mail Volume Incentive Pricing Program or "Summer Sale."

2. Our reply involves exclusive rebates provided by The United States Postal Service ("Postal Service" to customers who used Standard Mail to send letters and flats between July 1, 2009 and September 30, 2009). These rebates violated 39 U.S.C. Sec. 403(c), and 404a, which prohibit undue or unreasonable discrimination among users of the mails, undue or unreasonable preferences to users of the mails and unjust, unreasonable and inequitable rates and practices.

3. The Commission has jurisdiction over this reply pursuant to 39 U.S.C. Sections 3653 and 3662.

4. Notices and communications about this matter should be sent to:
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5. In its Summer Sale, USPS precluded all mailers that had not mailed at least one million Standard letters and flats between October 1, 2007 and March 31, 2008 from participating. Small or mid-sized mailers had no opportunity to participate regardless of their actual 2009 mailing volumes. They were simply locked out. This discrimination gave a significant and anti-competitive advantage to a small minority of larger mailers.

6. The Summer Sale caused direct and significant harm to small mailers like NYKM. Postage is often the single largest cost component of direct mail. By significantly reducing this cost for large companies, USPS created an

incentive for NYKM's larger competitors to significantly increase mail volumes. Increased mail volume led to a drop in average customer response per piece. As our larger competitors increased mail volumes, NYKM experienced a sharp, significant and across-the-board decline in response rates from its mailing lists, which coincided exactly with the period of the Summer Sale. Specifically, NYKM saw an average decline in per mailing piece revenue of about 33%. But unlike its larger competitors, which were able to absorb lower response rates due to the reduction in their postal expenses from the Summer Sale, NYKM and other smaller mailers experienced a sharp profitability decline.

7. The Summer Sale was not in compliance with the Postal Accountability and Enhancement Act (PAEA) because it was discriminatory, 403(c), and anti-competitive, 404a.

Sec. 403. General duties [of Postal Service]

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

AND

Sec. 404a. Specific limitations

-STATUTE-(a) Except as specifically authorized by law, the Postal Service may not - (1) establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service;

8. Further, because the Summer Sale was conceived of as a market test of a new incentive rebate, the following provisions of PAEA apply:

Sec. 3641. Market tests of experimental products

(a) Authority. (1) In general. - The Postal Service may conduct market tests of experimental products in accordance with this section. (2) Provisions waived. - A product shall not, while it is

being tested under this section, be subject to the requirements of sections 3622, 3633, or 3642, or regulations promulgated under those sections. (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

9. We contend that the Commission has the authority and responsibility under Sections 3622 and 3653 to find the Summer Sale in violation of the PAEA.

Sec. 3622. Modern rate regulation

(a) Authority Generally. - The Postal Regulatory Commission shall, within 18 months after the date of enactment of this section, by regulation establish (and may from time to time thereafter by regulation revise) a modern system for regulating rates and classes for market-dominant products.

(b) Objectives…

* * *

(8) To establish and maintain a just and reasonable schedule for rates and classifications, however the objective under this paragraph shall not be construed to prohibit the Postal Service from making changes of unequal magnitude within, between, or among classes of mail.

* * *

(c) Factors. - In establishing or revising such system, the

(10) Postal Regulatory Commission shall take into account the desirability of special classifications for both postal users and the Postal Service in accordance with the policies of this title, including agreements between the Postal Service and postal users, when available on public and reasonable terms to similarly situated mailers, that

(A) either (i) improve the net financial position of the Postal Service through reducing Postal Service costs or increasing the overall contribution to the institutional costs of the Postal Service; or (ii) enhance the performance of mail preparation, processing, transportation, or other functions; and

(B) do not cause unreasonable harm to the marketplace.

10. Therefore, we ask that the Commission find the sale in violation of sections 403(c) and 404a.

11. Further, we ask that in the future the United States Postal Service (USPS) be required to make its future sales available to small and mid-sized mailers. Given that USPS plans to initiate a 2010 seasonal volume incentive program similar to the 2009 Summer Sale, we ask that the Commission compel USPS to abide by the clear language of the statute and forgo its plans to discriminate.

12. Small and mid-sized companies are the engines of U.S. job growth. Today's small companies are tomorrow's larger companies. Discriminatory pricing practices, such as the USPS Summer Sale, threaten the lifeblood of small companies, which in term threatens the long-term financial viability of the USPS.

13. NYKM, its mail service provider, and a major trade association have made these concerns known to USPS. At the urging of Chairman Goldway, the Commission urged NYKM to work out a solution with USPS.

14. For example, in October 2009, Michael Bloom, CEO of NYKM, met with the President of USPS Mailing and Shipping Services, Mr. Robert F. Bernstock. Mr. Burnstock asked his staff and NYKM to work collaboratively to develop a mechanism to allow small mailers to participate. Since that point, this team developed several solutions designed to enable broader participation. NYKM worked with several experts to evaluate these options. Over the course of four months, USPS rejected every single compromise solution offered up by either its own senior staff or NYKM and its advisors. NYKM mailed approximately 600,000 pieces in 2009. Thus, under the terms of the next proposed Summer Sale, NYKM and similar organizations would again be discriminated against and not allowed to participate.

15. Some of the potential solutions discussed include: A) Require all participate mailers to mail using a CAPS account to facilitate mail volume tacking, B) Require use of Intelligent Mail Barcode system, C) Require each small mailer and its mail service provider(s) to certify mail quantities, D) Require small mailers to either exactly meet all rebate documentation specifications or cure any documentation defects promptly.

16. In February, 2010 the USPS communicated its intent to reject all compromise solutions in favor of a future discriminatory sale program similar in design and effect as the 2009 Summer Sale. USPS has made generalized claims that administering the program for all but the largest fraction of mailers would create an administrative burden. However, USPS has provided no evidence that a small mailer would create more administrative burden than a large

mailer. Indeed, it has been demonstrated that administering a volume incentive program for a smaller mailer could be made significantly less complex than for a larger mailer.

17. The USPS violated the clear language of the PAEA, resulting in direct and harmful discrimination and anti-competitiveness. We urge that the Commission: A) Find the 2009 Summer Sale in violation of sections 403(c) and 404a and/or B) Require USPS to make its future rebates and sales available to small and mid-sized mailers.

Respectfully submitted,

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