

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.
OPPOSITION TO POSTAL SERVICE APPLICATION FOR
NONPUBLIC TREATMENT
(January 26, 2010)**

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc.
(hereinafter "Valpak") hereby oppose the "Application of the United States Postal Service for
Non-public Treatment of Materials." The materials involved are set out in redacted portions
of the Postal Service's 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.¹

1. The Postal Service has requested confidential treatment of "the Postal Service's
arrangements with **Capital One** for resolution of its complaint case **and** on the parties'
expectations when **terminating the BAC NSA.**" USPS Application, unnumbered page 2.

¹ The Postal Service asserts the ACR review process is "not a trial-type proceeding in which parties submit to discovery." Of course, the procedure being used by Valpak for requesting the Commission to issue a CIR has been recognized by the Commission in Docket No. ACR2008 (*see generally* Order No. 174, Order Concerning Motion for Issuance of Commission Information Request, Jan. 23, 2009) as well as in Docket No. RM2009-12 (Order No. 293, Notice and Order of Proposed Rulemaking Concerning Obtaining Information from the Postal Service, Sept. 2, 2009, p. 12, n.12). Moreover, there is no requirement for mailers to "contact Postal Service counsel to resolve any outstanding questions" (USPS Response, p. 2), particularly where such efforts obviously would have be futile, based on the Postal Service's response.

However, the Postal Service seeks to redact portions of its response to Valpak’s motion for a CIR concerning the missing aggregate costs of the final six months of the BAC NSA.² *See* Valpak Motion, question 2. It is impossible to see a nexus between the claimed interest to protect **“parties’ expectations when terminating the BAC NSA”** (whatever that means) and the aggregate costs of the final six months of the NSA. Certainly, the Postal Service has not provided a rationale sufficient to override the PAEA requirement that the Postal Service report publically on each market dominant postal product — and each NSA is a separate postal product. 39 U.S.C. section 3652.

2. The Postal Service claims that Bank of America is a “relevant customer” having a third-party interest which must be protected (USPS Application, unnumbered page 2). Certainly, however, by entering into an NSA, a mailer gives up the right to prevent the Postal Service from reporting on the full aggregate financial costs of the NSA including early termination costs, as required by PAEA, in the interests of transparency and accountability.

3. The Postal Service claims that the information redacted from its Response is both (i) “of a commercial nature” and (ii) “third party business information,” but these claims are irrelevant. Valpak has not asked for “facts, interests, and other considerations particular to

² The Postal Service’s redacted response seems to oppose Valpak’s proposed question no. 2, claiming it “has already provided all applicable cost, volume, and revenue data for the entire period of Fiscal Year 2009 [with] no explicit entries for quarters 3 and 4.” USPS Answer, p. 2. If so, the Postal Service (public) filing (USPS-FY09-30, file ACR_NSA_FY09_report.xls, tab ‘MC2007-1 Bank of America,’ columns 1-3) appears to be in error, and should be corrected as there appear to be no data whatsoever — explicit or implicit — provided for the time period April 1, 2009 — September 30, 2009.

[those] customer[s].” Instead, Valpak has posed questions simply seeking a complete reporting of the costs of having offered this market dominant product.

4. The Postal Service describes hypothetical situations that could lead to an “unfair competitive advantage” to BAC and Cap One’s competitors. USPS Application, unnumbered p. 4. The Postal Service speculates about “greater confidence and less willingness to compromise” of a competitor when negotiating with BAC, Cap One, or the Postal Service if the Postal Service does not withhold such information from the public. *Id.* Additionally, the Postal Service says that the information withheld “would encourage other customers to seek concessions through litigation.” *Id.* These are not permissible reasons under PAEA, where the Commission must publicly assess all market dominant products in its annual compliance determination and where similarly situated mailers are **entitled** to a functionally-equivalent negotiated service agreement on “**public and reasonable terms.**” 39 U.S.C. § 3622(c)(10) (emphasis added). Moreover, now that the Bank of America NSA has been terminated, it appears there is no baseline NSA where mailers could claim a functionally-equivalent NSA, and no one would be in a position to demand “similar concessions” from the Postal Service.

5. If the Postal Service had wanted to keep secret financial information regarding the full costs of the BAC NSA and payments to Cap One for not allowing it a functionally-equivalent NSA, why did it not come forward and ask the Commission for such treatment at the initiation of the docket? This is not like the federal government’s intelligence budget which can be expected to be hidden in any part of the federal budget under other programs. Moreover, if this information is permitted to be non-public, it effectively will create a loophole for public reporting of NSAs whereby any NSA terminated before the end of the contract term

transforms such NSA's final year finances into confidential "third party business information," to evade the public reporting requirement.

The Postal Service's application for non-public treatment about the costs triggered by an NSA — a market dominant product — is not justified, and should be denied, and the Postal Service should be asked to provide the information described in Valpak's motion for issuance of a CIR.

Respectfully submitted,

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