

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

ANNUAL COMPLIANCE REPORT, 2009

Docket No. ACR2009

**UNITED STATES POSTAL SERVICE RESPONSE TO 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 22, 2010)

The Postal Service hereby responds to 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. In its Motion, Val Pak seeks responses to the following questions related to the Bank of America (BAC) negotiated service agreement (NSA):

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.

The Postal Service opposes Val-Pak's motion on principle that the Annual Compliance Review process is not a trial-type proceeding in which parties submit

to discovery. Rather, the process of generating the report is subject to comment, and interested commenters are encouraged to contact Postal Service counsel to resolve any outstanding questions. Hence, the Postal Service opposes Val-Pak's motion on this ground alone. Notwithstanding, in the interest of addressing Val Pak's concerns, the Postal Service offers the following observations in response to Val-Pak's questions, in an effort to obviate the need for further motions practice on the issues it raises.¹

With regard to the question no. 1, the administrative costs were not anticipated at the time of litigation of Docket No. MC2007-1. The reason that administrative costs appear to have increased is that in the original reporting for the 2008 ACR and the Year 1 Data Collection Report, the costs over the full three-year term of the contract were amortized, based on the assumption that the contract would run its full three year length. However, since the NSA was discontinued, the amortization was changed to reflect the fact that the contract term was reduced. Thus, the amount originally identified in the FY 2008 ACR has now been allocated based on the activity period under the contract.

Val-Pak's question no. 2 seeks data for costs, volumes, and revenues for quarters 3 and 4 of FY2009. In fact, in USPS-FY09-30, the Postal Service has already provided all applicable cost, volume, and revenue data for the entire period of Fiscal Year 2009 (which, by definition, includes quarters 3 and 4). Val-Pak apparently did not apprehend that all applicable data for the fiscal year had been provided, because there were no explicit entries for quarters 3 and 4. [REDACTED]

¹ A redacted version of this pleading has been filed publicly. The justification for the redacted information is explained in Attachment 1.

[REDACTED]

[REDACTED]

[REDACTED]

Val-Pak question 3 seeks disclosure of all costs associated with settlement of the complaint of Capital One Services, Inc. (Docket No. C2008-3).

The Postal Service notes that [REDACTED]

[REDACTED]

[REDACTED]

We hope this will obviate the need for further motions practice on this issue.

WHEREFORE, the Postal Service respectfully requests that Val-Pak's motion be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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ATTACHMENT 1

APPLICATION OF THE UNITED STATES POSTAL SERVICE FOR NON-PUBLIC TREATMENT OF MATERIALS

In accordance with 39 C.F.R. § 3007.21 and Order No. 225, the United States Postal Service (Postal Service) hereby applies for non-public treatment of certain portions of a response to a motion in this docket by Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. (collectively, "Valpak"). The motion seeks responses to questions related to the Bank of America (BAC) negotiated service agreement (NSA), as well as information about the Postal Service's settlement of a complaint by Capital One Services, Inc. (Capital One). A complete copy of this response is being filed separately under seal with the Commission. The Postal Service hereby furnishes the justification required for this application by 39 C.F.R. § 3007.21(c) below.

(1) The rationale for claiming that the materials are non-public, including the specific statutory basis for the claim, and a statement justifying application of the provision(s);

Information of a commercial nature, which under good business practice would not be publicly disclosed, as well as third party business information, is not required to be disclosed to the public. 39 U.S.C. § 410(c)(2); 5 U.S.C. § 552(b)(4). The Commission may determine the appropriate level of confidentiality to be afforded to such information after weighing 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. 39 U.S.C. § 504(g)(3)(A). Because the portions of the instant response fall within the scope of information not required

to be publicly disclosed, the Postal Service asks the Commission to support its determination that these portions are exempt from public disclosure and grant its application for their non-public treatment.

(2) Identification, including name, phone number, and email address for any third-party who is known to have a proprietary interest in the materials, or if such an identification is sensitive, contact information for a Postal Service employee who shall provide notice to that third party;

The Postal Service believes that the only third parties with a proprietary interest in the non-public portions of its response are the relevant customers. The Postal Service maintains that customer identifying information should be withheld from public disclosure. The Postal Service identifies Ms. Joy Leong, The Leong Law Firm PLLC, as the appropriate contact on behalf of Capital One. Ms. Leong's telephone number is (202) 640-2590, and her email address is joy@joyleong.com. The Postal Service identifies Mr. Michael Scanlon of K&L Gates LLP, as the appropriate contact on behalf of Bank of America. Mr. Scanlon's telephone number is (202) 778-9000 and his email address is michael.scanlon@klgates.com.

(3) A description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow a person to thoroughly evaluate the basis for the claim that they are non-public;

In response to Valpak's motion, the Postal Service has responded by, among other things, providing explanations of cost reporting decisions related to the BAC NSA and Capital One. These explanations rely on information about the Postal Service's arrangements with Capital One for resolution of its complaint case and on the parties' expectations when terminating the BAC NSA.

Information about negotiations related to a commercial agreement and commercial litigation is considered to be information of a commercial nature, and the Postal Service is unaware of other businesses that would disclose this information publicly in good practice. It is also considered to be information proprietary to each customer that was shared with the Postal Service voluntarily and confidentially in the interest of reaching a favorable outcome.

(4) Particular identification of the nature and extent of commercial harm alleged and the likelihood of such harm;

If the portions of the response that the Postal Service determined to be protected from disclosure due to their commercially sensitive nature were to be disclosed publicly, the Postal Service considers that it is quite likely that it and the relevant customers would suffer commercial harm. Negotiated arrangements toward terminating a NSA or resolving pending litigation with a customer, as is the case with BAC and Capital One, depend on facts, interests, and other considerations particular to that customer. Disclosing information about the outcome of those negotiations thus would give the customer's competitors access to information about what is of value to that customer. Disclosure of the information would also provide the customer's competitors access to information about the customer's financial or operational situation and its relationship with the Postal Service of a type that those competitors are not required to disclose about themselves. This would enable the competitors to seek additional leverage when negotiating with the customer, with the Postal Service, or with other actors in the marketplace. In the case of the arrangement with Capital One, it would also suggest to the customer's competitors, even if incorrectly, the result that they

might expect to achieve if they were to engage in or threaten litigation against the Postal Service, thereby prejudicing the Postal Service's ability to resolve disputes in a customer-appropriate and non-litigious manner.

(5) At least one specific hypothetical, illustrative example of each alleged harm;

Identified harm: Disclosing information about the arrangement with BAC or Capital One would give BAC and Capital One's competitors an unfair competitive advantage.

Hypothetical: A firm competing with BAC and/or Capital One obtains a copy of the unredacted version of the Postal Service's response to the Valpak motion from the Postal Regulatory Commission's website. The competitor analyzes the information about the parties' negotiated arrangements to assess the customers' negotiating strategy, make assumptions about the considerations that may have led BAC or Capital One to agree to those arrangements, and project how the outcome results in a benefit or loss to BAC or Capital One. The competitor uses that information to negotiate with BAC, Capital One, or the Postal Service based on assumptions that, accurate or not, endow the competitor with greater confidence and less willingness to compromise than other Postal Service customers.

Identified harm: Disclosing information about the arrangement with BAC or Capital One would encourage other customers to seek concessions through litigation.

Hypothetical: A firm competing with BAC and/or Capital One obtains a copy of the unredacted version of the Postal Service's response to the Valpak motion from the Postal Regulatory Commission's website. The competitor analyzes the information about the parties' negotiated arrangements and ascertains that it is in a position to obtain similar concessions. The competitor threatens to file a complaint at the Commission unless the Postal Service offers it terms similar to those provided under its arrangement with Capital One.

(6) The extent of protection from public disclosure deemed to be necessary;

The Postal Service maintains that the redacted portions of its response should be withheld from persons involved in competitive decision-making, as well as their consultants and attorneys. The Commission's regulations provide that non-public materials shall lose non-public status ten years after the date of filing with the Commission, unless the Commission or its authorized representative enters an order extending the duration of that status. 39 C.F.R. § 3007.30.

(7) The length of time deemed necessary for the non-public materials to be protected from public disclosure with justification thereof;

The Commission's regulations provide that non-public materials shall lose non-public status ten years after the date of filing with the Commission, unless the Commission or its authorized representative enters an order extending the duration of that status. 39 C.F.R. § 3007.30.

(8) Any other factors or reasons relevant to support the application.

None.