

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Market Test of Experimental Product—)
Marketing Mail Made Easy)

Docket No. MT2011-3

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
REPLY COMMENTS REGARDING MARKET TEST OF
EXPERIMENTAL PRODUCT — MARKETING MAIL MADE EASY
(February 15, 2011)**

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc.

(hereafter "Valpak") submit these joint reply comments in response to Order No. 649 (Jan. 13, 2011) with respect to the Postal Service's proposed market test of an experimental product under 39 U.S.C. section 3641 — "Notice of United States Postal Service of Market Test of Experimental Product — Marketing Mail Made Easy." These reply comments respond to the Initial Comments of the Newspaper Association of America and the Initial Comments of the Public Representative.

1. Newspaper Association of America's Opposition.

The Newspaper Association of America's ("NAA") Opposition (Feb. 4, 2011) to the Marketing Mail Made Easy ("MMME") market test argues that the Postal Service proposal has failed to demonstrate compliance with either 39 U.S.C. section 3641 (governing market tests) or 39 U.S.C. section 404a (specific limitations). NAA Opposition, pp. 8-10. NAA argues that the Postal Service has made a number of specified changes to its mailing regulations, entry requirements, and rates that, when viewed in light of the MMME proposal, clearly "establish the terms of competition" in its favor in violation of section 404a.

Prior to reviewing NAA's comments, Valpak had not considered the applicability of 39 U.S.C. section 404a, which provides that the:

Postal Service may not ... 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. [Emphasis added.]

Interestingly, section 404a's general requirement that the Postal Service "**not create an unfair competitive advantage for itself**" is remarkably similar to section 3641(b)(2)'s specific requirement that the Postal Service show that a market test does "**not create an unfair or otherwise inappropriate competitive advantage for the Postal Service....**" (Emphasis added.)

While not disagreeing with NAA's assertion of the applicability of section 404a, and despite the similarity of these two provisions, an important difference exists as to how they are enforced. The Postal Accountability and Enhancement Act ("PAEA") appears to anticipate that violations of 39 U.S.C. section 404a would be enforced principally by the Commission when a complaint against the Postal Service is filed pursuant to section 3662.¹ If that were the only constraint against market tests such as MMME, one might argue that the Commission could overlook the violation, and await the filing of a complaint. Although the complaint process is costly and time consuming, if the Postal Service chooses to ignore the limitation on its authority in section 404a, the Commission might be tempted to avert its eyes, and allow the market test to go forward. However, violations of section 3641 governing market tests cannot

¹ See 39 U.S.C. § 404a(c) ("Any party (including an officer of the Commission representing the interests of the general public) who believes that the Postal Service has violated this section may bring a complaint in accordance with section 3662.").

be disregarded by the Commission. The market test statute establishes express condition precedents for the market test to go forward.²

Although many of those filing comments in this docket by letter may not have specifically referenced the precondition in section 3641(b)(2), they make out a case that the test creates an unfair competitive advantage for the Postal Service. Unless the Commission opts to disregard completely the seemingly unanimous opinion of all parties who filed comments opposing this market test,³ many of whom argued in essence that it would “create an unfair or otherwise inappropriate competitive advantage,” the Commission has no latitude, but must order the Postal Service to scrub the proposed test for failure to comply with 39 U.S.C. section 3641.

2. Public Representative’s Initial Comments.

The Public Representative’s opposition to the market test raised another issue which Valpak had not considered — that many Mail Service Providers “have substantially fewer than 500 employees devoted to mailing, labeling, and transportation ... and so would qualify them as small businesses.” *See* PR Comments, p. 6. The “market disruption” precondition of

² *See* 39 U.S.C. section 3641 (“A product **may not be tested** under this section unless it satisfies each of the following” preconditions) (emphasis added).

³ It is interesting to see how similarly NAA, the Public Representative (“PR”), and Valpak view one aspect of why the Postal Service failed to satisfy the 3641(b)(2) requirement. *See* NAA Opposition, p. 7 (“The thrust of MMME will be to **cannibalize** its current Standard mail volume by competing against its own customers in the advertising market...” (emphasis added); PR Comments (Feb. 4, 2011), p. 8 (“[T]he Postal Service should also collect the following data if the Commission approves MMME ... a record of the **cannibalized** volume of mail by product and rate element.”) (emphasis added); Valpak Initial Comments, p. 9 (“The Postal Service needs to consider that the success of new programs like MMME may come from **cannibalization** of existing mail.”) (emphasis added).

section 3641 is heightened with respect to small businesses (addressing unfairness “particularly in regard to small business concerns (as defined under subsection (h)).”)

Valpak Dealers Association, Inc. consists of over 200 independent Valpak franchisees, each with a limited geographical territory. Not only do none of the Valpak franchisees have over 500 employees (the Small Business Administration (“SBA”) number referenced by the PR) — none have over 50 — and most have under 20 — and each one is an independent business. Their ability to market their shared mail product would be affected adversely by competition from MMME. The interest of the Valpak franchisees as small businesses is aligned with the interest of the Mail Service Providers as small businesses, requiring heightened consideration from the Commission.

Respectfully submitted,

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