

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

POSTAL RATE AND FEE CHANGES, 2006 )

Docket No. R2006-1

VALPAK DIRECT MARKETING SYSTEMS, INC. AND  
VALPAK DEALERS' ASSOCIATION, INC.  
OPPOSITION TO LATE INTERVENTION  
BY COALITION OF CATALOG MAILERS  
(April 13, 2007)

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereinafter "Valpak") oppose the Motion for Acceptance of Late Notice of Intervention by the Coalition of Catalog Mailers and oppose its intervention. (According to Presiding Officer's Ruling ("POR") No. R2006-1/130, oppositions to that motion are due by today, April 13, 2007. Rule 20(d).)

On February 26, 2007, the Commission's Opinion and Recommended Decision was issued. On March 19, 2007, the Governors of the United States Postal Service allowed certain rates to take effect under protest, including rates for Standard Regular letters and flats, while seeking Commission reconsideration of those Standard Regular rates.<sup>1</sup> On March 28, 2007,

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<sup>1</sup> Valpak understands the Decision of the Governors the same way as does the Postal Service (Initial Statement of the United States Postal Service on Reconsideration, March 28, 2007, pp. 9-12) and the Commission (Notice of Request for Reconsideration and Order Establishing Procedures, March 29, 2007, p. 4, n.6) that only Standard Regular Mail rates were remanded by the Governors (and therefore Standard ECR rates are not now before the Commission). Although Valpak primarily uses Standard ECR mail, not Standard Regular mail, many of the same principles involving the appropriate passthroughs of letter-flat cost differences apply to both subclasses of Standard mail. Therefore, if the record involving Standard Regular mail were now reopened, Valpak would need to participate actively to seek to defend the interests of letter mailers, including filing interrogatories, conducting oral cross-examination, rebuttal testimony, and complete briefing.

the Postal Service filed its “Initial Statement” on Reconsideration, indicating its position that “reconsideration in this instance can be conducted without the need to reopen the record.” On March 29, 2007, the Commission issued a Notice of Request for Reconsideration and Order Establishing Procedures (Commission Order No. 8), requiring parties to file requests to reopen the record by April 4, initial comments by April 12, and reply comments by April 19. This Order properly cautioned potential commenters who had not intervened from relying on anecdotal evidence, as follows:

While the procedures adopted herein provide an opportunity for comments, the Commission reminds **potential commenters** [*i.e.*, non-intervenors] of the need to rely on record evidence. Anecdotal comments **unconnected to the record**, particularly **from persons not parties to the proceeding**, are problematic and cannot be relied on by the Commission in resolving issues raised on reconsideration. [Commission Order No. 8, p. 6 (emphasis added) (footnotes omitted).]

It appears that to circumvent the Commission’s restrictions on the role of non-intervenors in this remand, and the Commission’s inability to rely on non-record evidence, a new mailer association was formed. On April 3, 2007, a “newly formed ad hoc coalition” of mailers named the “Coalition of Catalog Mailers” (“CCM”) made three filings: (i) a Notice of Intervention, (ii) a Motion for Acceptance of Late Notice of Intervention, and (iii) a Motion for an Extension of Time in which to file a Motion to Reopen and Supplement the Record for Reconsideration. In response, on April 5, 2007, in POR No. R2006-1/130, the Presiding Officer granted the CCM Motion for an Extension of Time in which to file a Motion to Reopen and Supplement the Record for Reconsideration, which had been April 4, and suspended the

April 12 and April 19 deadlines with respect to Standard Mail issues. (This POR also noted that oppositions to CCM's notice of intervention were due on April 13.)

Commission rules require that interventions either must be timely or can only be approved on motion "in extraordinary circumstances for good cause shown."

*Form and time of filing.* 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....** [39 CFR § 3001.20(c) (emphasis added).]

According to the Commission Order commencing this docket, notices of intervention were due "no later than May 31, 2006" — over ten months ago. Order No. 1464, pp. 11, 13. Clearly, CCM must meet this test of "extraordinary circumstances for good cause shown." (CCM itself recognizes that it must meet this test, as it states in its Motion for Acceptance of Late Notice of Intervention, p. 1.) However, coming as it does, ten months after the deadline for intervention, after close of the record and issuance of an Opinion and Recommended Decision and the Governors' Decision, under the circumstances set out below, it is submitted that this test has not been met.

Indeed, CCM's only arguments in its Motion for Acceptance of Late Notice of Intervention are as follows:

The Recommended Decision contained certain significant rate **increases** for Standard Mail flats that had **not been generally expected** by the parties in the rate case or by the catalog industry in general. [Motion, p. 1 (emphasis added).]

CCM could not have intervened earlier because it was **not in existence until this week**. The individual catalogers did not individually intervene earlier in the rate case because they **did not anticipate** that the Commission would propose rates for Standard

Mail flats **in excess of the rates proposed** by the United States Postal Service and were thus **unaware** of the disastrous impact on their businesses of the current rate increases. [Motion, p. 2 (emphasis added).]

Moreover, some of the catalogers are **members of trade associations for Standard Mail letters and flats mailers** that did participate in the rate case on behalf of all mailers of Standard Mail, not just mailers of flats. [Motion, p. 2 (emphasis added).]

These allegations are not persuasive, and certainly they establish neither “extraordinary circumstances” nor “good cause shown.”

First, the fact that a Recommended Decision contains rates “that [CCM claims] had **not been generally expected** by the parties in the rate case or by the catalog industry in general” cannot justify intervention after the Recommended Decision is issued, for at least two reasons. Aside from the statement in CCM’s motion, no evidence is available on what rates “the parties in the rate case” or “the catalog industry in general,” for whom CCM appears to be speaking at this point, “had [ ] been generally expect[ing].” Even if it were presumed that “the parties in the rate case [and] the catalog industry in general” had been expecting the rates proposed by the Postal Service, this reason would not be reasonable. Anyone with even a passing understanding of the way in which the Postal Reorganization Act (“PRA”) has operated and the manner in which postal rates have been set for the past 35 years would understand that the Commission is obligated to recommend rates the record supports. Sometimes these rates are higher and sometimes lower than those proposed by the Postal Service. In effect, what CCM heralds as troublesome is actually standard fare; it would be surprising if it were otherwise. The notion of such a limitation on the Commission has no support in law or practice. Reliance on such a notion is virtually incomprehensible.

Second, if CCM was not in existence for even one week at the time that it filed this late notice of intervention, it certainly could not be considered an established mailer or representative of mailers. Its only reason for intervention would be derivative of its members' interests as mailers, so their situation must be examined.

Third, all mailers have been on express notice from the Commission that rates in Docket No. R2006-1 could result in rate shock, largely because current rates were recommended at the urging of many mailers and associations of mailers that did not want rates to be correlated to costs following Docket Nos. R2001-1 and R2005-1. Therefore, at the conclusion of Docket No. R2005-1, the Commission warned:

Facing an additional, imminent rate case most participants are willing to accede to the Postal Service's preference, and defer the complex cost analyses necessary to apply efficient component pricing principles until that case. This may be explained, in part, by the fact that the Postal Service could easily have filed a request for substantially more money had it not limited its focus to funding its escrow payment.

After careful consideration, the Commission agrees that under these unique circumstances, small equal increases now, to be **followed by a proceeding to "true-up" rates after a thorough examination of postal costs**, is consistent with sound public policy. The Commission's preference is to develop rates that accurately reward mailers' worksharing. It is concerned that the delay in recognizing the impact of recent innovations and improvements in postal operations, coupled with the passage of time, **will probably result in unusually disproportionate increases and decreases in different rates in the next case**. The Postal Service and mailers seem prepared for that possibility as they too recognize that proper cost-based rates foster efficiency and promote a healthy postal system. The Commission's Opinion identifies areas where additional analysis appears particularly necessary....

**Rate shock arguments** are often raised in rate proceedings. They are likely to be raised in the next proceeding as well, in which case the Commission will assess their merits

based on the record developed in that proceeding. **Parties should be aware** that the Commission will seek to obtain **economically efficient cost-based rates** and appropriate allocation of institutional burdens. The discussion of rate design in the following chapter highlights **several problematic areas deserving of closer examination in the next proceeding**. [Docket No. R2005-1, Op. & Rec. Dec., p. ii and ¶5032 (emphasis added), quoted in Docket No. R2006-1 by witness Mitchell in VP-T-1, pp. 7-8 ]

The proceeding to “true-up” rates after a thorough examination of postal costs commenced with the filing of a Postal Service request on **May 3, 2006**, and was designated as Docket No. R2006-1. The “unusually disproportionate increases and decreases in different rates in the next rate case” have now occurred, exactly as the Commission predicted (and warned) in Docket No. R2005-1. Mailers should not be heard now to say that they were completely unaware of everything that has happened at the Commission since Docket No. R2001-1 and that they were unaware of the Commission’s warning in Docket No. R2005-1.

Fourth, any mailer which observed the progress of Docket No. R2006-1 had to be aware that the Postal Service proposed rates were not the only rates proposed on the record before the Commission. Over seven months ago, on **September 6, 2006**, Valpak witness Robert W. Mitchell submitted a comprehensive set of Standard Regular and ECR rates in his testimony, VP-T-1. This testimony criticized Postal Service rates for failure to recognize properly demonstrated cost differences between flats and letters, resulting in the overcharging of letters to benefit flats that has occurred in the past and would continue under Postal Service proposed rates. *See, e.g.*, VP-T-1, p. 115, l. 6 - p. 116, l. 13; pp. 116 - 123; p. 120; p. 156, l. 20 - p. 161, l. 5 (a presort tree excerpt for letters and flats is shown on page 158, which

shows costs, cost differences, passthroughs, and rates); pp. 192-93 (specific percentage rate increases for letters and flats are shown in Chart 1).<sup>2</sup>

Moreover, over six months ago, on **October 3, 2006**, witness Mitchell filed a response to USPS/VP-T1-4 which clearly showed his specific, proposed percentage increases for flats. Certainly, the table in this interrogatory and response would put any mailer on notice that the Commission had before it large changes in Standard Regular flats rates. (Witness Mitchell made minor corrections to these rates in his response.)

	3 ounce	5 ounce	8 ounce	14 ounce
<b>Standard Mail Regular</b>				
Automation 5-digit, DSCF Letter	5.2%			
Automation 5-digit, DSCF Flat	39.1%	29.8%	19.7%	10.2%
Nonmachinable 3-digit DSCF Parcel	55.9%	49.9%	41.9%	31.9%
Machinable DBMC Parcel—Barcoded			73.4%	62.2%
NFM--3-digit DSCF	169.0%	141.7%	113.0%	85.7%
<b>Standard Mail ECR</b>				
Basic DSCF Letter	-15.8%			
Saturation DSCF Letter	-24.8%			
Basic DSCF Flat	-2.8%	-3.5%	-4.9%	-6.1%
Saturation DSCF Flat (On-piece Addressed)	-14.2%	-12.3%	-11.0%	-9.9%

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<sup>2</sup> Further, on top of all of the letter-flat adjustments proposed by witness Mitchell, the Postal Service had recommended a coverage for Standard Regular Mail of 170.4 percent. Witness Mitchell's rates were predicated on a recommended coverage for Standard Regular of either 180.2 percent or 175 percent, depending on whether the proposed adjustments between Standard Regular and Standard ECR occur in one or two steps (p. 97). If the 180.2 percent coverage he recommended had been adopted for both letters and flats, the rates for all Standard Regular products (including flats) would be approximately 6 percent more than those recommended by the Postal Service.

Thereafter, on **November 20, 2006**, Postal Service witness James Kiefer filed rebuttal testimony (USPS-RT-11) to witness Mitchell's testimony, and addressed the letter-flat issues. However, even he concluded that flats were underpriced compared to letters.

I do not believe that existing rate relationships are carved in stone and must never change. Indeed, I am sympathetic to the view, strongly advocated by Valpak in this docket, that Standard Mail **flats should bear a greater share of the Standard Mail institutional cost burdens.** [USPS-RT-11, p. 20, ll. 20-23 (emphasis added).]

Clearly, the Postal Service conceded the importance of Standard Mail flats paying a greater share of the institutional cost burden, and interested mailers would have been on notice.

Fifth, the argument in the CCM Motion concerning Standard Mail trade associations to which its members already belong is confusing and vague, but it must be conceded that the associations representing Standard Mail users are some of the most prestigious mailer associations, and are represented by some of the most able lawyers and economists.

Further, CCM's motion for late intervention is notable for what it did not allege. Nowhere did CCM allege or argue either that (i) no other party adequately represents its interests, or (ii) no other party will be prejudiced or disadvantaged if CCM is allowed to intervene.

As to the first omission, nowhere did CCM allege or argue that no other party adequately represents its members' Standard Mail interests. Indeed, it could not. Direct Marketing Association ("DMA")<sup>3</sup> and Association for Postal Commerce ("PostCom") have

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<sup>3</sup> Indeed, perhaps the largest association, DMA, previously has given voice to the interests of the catalog industry and flats mailers before the Governors. *See* DMA March 8, 2006 letter to Governors. <http://www.the-dma.org/government/GovernorsLetter.pdf>

aggressively represented the interests of Standard Mail users for many years. Moreover, the Mail Order Association of America (“MOAA”) is a well-established association that historically has aggressively litigated omnibus rate case solely on behalf of flats mailers and has been considered to be the voice of the catalog mailer. In this docket, MOAA filed, *inter alia*, the rebuttal testimony of Roger C. Prescott (MOAA-RT-1) on November 20, 2006, which took issue with certain of the letter-flat recommendations made by witness Mitchell. The fact that the Commission chose to pass through in rates a percentage of the demonstrated letter-flat cost differential higher than certain mailers wanted is no basis to claim “extraordinary circumstances” and “good cause shown.” Certainly, CCM has not shown any good reason why flats mailers who ignored the Commission’s proceedings should now have another bite at the apple.

As to the second omission, the Governors’ Decision (March 19, 2007) and the Postal Service’s Initial Statement on Reconsideration (March 28, 2007) both indicate that if this remand were to result in any mitigation of rates for flats mailers, it will come at the expense of letter mailers whose rates will be increased. Also, if CCM were allowed to intervene and reopen this docket after it has been fully litigated by the intervenors, it would force those intervenors which have already incurred substantial expense to incur substantial additional legal and economic expense to study, cross-examine, and rebut as necessary, the evidence which CCM asserts that it now wants introduced into the record. The litigation phase of Docket No. R2006-1 is over, and it should not be restarted by permitting this intervention so that this group of mailers can reopen the record to litigate issues that it had previously elected

to forego.<sup>4</sup> Indeed, if the record, which was officially closed on December 19, 2006 (POR No. R2006-1/129), were reopened at the request of this group of mailers that previously had not intervened, and a remand were to result in higher rates for letters and lower rates for flats, could another *ad hoc* coalition of letter mailers not a party to the remand thereafter claim that they had not anticipated higher letter rates, and ask for yet another round of hearings before the Commission? If ratesetting proceedings can be ignored by interested businesses, and those businesses are then given the right to reopen decided matters after-the-fact, there would be proceedings without end. At some point, there must be an end to litigation.

In conclusion, the Commission had a responsibility under the PRA, the Administrative Procedures Act, and its own rules, to establish rates upon the record. The Commission did exactly what it was required to do. The fact that any mailer or group of mailers failed to introduce record evidence on a particular point is no one's fault but those mailers. A mailer cannot establish "extraordinary circumstances" or "good cause shown" when it has ignored the opportunity to litigate a case which has reached an eminently predictable, albeit adverse, result for some.

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<sup>4</sup> In the only prior instance that has been identified by counsel for these intervenors of the Commission considering an intervention on remand, these two missing factors appear to have been central to the Commission permitting intervention. *See* Order Granting Petition for Late Intervention, Docket No. R80-1, p. 2. There, the intervenors were not mailers, but competitors of the Postal Service, and apparently there were no other similarly-situated intervenors in the docket, which is quite unlike this situation. There, the Commission expressly found that "petitioners' interests are not adequately represented by existing parties and that no party will be prejudiced if petitioners are allowed to intervene." *Id.*, p. 2. Moreover, unlike this request, it appears that the request for late intervention in Docket No. R80-1 was unopposed.

If not allowed to intervene at this late date, of course, CCM still has two avenues open to it. First, it is free to file comments (which do not become part of the record). Second, it is free to urge those other associations of which CCM's members are members, and which have been intervenors in this docket since May 2006, to advance its interests. Moreover, in future dockets, if it timely intervenes, it is free to intervene in its own behalf.

For all of the foregoing reasons, the motion for acceptance of late notice of intervention by the Coalition of Catalog Mailers should be denied.

Respectfully submitted,

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