

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Valassis NSA

Docket No. MC2012-14

Valassis NSA

Docket No. R2012-8

**SUPPORT OF NATIONAL NEWSPAPER ASSOCIATION
FOR NEWSPAPER ASSOCIATION OF AMERICA MOTION FOR STAY
(August 28, 2012)**

In response to Commission order No 1450, National Newspaper Association (NNA) hereby provides its comment in support of the Newspaper Association of America (NAA) Motion for Stay in this proceeding.

National Newspaper Association represents 2,350 members, almost all of which are small businesses under the Small Business Act. More than 200 of its members, along with nearly 400 non-member newspapers, filed comments in opposition to this NSA, asserting harm to the marketplace if the agreement were to be executed.

NNA supports the rationale advanced by NAA that the Commission's criteria for a stay articulated in Order No 1387 in the Complaint of the American Postal Workers Union, Docket No C2012-2 have been met. Newspaper Association of America Motion for Stay, August 24, 2012 at 2-3. NAA believes it has a substantial likelihood of success in its appeal of Order No. 1448 in this docket because the proposed NSA is too narrowly tailored, in violation of 39 U.S.C. 3622(c)(10); would cause undue harm to the marketplace in violation of 39 U.S.C. 2633(c)(10)(B); would result in a net financial loss to the Postal Service in violation of 39 U.S.C.3622(c)(10)(A) and would be unreasonably discriminatory in violation of 39 U.S.C. 403(c). NNA supports NAA's logic and believes there are other flaws in the Commission's conclusions in this docket.

First, the Commission conducted an antitrust-type of analysis in its decision, relying on the Department of Justice's Horizontal Merger Guidelines.¹ But the Commission neither sought nor received sufficient advertising price information,

¹ Horizontal Merger Guidelines, Department of Justice and the Federal Trade Commission, August 19, 2010.

distribution patterns or market coverage in the markets targeted by USPS and Valassis for the NSA program to enable it to perform its analysis. Without the information available to analyze any of the traditional elements of an antitrust review, the Commission nonetheless attempted to define a relevant market and the players in it. Whether or not the starting point of the analysis—which obscured whether the market player being analyzed was Valassis or the Postal Service itself--was the correct one, insufficient evidence was available in this proceeding to enable the Commission to make the proper conclusions and, indeed, without an extensive evidentiary hearing and record, it would have been impossible to carry out the mission the Commission attempted.

Second, the nature of marketplace harm was not sufficiently apparent to the Commission. It used an antitrust definition of “harm” in Section 3622(c)(10)(B), but there is no suggestion in the statute or legislative history that Congress intended its concerns about marketplace harm to extend only to issues of higher price, lower quality or reduced output. The Commission’s analysis is unclear in whether it considers the competitors it examines to be Valassis versus the newspaper industry, or the Postal Service versus the newspaper industry, though its opinion suggests that it considers the Postal Service itself to be the market player of concern.²

But the Postal Service is not just one of many equally situated players in a national marketplace and nowhere in Title 39 does Congress suggest it should be considered so. It is a government-sponsored enterprise, provider of services to millions of businesses and the keeper of proprietary mailing data which it is charged not to use for its own benefit. It is also mandated to avoid undue discrimination among users of the mail. 39 U. S. C. 404 (a). It occupies a special place both in law and in commerce.

Third, the Commission sought information in its Notice of Inquiry of June 15, 2012, about the impact of the NSA on small businesses. NNA submitted in the form of a survey compilation the comments of many small newspapers that were responsive to Question No. 6 in the NOI. The comments were provided in a compilation rather than as individual filings for the ease of the Commission staff as well as the newspaper

² See, e.g., the Commission’s statement “Currently the Postal Service is unsuccessfully competing with newspapers for the distribution of the kind of advertisements included in the NSA...” Order No 1448 at 32.

managers, who are unaccustomed to and intimidated by the creation of legal pleadings, not to mention the electronic filing system at the Commission. Because the Commission's Order No. 1330 in this docket requested comments and made no suggestion that sworn evidence would be required, NNA believed this format was the most efficient and effective way to provide information for the Commission's consideration. No party objected to the filing. But Order No. 1448 stated, "Only one commenter states that it is a small business." Order at 37. NNA believes that if the Commission had examined the comments of the nearly 600 small businesses that responded through NNA's filing, it would have been able to more fully consider the impact upon small business.

Finally, this docket represents the first foray by the Postal Service into the market dominant advertising market place with a Negotiated Service Agreement. Although the substantial pressures on the Service to develop new revenue sources have clearly led it into these uncharted waters where so many of its customers—sources of its existing revenue—count on their livelihood, mistakes in this matter could have grave consequences. While the Postal Service has the backing of the full faith and credit of the United States should the NSA venture fail, its customers and competitors in the newspaper world do not enjoy the same privilege if the NSA succeeds and their own position in the market fails. No business can compete against its own government. Thus, if the NSA in fact does create undue harm in the marketplace, the harm is likely to be irreparable. NNA urges the Commission to stay its order, seek expedited review in the Court of Appeals if it believes the matter urgent, and permit a full test of the law governing this NSA before permitting the Postal Service and Valassis to proceed.

Respectfully submitted,

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