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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

ANNUAL COMPLIANCE REPORT, 2009	)))	Docket No. ACR2009

VALPAK DIRECT MARKETING SYSTEMS, INC. AND VALPAK DEALERS' ASSOCIATION, INC. MOTION FOR ISSUANCE OF COMMISSION INFORMATION REQUEST CONCERNING CERTAIN COSTS RELATED TO NEGOTIATED SERVICE AGREEMENTS
(January 15, 2010)

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereinafter "Valpak"), pursuant to Rule 3001.21(a), hereby move the Commission to issue a Commission Information Request ("CIR"), seeking additional clarifying data and explanation from the Postal Service concerning the costs of and certain information about:

(i) administering, and terminating, the negotiated service agreement ("NSA") between the Postal Service and Bank of America (hereinafter "BAC") (originated in Docket No. MC2007-1), and

(ii) settlement of the Capital One Services, Inc., (hereinafter "Cap One") complaint against the Postal Service (litigated in Docket No. C2008-3).

Valpak has reviewed the Postal Service's FY 2009 ACR, and has been unable to fully locate or understand these costs.

Although Valpak believes that participants should be permitted to request information directly from the Postal Service on the record (*see* Valpak Initial Comments, Docket No. RM2008-4, p. 13), the Commission has recognized that participants are permitted to bring a matter to the attention of the Commission with an appropriate request for action, such as issuing a notice of inquiry or a CIR. *See* Docket No. RM2008-4, Order No. 203 (Apr. 16, 2009).[1]

I. NSA-related Costs Should Be Fully Reported.

The past decade has seen much activity, as well as contention, with respect to negotiated service agreements for market dominant products. A number of such NSAs have been proposed by the Postal Service, and approved by the Commission, despite some serious reservations. Valpak has been heavily involved in most (market dominant) NSA's before the Commission in an effort to ensure that such agreements complied with PAEA, as well as good fiscal management of the Postal Service.

Even though no new NSA's for market dominant products have been submitted in recent years, Valpak believes it important that the full cost and other information about prior NSAs be publicly known, so that any errors that might have been made in the past would not be repeated.

Since each NSA is a product, detailed cost reporting on each NSA is part of the Postal Service's obligation under PAEA. Moreover, such cost data are relevant to any ongoing appraisal of the Postal Service's programs and operations. *See, e.g.*, Rule 3010.42(c) (financial or operations impact of the NSA on the Postal Service over the duration of the NSA). The Commission's rules require the Postal Service to estimate an NSA's "costs, volumes, and revenues." Rule 3050.21(f)(2).

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[1] Indeed, even the Postal Service agrees that if such a procedure were followed, "the Commission can pursue such inquiry itself." *See* Postal Service Reply Comments (Nov. 14, 2008), Docket No. RM2008-4, pp. 4-5.

II. All Postal Service FY2009 Costs and Relevant Details Related to the BAC NSA Should be Reported

The BAC NSA was filed on February 7, 2007, Docket No. MC2007-1. Valpak's involvement as a participant in that docket was significant, including discovery, responses to the Commission's inquiries, and submission of both initial brief and reply brief. Valpak's briefs focused on deficiencies in the proposed BAC NSA vis-a-vis the Commission's rules governing baseline NSAs, and argued that the standards had not been met in the proposed NSA, which had to do fundamentally with costs involved in processing automation-compatible letter mail. *See, e.g.*, Valpak Initial Brief, Docket No. MC2007-1, pp. 8-21. Included in Valpak's brief was the argument (*id.*, at 8-11) that, although mailer-specific costs generally were required by the Commission's rules (*see* former Rule 3001.193(e)(1)), they were not provided by the Postal Service in Docket No. MC2007-1 (and could not be provided because no such costs were available) — as well as the argument that the NSA, as proposed, could open the floodgates to significant revenue loss. *Id.*, at 18-21.

Although the Postal Service reported certain costs related to the BAC NSA, not all costs appear to have been reported. *See* USPS-FY09-30. Specifically, the Postal Service has reported the costs related to the first two quarters of FY2009, but not the final two quarters of FY2009. The BAC NSA contract year began with April 1, 2008, and ended on March 30, 2009, and the Commission's rules on the reporting of NSAs allow reporting by NSA contract year (*see* Rule 3050.21(f)(4)), and the BAC NSA was terminated by the Postal Service effective at the end of the fiscal year, September 30, 2009, only halfway through the three-year term of the contract. Thus, there were costs attributable to the BAC NSA for the six-month period from April 1, 2009 through September 30, 2009 which were entirely within FY 2009, that need not and should not wait for another year to be evaluated in the context of the Commission's Annual Compliance Determination for FY 2010. Thus, if costs were associated with termination of the BAC NSA in FY 2009, (i) those costs should be reported in ACR 2009, and (ii) any relevant revenues, costs, and volumes for the third and fourth quarters of FY2009 should be included.

Further, the Postal Service has reported, in USPS-FY09-30, an astounding amount for "administrative costs" of $3,250,000 for each quarter from April 1, 2008 through March 30, 2009 — for a total of $13 million — relating to the BAC NSA.[2] The Postal Service explains that $10 million of these were for IT expenses now of no value to the Postal Service.[3] In Docket No. ACR2008, the Commission noted that for the first two quarters of the agreement, the Postal Service incurred an additional $2.6 million of costs for "consultants, hardware and software used solely for this agreement … which were not identified previously for this or any other NSA." *See* FY 2009 Annual Compliance Determination, p. 84. Now, these previously-undisclosed IT costs appear to have ballooned to $13 million. If these costs were not disclosed in Docket No. MC2007-1, and the PRC had known that these additional costs were potential losses, on top of the $25 million to $45 million the Commission estimated the Postal Service would lose on this NSA when it approved it, it may never have been approved. *See* Docket

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[2] USPS-FY09-30, file ACR_NSA_FY09_report.xls, tab 'MC2007-1 Bank of America,' cell K36.

[3] It is difficult to envision on what this $10 million could have been spent (*e.g.*, hardware, software, etc.) which apparently was not anticipated when the NSA was being litigated and which now has no value.

No. MC2007-1, *Op. & Rec. Dec.,* ¶1006, p. 2. And the Postal Service's other rationale for the NSA — efficiency improvements — was unsuccessful as the "NSA failed to produce measurable mail-processing efficiency improvements." ACR, p. 57.

III. All Postal Service FY2009 Costs and Relevant Details Related to Settlement of the Complaint Case of Capital One Services, Inc., Docket No. C2008-3, Should Be Reported.

In Docket No. C2008-3, the complaint of Cap One alleged that Cap One was "faced with the competitive advantage conferred on Bank of America" by the BAC NSA. Cap One complained that it was denied an NSA functionally equivalent to that agreed to for BAC, and that the Postal Service refused, insisting "on mailer-specific baselines and reduced per-piece discounts in an attempt to enforce true 'pay-for-performance' conditions that were never imposed on Bank of America." Capital One Complaint, Docket No. C2008-3 (June 19, 2008), ¶8, p. 3. The Postal Service, in its motion to dismiss the complaint, stated:

> Under the Postal Accountability and Enhancement Act (PAEA), **the Postal Service must ensure that NSAs improve the net financial position of the Postal Service or improve operational efficiency**. The statute does not distinguish between baseline NSAs or functionally equivalent NSAs here; this provision applies to all future NSAs filed under the PAEA. [Postal Service, Motion to Dismiss, Docket No. C2008-3 (July 21, 2008), p. 6 (emphasis added, footnote omitted).]

Clearly, the financial consequences and operational efficiencies of all NSAs are of importance in evaluating the Postal Service's operations, as the Postal Service readily concedes. When the Presiding Officer granted Cap One's motion to withdraw the complaint, Valpak urged that any settlement costs should be reported with the BAC NSA costs pursuant to Commission Rule

3050.21(f). *See* Valpak Comment on Presiding Officer's Ruling No. C2008-3/47 Granting Motion to Withdraw Complaint (June 2, 2009).

Ultimately, of course, the Cap One complaint docket was settled by the Postal Service. In its 2009 ACR, however, as far as Valpak can determine, the Postal Service did not report any costs, *e.g.*, legal, administrative costs, relative to the Capital One complaint case, including settlement costs. If such costs are reported, they do not appear to be reported with respect to the conduct or settlement of the Capital One complaint case. It is submitted that they should be reported — at least if any such costs were settlement payments of any kind in lieu of giving Cap One a functionally-equivalent NSA. Again, transparency and accountability require the Postal Service to report, and for the Commission and the public to be made aware of, the actual costs attributable to specific programs of the Postal Service. Further and/or clarifying information from the Postal Service concerning the Cap One settlement would be in the public interest. Valpak requests that the Commission ask the Postal Service for an explanation and breakdown of such costs. If "administrative cost" is a euphemistic "catch-all" (including the costs of settlement of the Cap One Complaint), this should be made clear.

Proposed Questions for the Postal Service

For the foregoing reasons, Valpak requests that the Commission issue a CIR directing the Postal Service to be more transparent about NSA's by reporting to the Commission and the public more clearly and fully the following:

1. For the Bank of America Corporation Negotiated Service Agreement (Docket No. MC2007-1), please explain fully the $13 million identified as "Administrative Cost," and whether these were disclosed to the Commission in Docket No. MC2007-1.

2. Please provide the costs, volumes, and revenues associated with the Bank of America Corporation Negotiated Service Agreement for the period April 1, 2009 to September 30, 2009 (the effective date of termination).

3. Please explain and provide all costs associated with settlement of the complaint of Capital One Services, Inc. (Docket No. C2008-3) or identify where they appear in the Postal Service's ACR.

Respectfully submitted,

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