

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

Regulations Establishing Procedures for )  
Obtaining Information from the Postal Service )

Docket No. RM2009-12

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND  
VALPAK DEALERS' ASSOCIATION, INC.  
REPLY COMMENTS ON PROPOSED RULEMAKING CONCERNING  
OBTAINING INFORMATION FROM THE POSTAL SERVICE  
(November 23, 2009)**

**INTRODUCTION**

On September 2, 2009, the Commission issued Order No. 293, "Notice and Order of Proposed Rulemaking Concerning Obtaining Information from the Postal Service," commencing Docket No. RM2009-12. Initial Comments were filed by the Public Representative, the Postal Service, and Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereafter "Valpak") on November 9, 2009.

Valpak submits these reply comments in response to the Postal Service's Initial Comments relating to third-party requests for Commission subpoenas.

**COMMENTS**

**1. Postal Service Objections to Third-Party Involvement in Subpoenas.**

The Commission's proposed regulations relating to obtaining information from the Postal Service by subpoena create a process for third parties<sup>1</sup> to request the Commission to

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<sup>1</sup> The term "third party" could connote to some parties having no direct connection with the Postal Service. Nothing could be further from the truth. "Third parties" will generally include mailers, mailer associations, and Postal Service employee unions. "Third parties" who participate in Commission proceedings are important postal stakeholders who work with or for the Postal Service on a daily basis.

issue subpoenas in certain circumstances. The Postal Service takes issue with this recognition of the role of third parties, claiming that it “allows participants to prod the Commission as to its own information requests.” The Postal Service believes that enforcement of “[w]hether and how to enforce a Commission information request is a matter between the Commission and the Postal Service,” and that third parties should not be allowed to “put the Commission on the spot about compelling production.” The Postal Service warns that third party requests for subpoenas “threaten[] to embroil participants in the Commission’s exercise of discretion as to enforcement” and will “encourag[e] extension of discovery disputes and cheerleading in support of the Commission’s exercise of discretion as to issuance of a subpoena.” Postal Service Initial Comments, pp. 2-4. (The sole area where the Postal Service would allow third parties to have a voice in the process relates to enforcement of discovery requests filed in the course of litigation, discussed further *infra*. See *id.*, p. 2, n.2.)

The Postal Service would convert all matters of compelled disclosure into private, inter-agency exercises. However, interested third parties have been recognized as having due process rights under PAEA. See, e.g., Docket No. RM2007-1, Order No. 43, pp. 4-17. Due process for third parties is better served by having specific procedures in the regulations rather than trying to determine procedures on an ad hoc basis. Even when third parties are allowed to participate, issuance of subpoenas is solely within the discretion of the Commission, and allowing third parties to make requests do not limit that discretion. Indeed, the very fact that third parties must request subpoenas confirms the Commission’s discretion.

The Postal Service conceded a small role for third parties when it stated that its argument “is not intended to suggest that participants could not be entitled to petition the

Commission for enforcement of their discovery requests arising in the course of litigation.” However, restricting third-party subpoena requests to “litigation” presumably would include complaint proceedings and maybe little more. The Postal Service complains of proposed rule 13 being “overbroad” in that it “allows participants to prod the Commission as to its own information requests,” but forgets that the Commission sometimes issues information requests in response to third-party requests for such issuance. *See, e.g.*, Order No. 293, p. 12, n.12. Currently, a third party would withhold requesting a Commission information request if the Commission has issued one already, either sua sponte or in response to another third party’s request. Under the Postal Service proposal, third parties would be incentivized to file redundant protective requests for a Commission information request to protect its “standing” to request a subpoena if the Postal Service did not comply with a request.

Furthermore, the Postal Service seems to assume that third parties could use their right to request a Commission subpoena for improper purposes, but this should not be assumed, particularly since such tactics could be inconsistent with “standards of ethical conduct required of practitioners....” *See* Commission Rule 3001.6(d).

## **2. Additional Certifications for Third-Party Requests.**

The Postal Service also complains that under the Commission’s proposed rules, “a [third] party need not wait to learn the Postal Service reaction to the order compelling a response before filing a request for issuance of a subpoena.” As an alternative to deleting proposed rule 13, the Postal Service suggests increasing the required contents of third-party requests for subpoena to include a certification of “any efforts on the part of the subpoena target to respond, a specified period of time following issuance of an order or the passage of a

reply deadline, and any response by the subpoena target to the applicant's inquiry as to whether any response would be forthcoming." Postal Service Initial Comments, p. 4.

In requiring a third party to certify that "the Postal Service has failed to comply with an order compelling discovery" (proposed rule 13(c)(4)), the Commission has already required that (i) the time to respond has expired, and usually that (ii) the Postal Service did not submit a motion for an extension of time in which to respond.

The Postal Service calls for additional certification, but acknowledges that "efforts to respond affirmatively to a Commission order are not always visible externally." Postal Service Initial Comments, p. 3, n.3. Valpak believes that third parties should not be required to certify to invisible efforts of the Postal Service.

### **CONCLUSION**

Increased transparency and compliance with the Postal Accountability and Enhancement Act require the Commission to be willing and consider third-party interests with the Postal Service before making decisions. The quality of Commission decisions is enhanced by allowing third-party participation. The Commission should reject the Postal Service's suggested changes to proposed rule 13.

Respectfully submitted,

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William J. Olson  
John S. Miles  
Jeremiah L. Morgan  
WILLIAM J. OLSON, P.C.  
370 Maple Avenue West, Suite 4  
Vienna, Virginia 22180-5615  
(703) 356-5070

Counsel for:  
Valpak Direct Marketing Systems, Inc. and  
Valpak Dealers' Association, Inc.