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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

ANNUAL COMPLIANCE REPORT, 2008	)))	Docket No. ACR2008

REPLY OF VALPAK DIRECT MARKETING SYSTEMS, INC., VALPAK DEALERS' ASSOCIATION, INC., NATIONAL ASSOCIATION OF PRESORT MAILERS, AND ASSOCIATION OF PRIORITY MAIL USERS, INC. TO RESPONSE OF THE UNITED STATES POSTAL SERVICE TO COMMISSION ORDER NO. 155
(January 21, 2009)

On December 29, 2008, the Postal Service filed a Response regarding Commission Order No. 155 (Dec. 23, 2008). *See* Response of the United States Postal Service to Commission Order No. 155, Docket No. ACR2008 (December 29, 2008) (hereinafter "USPS Resp."). Valpak Direct Marketing Systems, Inc., Valpak Dealers' Association, Inc., National Association of Presort Mailers, and the Association of Priority Mail Users, Inc. (hereinafter "Valpak/NAPM/APMU") submit this joint reply.

BACKGROUND

The Postal Service's Response purports to be an effort to explain how the Postal Service's 2008 Annual Compliance Report ("ACR") materials "relate to" Commission Order No. 155. USPS Resp., p. 1. This followed on the heels of the Postal Service's motion to establish certain "protective conditions for certain core costing materials in [the USPS] ACR filing," which the Commission denied in Order No. 155. USPS Resp., p. 1. According to the Postal Service's Response, the Postal Service has attempted to comply with Order No. 155

where information on market dominant and competitive products are intertwined,[1] although public versions of certain models and workpapers are not guaranteed to correspond to the nonpublic versions.[2] USPS Resp., pp. 5-6. However, the Postal Service points out that it has never sought protective conditions for materials related exclusively to competitive products (*i.e.*, those not intertwined with information related to market dominant products), and apparently thinks that it will never need to do so, because, according to the Postal Service, "materials relating exclusively to competitive products should simply remain in the nonpublic annex." USPS Resp., p. 7.

Valpak/NAPM/APMU views the matter differently. The Postal Service, although expressing its opinion about what it thinks the law should be, has not even attempted to demonstrate that the Postal Accountability and Enhancement Act, Pub. L. 109-435 (2006) ("PAEA") provides absolute immunity from any sharing of information concerning competitive products. Indeed, PAEA would appear to require just the opposite. This Reply attempts to clarify the limits on protection afforded information submitted by the Postal Service to the Commission.

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[1] It is not at all clear that only matters relating to competitive products or mixed market dominant/competitive products are in the nonpublic annex. For example, the Postal Service develops an adjustment of certain Standard Mail letter and flat volumes due to use of detached address labels. Although only market dominant products use DALs, the Postal Service develops the DAL adjustment in the nonpublic annex. *See* USPS-FY08-19, UDCmodel08.xls, tab Changes from PRC-ACR2007-LR7.

[2] Although public versions of the four basic costing data collection systems had not been filed at the time the Postal Service filed its Response, the four basic costing data collection systems were subsequently filed on December 30 and 31, 2008.

DISCUSSION

PAEA Provisions.

The Postal Service asserts an absolute confidentiality for information related exclusively to competitive products except for Commission review, which is at odds with the statutory scheme established by PAEA.

With respect to material provided by the Postal Service in an Annual Compliance Report, the relevant statutory provisions — 39 U.S.C. section 3652(f)(1)-(2) — provide as follows:

> (f) Confidential Information —
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> (1) In General — If the Postal Service determines that any document or portion of a document, or other matter, which it provides to the Postal Regulatory Commission in a **nonpublic annex under this section** or **under subsection (d)**[[3]] contains information which is described in **section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5**, the Postal Service shall, at a time of providing such matter to the Commission, notify the Commission of its determination, in writing, and describe with particularity the documents (or portions of documents) or other matter for which confidentiality is sought and the reasons therefor.
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> (2) Treatment — Any information or other matter described in paragraph (1) to which the Commission gains access under this section shall be subject to **paragraphs (2) and (3) of section 504(g)** in the same way as if the Commission had received notification with respect to such matter under **section 504(g)(1)**. [39 U.S.C. § 3652(f), emphasis added.]

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[3] Subsection 3652(d) provides that the Commission shall have access, "in accordance with such regulations as the Commission shall prescribe, to the **working papers and any other supporting matter** of the Postal Service and the Inspector General in connection with" the ACR. 39 U.S.C. § 3652(d) (emphasis added).

Thus, section 3652(f)(1)-(2) sets forth the parameters of any claim of confidentiality by the Postal Service with respect to material provided in its ACR.

With respect to material provided to the Commission by the Postal Service pursuant to request or subpoena, 39 U.S.C. section 504(g)(1)-(3) provides as follows:

> (g) (1) If the Postal Service determines that any document or other matter it provides to the Postal Regulatory Commission under a subpoena issued under subsection (f), or otherwise at the request of the Commission in connection with any proceeding or other purpose under this title, contains information which is **described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5**, the Postal Service shall, at the time of providing such matter to the Commission, notify the Commission, in writing, of its determination (and the reasons therefor).
>
> (2) Except as provided in paragraph (3), no officer or employee of the Commission may, with respect to any information as to which the Commission has been notified under paragraph (1)--
> (A) use such information for purposes other than the purposes for which it is supplied; or
> (B) permit anyone who is not an officer or employee of the Commission to have access to any such information.
>
> (3) (A) Paragraph (2) shall not prohibit the Commission from **publicly disclosing** relevant information in furtherance of its duties under this title, provided that the Commission has adopted regulations under section 553 of title 5, that establish a **procedure for according appropriate confidentiality** to information identified by the Postal Service under paragraph (1). **In determining the appropriate degree of confidentiality** to be accorded information identified by the Postal Service under paragraph (1), the Commission shall **balance** the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.
> (B) Paragraph (2) shall not prevent the Commission from requiring production of information in the course of any discovery procedure established in connection with a proceeding under this title. **The Commission shall**, by regulations based on

> rule 26(c) of the Federal Rules of Civil Procedure, **establish procedures for ensuring appropriate confidentiality for information furnished to any party**. [39 U.S.C. § 504(g)(1)-(3) (emphasis added).]

Thus, 39 U.S.C. section 504(g) sets out a procedure for the Commission to establish specific rules to evaluate Postal Service initial determinations that certain information — including information related to competitive products — filed with the Commission pursuant to a subpoena or request should be treated as confidential.[4] Section 504(g) of PAEA contains no blanket exception for information related to competitive products.

Docket No. RM2008-1.

The Commission opened Docket No. RM2008-1 to establish rules governing protection for, and access to, material that the Postal Service deems confidential and nonpublic. *See* Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, Docket No. RM2008-1. Presumably, the Commission soon will issue specific rules governing the procedure for claiming confidentiality according to these statutory provisions.[5] As Valpak has previously pointed out, Commission rules will have the opportunity to clarify that there can be no claim of confidential treatment relating to the ACR except for that which is part of (i) the nonpublic annex or (ii) working papers and supporting matter. *See* Valpak Comments Regarding Regulations to Establish a Procedure for According

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[4] 39 U.S.C. section 3652(f)(2), of course, refers to section 504(g) as the appropriate authority governing the treatment of claims of confidentiality.

[5] In Docket No. ACR2007, without the benefit of Commission rules implementing section 3652, the Postal Service filed certain information relating to competitive products in a nonpublic annex.

Appropriate Confidentiality, Docket No. RM2008-1, p. 5 (Sept. 25, 2008). The Postal Service's argument in that docket — that there should be a presumption of confidentiality accorded to any information when the Postal Service makes a determination that the public interest would be served by prohibiting access to such information — was not contemplated by PAEA. *See* Valpak Reply Comments Regarding Regulations to Establish a Procedure for According Appropriate Confidentiality, Docket No. RM2008-1, pp. 3-4 (Oct. 10, 2008).

Docket No. RM2008-4.

The Commission proposed rules for the Postal Service's ACR in Docket No. RM2008-4 on August 22, 2008. *See* Commission Order No. 104. The Commission's Order stated: "Rather than treat any category of information as commercially sensitive *per se*, the Commission would balance the potential harm to the Postal Service's commercial interests against the need of stakeholders and the public to know how the Postal Service is discharging its duties as a monopoly imbued with a public trust." Order No. 104, p. 15.

Although little attention was paid to the nonpublic annex (and other confidential aspects of the ACR) by the Postal Service, the Postal Service relied on 39 U.S.C. section 3652(e)(1)(B) for its point that the Commission should require only the minimal amount of information in order to decrease the Postal Service's workload so it can cut expenses — to the exclusion of subsection (A) ("providing the public with timely, adequate information to assess the lawfulness of rates charged") and subsection (C) ("protecting the confidentiality of commercially sensitive information"). *See* Docket No. RM2008-4, USPS Initial Comments, pp. 3-4, and USPS Reply Comments, pp. 1-2.

Now, the Postal Service apparently has shifted its focus, from reducing expenses with respect to the ACR, to protecting commercially sensitive information. As a result, the Postal Service has significantly increased its (and the Commission's) administrative workload by dividing up information and placing it under protective conditions, instead of simply submitting it to the Commission and "providing the public with timely, adequate information." 39 U.S.C. § 3652(e)(1)(A).

Docket No. ACR2008.

The Postal Service's motion in Docket No. ACR2008 to establish protective conditions — although recognizing "the legitimate interest in public review of the core costing documentation at issue" (Order No. 155, p. 4 n.6) — took as its point of departure the fact that all core costing information related to competitive products would be put in the nonpublic annex, which, according to the Postal Service, "also necessitated the background documentation, in which the cost splits between competitive and market dominant products are developed, must likewise be shifted into the nonpublic annex." USPS Motion Requesting Establishment of Protective Conditions, Docket No. ACR2008, p. 3 (Dec. 1, 2008).

In the face of the Commission's denial of that motion, the Postal Service filed an unusual Response, "in order to explain how the FY08 ACR materials filed today relate to Commission Order No. 155." USPS Response, p. 1. At the end of that Response, the Postal Service added the following:

> One final aspect of Order No. 155 compels comment. At the end of that Order is the statement that the Commission"will be inclined to grant **protective conditions** as proposed by the Postal Service for materials **pertaining only to competitive products**." Order No. 155 at 5. It is unclear exactly what the

> Commission intends to convey with that statement. … The Postal Service's position continues to be that **materials relating exclusively to competitive products should simply remain in the nonpublic annex**. The Postal Service does **not see**, and indeed would oppose, **protective conditions** for such materials. [USPS Resp., pp. 7-8 (emphasis added).]

The Postal Service's position concerning "materials relating exclusively to competitive products" appears to be that they "should simply remain in the nonpublic annex," and should not be subject to review by any party, for any reason, even after agreeing to protective conditions.

CONCLUSION

Valpak/NAPM/APMU believes the Postal Service has failed to justify broad limits on public access to its "core costing" data, but instead has proposed to stand PAEA on its head by placing broad categories of data in a non-public annex, without carefully identifying and justifying each item placed in that annex. While the Commission may be able to defer clarification of the rules governing access to material placed in a nonpublic annex by the Postal Service until a party actually seeks access to such materials, it must resist any effort to have it allow the exception (denial of all public access to certain costing data) to become the rule. Thus, the Commission should reject the Postal Service's approach, which would keep large amounts of data from the public without a detailed explanation as required by PAEA. In effect, the Postal Service would have the Commission allow a small percentage of the Postal Service's business to be employed as a shield behind which large amounts of vital costing data would be protected from public access, violating PAEA's transparency mandate. While the Postal Service may be able to demonstrate the need to place some data in a nonpublic annex in

a particular docket, the public must be informed of the nature and scope of anything placed in any nonpublic annex and the justification therefor. Finally, the Commission must ensure that the placement of any material in any nonpublic annex does not foreclose review of such material by properly interested parties under appropriate protective conditions.

Respectfully submitted,

Joel T. Thomas
Executive Director
National Association of Presort Mailers
1195 Mace Road
Annapolis, Maryland 21403
(410) 990-1180

William J. Olson
John S. Miles
Herbert W. Titus
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102-3860
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc.
Valpak Dealers' Association, Inc., and
Association of Priority Mail Users, Inc.