Postal Rate Commission
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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

RATE AND SERVICE CHANGES TO IMPLEMENT FUNCTIONALLY EQUIVALENT NEGOTIATED SERVICE AGREEMENT WITH DISCOVER FINANCIAL SERVICES, INC.	))))	Docket No. MC2004-4

VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
REPLY COMMENTS ON LIMITATION OF ISSUES
(August 5, 2004)

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. ("Valpak") hereby respond to written comments on the Postal Service's Proposal for the Limitation of Issues. POR No. MC2004-4/1 requested written comments to the Postal Service's proposal by July 29, 2004 (at which time the Office of the Consumer Advocate ("OCA"), Valpak, Discover Financial Services, Inc. ("DFS"), and the Postal Service filed comments), with written responses by August 5, 2004.

Generally, Valpak agrees with the Postal Service's filing of July 29, 2004, urging that functionally equivalent Negotiated Service Agreements ("NSAs") be treated with expedition. Valpak believes that the Commission's rules accomplish this objective, while protecting the due process rights of intervenors and OCA. And Valpak agrees in concept that the Commission should look favorably on efforts to limit the issues litigated to achieve that expedition. Indeed, Valpak's major concern is for the protection of the due process rights of intervenors and OCA to explore the three issues set out in Rule 3001.196(a)(6), as well as such issues necessarily raised by each filing for a functionally equivalent NSA. As demonstrated in its July 29, 2004 filing on limitation of issues, Valpak has no real opposition to the Postal

Service's proposal to limit issues in this docket as Valpak has chosen to raise no issues in this docket which are not subsumed by the three issues set out in the Postal Service's proposal to limit issues.

On the other hand, Valpak has a few comments on the DFS Comments of July 29. DFS seeks speed and efficiency in handling a functionally-equivalent NSA, not "the squabbling of lawyers and economists over econometric models." (at 2). However, questioning the basis for a proposed functionally equivalent NSA should not be viewed as creating a squabble. The issues involved in this docket are not just about arcane models. It is perfectly reasonable for intervenors and OCA to scrutinize such proposals. However, fortunately, it appears that Valpak, OCA, and the Postal Service's efforts to conduct informal discovery are succeeding, and, at least for Valpak, it appears that all that is needed is reasonable responses from the Postal Service — that it fully expects to receive — to its final few interrogatories, which have grown out of informal consultations between the Postal Service lawyers and economists, and Valpak lawyers and economists. Valpak hopes to be able to notify the Commission that it would withdraw its protective request for a hearing before the August 17, 2004 deadline. Nevertheless, a few comments on the procedural issues involved are in order.

Apparently lost on DFS is the reality that a party's decision to seek a hearing is not an uncomplicated or inconsequential matter. A hearing may be necessary, for example, to explore disputed issues of fact, but sometimes more than one round of discovery is necessary to determine whether such disputes exist. A party may submit written interrogatories, but whether the answers it receives will be satisfactory is far from guaranteed. The many objections to Valpak interrogatories filed by DFS attest to this reality. When a party receives

nonresponsive responses it can submit follow-up interrogatories, but there is no guarantee that responses to those will be satisfactory, either. In that instance, the only real remedy available is the use of oral cross-examination at a hearing. Failure to request a hearing would waive the opportunity for oral cross-examination. Proponents who successfully pressured intervenors into waiving their right to cross-examine orally, of course, would also be insulating themselves from the need to submit responsive answers. (Fortunately, Valpak can report that the responses of the Postal Service to discovery in this docket to date have been responsive, if not commendably forthcoming.)

Further, DFS appears not to understand that until answers to interrogatories are received, in many cases, it may be difficult, and in some cases impossible, to know whether it will be necessary to file testimony to amplify the record for the benefit of the Commission.

For both reasons, no party should be put to the decision of being forced to request a hearing or waive it at the outset of the docket. At the July 21, 2004 settlement conference, counsel for DFS complained that no issues had been raised by any party. Certainly, no agreement was reached as to whether a hearing was warranted (*see* Report of Settlement Coordinator, July 22, 2004, p. 1, 2), and both OCA and Valpak filed statements of known issues on July 23, 2004.

Although the Commission specified that it would be liberal in applying rules in this first docket of an NSA asserted to be functionally-equivalent (Prehearing Conference, July 15, 2004, Tr. 1/5, ll. 12-16), the co-proponent has asked the Commission to be extremely strict in defining new rules limiting participation by intervenors and OCA.

Fortunately, the Postal Service appears to have taken a more reasonable path, recommending that the issue of a hearing be deferred until after the August 17, 2004 date set for parties to request oral cross-examination of Postal Service witnesses. United States Postal Service Response to Motions for Hearing by OCA and Valpak, p. 4, July 28, 2004.

Intervenors and OCA should not be asked to accept blindly the proponents' evidence as accurate and devoid of errors. Indeed, the entire system — all parties included — benefits when established rules and procedures are fairly employed.

Respectfully submitted,

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