

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

POSTAL RATE AND FEE CHANGES, 2005)

Docket No. R2005-1

REVISED RESPONSES OF VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.

WITNESS ROBERT W. MITCHELL TO INTERROGATORIES OF
UNITED STATES POSTAL SERVICE (USPS/VP-T1-5, 8 and 9) (Errata)
(September 2, 2005)

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

("Valpak") hereby submit revised responses of witness Robert W. Mitchell to the following interrogatories of Postal Service: USPS/VP-T1-5 and 8, filed August 19, 2005, and USPS/VP-T1-9, filed August 22, 2005. Each interrogatory is stated verbatim and is followed by the response. Counsel for the Postal Service has advised counsel for Valpak that the Postal Service wants to designate the interrogatory responses of witness Mitchell to their interrogatories, and Valpak does not object to such late designations. However, had Postal Service had designated these responses at the hearing when witness Mitchell testified, he would have made these changes

Respectfully submitted,

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**Response of Valpak Witness Mitchell
to Interrogatory of Postal Service**

Revised 9/2/05

USPS/VP-T1-5.

On page 16 of your testimony, you state:

“[A]rguments that the Postal Service has a financial interest in implementing rates a month or so sooner lack merit. The Postal Service has had full control over the timing of this case and it has known of the escrow requirement since P.L. 108-18 was enacted on April 23, 2003. Borrowing options are available to allow flexibility and to smooth things out over time. Neither a desire for a settlement nor a hurry to realize increased revenue is a credible justification for an ATB approach.” (footnote omitted).

- (a) Is it Valpak’s position that the Postal Service should have filed a request for recommendations on rate increases earlier than April 8, 2005?
- (b) Is it Valpak’s position that the Postal Service should have filed a request for recommendations on rate increases later than April 8, 2005?
- (c) Is it Valpak’s position that the Postal Service should have exercised its “borrowing options” to delay the filing of a request for recommendations on rate increases? Please explain any negative responses.

RESPONSE:

a.-c. None of these represent specific Valpak positions. My view is (i) if a rate case had to be filed, it should have been a full, normal case, (ii) there is no basis for funding, and no real way to fund, one category of expenses one way and another category of expenses another way, and (iii) the Postal Service should have had no real difficulty in working out any associated problems of timing and financing.

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USPS/VP-T1-8.

Is willingness to enter into a settlement agreement adopting a particular set of rates an indication of the impact of those rates on mailers and other participants adhering to the agreement?

RESPONSE:

Most observers would probably agree, as I do, that “willingness to enter into a settlement agreement adopting a particular set of rates” is “an indication” of the acceptability of the rates involved, and I would presume that “participants adhering to the agreement” have considered the effects of the rates. But concern over effects might be a key factor leading to an unwillingness to sign an agreement only when the effects seem larger than average on their face, which cannot happen in an across-the-board proposal. On the other hand, such a willingness may not be enough to satisfy the Act’s requirements.

Several observations are important. (1) The obligation of the Commission is to consider the interests of all mailers, regardless of whether they are represented in a particular case. (2) It is possible for participants to be organizations representing rather broad collections of mailers. If such organizations believe updating costs and examining the bases for the proposed rates will do little more than make some members worse off and some better off, they may decide not to raise questions. (3) Mailers seeing no proposals for classification or other structural changes, and feeling that it would be difficult to introduce such proposals, might have reduced interest in a full examination of the issues. In other words, improvements in rates normally have differential effects on mailers, so a case without improvements is less likely to cause concern over effects. (4) In any settlement arrangement, it seems likely that at

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least half of the participants would believe they might be made worse off by what is sometimes referred to as a “full blown” case. These parties would provide the Postal Service with a base for a settlement. (5) Under these conditions, it seems possible that only a limited number of parties would see potential benefit from a full proceeding.

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USPS/VP-T1-9.

On page 17 of your testimony, you state:

Focusing on settlement as a goal in such a situation introduces a dynamic that may be out of line with appropriate ratemaking. It is altogether possible that the Postal Service, in negotiating with intervening parties, who may represent the interests of some mailers to the neglect of others, will find that it can achieve settlement by proposing rates that it cannot justify as most appropriate, in hopes that the Commission will do little more than certify that the rates in the settlement are within a range allowed by law instead of being the best for the nation. The incentives of such a dynamic are unacceptable and should not be allowed to dictate the nation's postal rates and fees.

- (a) Please explain fully your words "a range allowed by law."
- (b) Please explain fully your words "best for the nation."
- (c) Please identify and explain every consideration, factor, or criterion encompassed by your use of the words "incentives of such a dynamic."

RESPONSE:

- a. My conception is that the Act provides both guidance and strictures, that neither of these are precise, and that more than one set of rates is consistent with them. Also, as I explain further in my response to part b of this question, I define a best set of rates as the result of the Commission's deliberative process, when that process is supplied with a full record and no settlement agreement. I take it as obvious that the best set of rates should be one of the sets that is not inconsistent with the Act.

Although I do not want to be accused of practicing law, the courts have been presented with cases relating to whether specific sets of rates are inconsistent

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with the Act. In NAGCP-III, the court said: “In considering the various challenges to the assignment of service related costs, we recall that we judge a particular ratemaking methodology by whether it is reasoned, nonarbitrary and congruent with the statutory mandate.” National Association of Greeting Card Publishers v. United States Postal Service, 607 F.2d 392, 407-08 (D.C. Cir. 1979). In Newsweek, the court said: “The selection of one approach from among acceptable alternatives is a matter for agency expertise.” Newsweek v. United States Postal Service, 663 F.2d 1186, 1194 (2d Cir. 1981). In the AAP case, the court said: “But, though courts hesitate so to admit, they know that in the rate-making area, John Selden was prophetic in declaring that in governing it is not juggling, but too much juggling that is to be blamed” and “Ours is only to determine whether the Postal Service lacked substantial evidence for rates it prescribed, took into account irrelevant considerations, omitted relevant considerations, flouted a statutory command, acted *ultra vires*, or denied a Constitutional right.” Association of American Publishers, Inc. v. Governors of the United States Postal Service, 485 F.2d 768, 773 and 775, respectively (D.C. Cir. 1973). I take these to mean that many sets of rates might be consistent with the law and that too much juggling involves such things as lacking substantial evidence, as the court explained further.

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The heading of Section I of the Postal Service's Reply Brief (p. I-1) in Docket No. R94-1 was: "THE PROPOSED SETTLEMENT SHOULD BE ACCORDED GREAT WEIGHT BY THE COMMISSION." On the next page it said: "No one is attempting to bind anyone's hands here. The settlement parties always have recognized that the Commission cannot – even in the face of a unanimous settlement proposal – dispense with an independent assessment that the settlement rates and fees are in full compliance with the criteria of the Act." (*Ibid.* at I-2.) I take "full compliance" to mean that it is reasoned and nonarbitrary, and that it does not involve too much juggling. When the Commission is asked to give "great weight" to a settlement proposal, whether unanimous or not, I believe it is being asked to find that the rates, fees, and DMCS language in the settlement are in full compliance.

- b. The Act establishes a set of guidelines for setting rates and provides for review and decision-making by five commissioners. The process is guided as well by Commission rules and by principles the Commission has adopted. The usual procedure is for the Commission to be presented with proposals and testimony from the Postal Service and interested parties. When the Commission is presented with a complete record and makes an unincumbered recommendation (meaning, for present purposes, that it is not presented with a settlement agreement, unanimous or not), I view a recommended decision coming from

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such circumstances as the best for the nation. I understand that a different record or different commissioners could lead to a different recommendation.

But the process I have described is the process that Congress put in place, and it must be defined as the reference point and the collective judgment on what is best.

- c. I take it as evident that it is possible for the Postal Service to have a strong preference for working out a settlement agreement. It seems clear on its face that the proposal viewed by the Postal Service as most likely to achieve settlement might differ from the proposal that it would view as best for the nation, under the guidance in the Act, developed objectively and independently. Viewed in terms of the Act's ratesetting scheme, I don't see anything good about having this difference occur. And if the Postal Service were to negotiate in any way with mailers to improve the chances for settlement, and in the process were to make adjustments to any rate package it is considering for submission to the Commission, then I think the difference between what is proposed and what the Postal Service really views as best under the Act could become greater.

If the Postal Service were to believe that when it can obtain a settlement, the record need not be fully developed, and the Commission's review will be less

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thorough, the Postal Service's freedom to deviate from what it might view as most appropriate under the Act will be greater. This is the incentive I have in mind. The possibility of any of this happening makes it all the more important for the Commission to seek a complete record and undertake a thorough review.