

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

VALASSIS NSA

Docket No. MC2012-14

VALASSIS NSA

Docket No. R2012-8

**UNITED STATES POSTAL SERVICE ANSWER IN OPPOSITION TO NEWSPAPER
ASSOCIATION OF AMERICA'S MOTION FOR STAY**
(August 28, 2012)

Pursuant to 39 C.F.R. § 3001.21(b), the Postal Service files this Answer in Opposition to the Motion for Stay (Motion) filed by the Newspaper Association of America (NAA) on August 24, 2012. For the reasons set forth below, the Postal Regulatory Commission (Commission) should deny the Motion.

On August 23, 2012, the Commission issued Order No. 1448 approving the Valassis, Direct Mail, Inc. Negotiated Service Agreement (NSA). As a result of the Commission's finding, NAA filed a petition for review of Order No. 1448 in the United States Court of Appeals for the District of Columbia Circuit. In the instant Motion, NAA requests that the Commission issue a stay to prevent purported irrevocable harm to the marketplace while judicial review is pending. The Postal Service respectfully requests that the Commission reject this Motion, which, in the current circumstances, is essentially a request for reconsideration of the Commission's Order, not a request for emergency relief. Even if the Commission found the Motion to be within its authority, NAA has failed to satisfy its burden of proving any of the elements for a stay.

Argument

I. NAA IS NOT ENTITLED TO A STAY BECAUSE IT'S REQUEST IS A MOTION FOR RECONSIDERATION, NOT FOR INJUNCTIVE RELIEF

The relief sought by NAA's motion is completely inappropriate in the current procedural context. NAA cites Commission Rule 66 as the basis for its request for stay of Order No. 1448. Rule 66, however, was repealed on May 18, 2008 after the Commission established rules implementing structural and procedural changes as a result of enactment of the Postal Accountability and Enhancement Act (PAEA). The repeal and new rules rendered Rule 66 obsolete.¹ In any event, old Rule 66 applied in the context of an ongoing proceeding, when the Postal Service had failed to provide information required by the rules or a Commission or Presiding Officer ruling. In that situation, Rule 66 authorized the Commission to stay the proceedings until it obtained what it needed to consider the Postal Service's request or conduct the proceedings. Rule 66 was never intended to apply, in effect, to suspend the effectiveness of a final Commission Order or Recommended Decision disposing of a proceeding.

NAA further cites to Commission's Order No. 1387, which was issued in response to a motion by the American Postal Worker's Union (APWU) in the context of an ongoing complaint proceeding conducted under 39 U.S.C. § 3662. However, like the APWU case, NAA's request should be denied because no such relief is available and NAA has failed to show it is entitled to such relief. There, APWU sought emergency relief, in effect, to partially enjoin implementation of the Postal Service's Network Rationalization plans pending issuance of a Commission advisory opinion pursuant to

¹ Docket No. RM2009-4, Commission Order, No. 214, Order Eliminating Obsolete Rules of Practice, at 3-4, May 18, 2009.

39 U.S.C. § 3661.² In those circumstances, the APWU and the Commission analogized the situation procedurally to a motion seeking preliminary injunctive relief in District Court after a complaint had been filed there. Unlike those circumstances, here, NAA's motion is tantamount to seeking preliminary relief after the court had issued an order resolving the underlying complaint.³ Such a procedure simply makes no logical or legal sense.

In denying the underlying Motion in Order No. 1387, the Commission cited case law establishing standards for reviewing requests for emergency measures or injunctive relief in federal district courts in the District of Columbia Circuit. Those standards include the familiar elements of the complainant demonstrating its likelihood of prevailing on the merits, irreparable harm to complainant, a balance of equities among all parties, and consideration of the public interest.⁴ NAA cited Order No. 1387 as guidance governing its request for preliminary injunctive relief here. Again, APWU's motion arose in a completely different procedural setting -- to enjoin conduct that was

² Docket No. C2012-2, Commission Order No. 1387, Order Denying American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, June 29, 2012.

³ As the Postal Service argued in Docket No. C2012-2, there is no statutory or regulatory basis for the relief apparently sought by the NAA in its Motion. Congress has not delegated to the Commission the authority to issue emergency injunctive relief, particularly to a party seeking relief from the Commission's own findings. When Congress intends to provide an agency with the authority to issue injunctive relief, it delegates this authority expressly. See *Trans-Pac. Freight Conference of Japan v. Fed. Mar. Bd.*, 302 F.2d 875, 880 (D.C. Cir. 1962) and 39 U.S.C. 404(d)(5). Although all the powers possessed by an agency require conferment from Congress, the requirement of express delegation is particularly strong with respect to the power to issue injunctive relief. *Trans-Pac.*, 302 F.2d at 880. The NAA cannot cite any source for the Commission's alleged authority to issue emergency injunctive relief, nor has it, because none exists. Congress has not conferred the power to issue emergency injunctive relief on the Commission, and without this grant from Congress, the Commission cannot provide the relief sought in the Motion. In contrast, section 404(d)(5) of Title 39 provides an example of Congressional delegation of authority to issue preliminary relief. Section 404(d)(5) provides the Commission with the authority "to suspend the effectiveness of the determination of the Postal Service until the final disposition of the appeal." The comparison of these two sections demonstrates that Congress delegates authority for preliminary relief expressly where it intends for an agency to possess such authority. For this reason alone, the Commission should deny the relief requested in the Motion.

⁴ Docket No. C2012-2, Commission Order No. 1387 at 3.

the subject of an ongoing proceeding before the Commission had, in a final order, resolved the issues raised by the Postal Service's request for an advisory opinion.⁵

The PAEA is very clear regarding the recourse available to allegedly aggrieved persons as a result of a final Commission order. Such persons may seek appellate review of the order in the U.S. Court of Appeals for the District of Columbia Circuit. 39 U.S.C. § 3663. Such an appeal would be conducted in accordance with the Administrative Procedure Act (5 U.S.C. § 706), and other applicable statutes (28 U.S.C. Chapter 158 and § 2112). The Postal Service has been notified that NAA has filed a petition challenging Order No. 1448, and has sought emergency relief, pursuant to the Court's rules.

To our knowledge, a subsequent Commission order, in effect suspending a final determination issued in connection with proceedings under to 39 U.S.C. §§ 3622 and 3642 would be unprecedented and is not specifically authorized by any Commission rule or procedure.⁶ In that regard, we note that the Postal Service previously sought a partial stay of the remedial provisions relating to the Standard Mail Flats product, which were included, in the Commission's Annual Compliance Determination (ACD) for FY 2010.⁷ In that motion, the Postal Service sought to stay the effectiveness of specific remedial actions directed by the Commission (i.e. presenting a schedule of price increases within 90 days) in connection with its review of the Standard Mail Flats

⁵ In this regard, it is notable that, on one of APWU's contentions, namely, that the Postal Service could not implement a service change prior to issuance of a Commission advisory opinion, the Commission concluded that there was no statutory or regulatory basis to enjoin the Postal Service from implementing service changes prior to issuance of an advisory Opinion. *Id.* at 6.

⁶ Parties to proceedings may always file motions seeking procedural and other relief pursuant to 39 C.F.R. § 3001.21

⁷ ACR2010, Motion of the United States Postal Service Requesting Stay of the Remedial Provisions Regarding Standard Flats Set Forth in the FY 2010 Annual Compliance Determination, May 17, 2011.

product.⁸ The Commission granted the motion, noting that the Postal Service did not seek a stay of the general remedial action outlined by the Commission, but, rather, only specific measures pending appellate review.⁹

By comparison, NAA's Motion seeks to stay the Commission's entire order, and would be completely inappropriate in the current situation. The pertinent provisions of the 2010 ACD involved a fundamental disagreement between the Postal Service and the Commission regarding statutory interpretation and their respective authorities under the PAEA. The Postal Service sought only a partial stay, insofar as it affected relatively minor planning steps for the implementation of the Commission's broader directive. Here, NAA is challenging the Commission's factual findings in Order No. 1448 and its application of legal standards to those facts. Under 39 U.S.C. §§ 3622 and 3642, and the Commission's rules, the Postal Service has the authority and flexibility to establish price changes and create special classifications, unless, after review, the Commission determines that the changes are inconsistent with statutory standards. Here, the Commission arrived at the opposite conclusion. It determined that the Valassis NSA met the statutory standards, specifically rejecting the contrary contentions made by NAA and other participants, including the allegations of irreparable harm. As a legal matter,

⁸ The Postal Service stated: "Because the Standard Flats portion of the ACD is the portion which the Postal Service intends to challenge before the court, it would be potentially wasteful of the parties' resources, particularly those of the Postal Service, to require what are essentially planning steps for completion of a process when the fundamental merits of that process are before the court. This is not a situation in which, unless work begins immediately on constructing a detailed step-by-step plan, accomplishment of the remedy contemplated by the Commission would necessarily be delayed. Instead, were the court to later uphold the Commission on the merits, appropriate steps could promptly be taken at that time." *Id.* at 1.

⁹ The Commission stated:

However, no mailer opposes the Postal Service request for the reason that the absence of the schedule will make it more difficult to budget for potential postage expenses. The Commission therefore accepts the Postal Service's suggestion that it may be desirable to forgo the production of that schedule while it obtains judicial review of the underlying decision. ACR2010, Commission Order No. 739, May 27, 2009

a suspension of the Commission's lawful findings is not justified, and cannot be justified. Consequently, NAA's only recourse is to seek review of the Commission's decision in the court of appeals.

The Valassis NSA is a legally binding contract, which the Commission has determined will benefit the Postal Service. It should not, even temporarily, be impeded, pending judicial review. Such a broad doctrine of sanctioning stays could easily result in abuse and create practical difficulties by allowing opponents of particular price adjustments, especially competitors, to significantly delay such changes. Most importantly, routinely sanctioning such stays could also have a chilling effect on the willingness of other parties to enter into agreements with the Postal Service. The prospect of significant delays and acrimonious litigation is enough to dissuade even the most eager of potential customers.

Moreover, in the instant case, a stay would have significant consequences. Resolution by the Court of Appeals is likely to take several months. In the meantime, the Postal Service would be deprived of badly needed new revenues, and Valassis, which will need time to establish its programs and arrange for eligible advertisements, will be deprived of income that would otherwise result from the NSA. In the volatile markets in which Valassis competes delays could be seriously debilitating.

As noted above, the model of injunctive relief is out of place here. Nevertheless, the Postal Service will address each of the standards cited by the Commission in disposing of APWU's action seeking injunctive relief. In this regard, the salient feature of NAA's contentions is that each was dispositively addressed and dismissed in the Order that NAA seeks to stay. Yet, in its motion, NAA has not offered

one fact or legal argument other than what it has previously argued unsuccessfully to the Commission. As such, the Commission's findings and conclusions should stand.

NAA's motion is, in essence, a motion for reconsideration of the Commission's findings rather than a request for injunctive relief. Even in that context, however, NAA has not presented any new facts or arguments that the Commission has not already addressed. Nor has it engaged in any critique of the Commission's reasoning in Order No. 1448. As a consequence of this alone, NAA's motion for stay must fail.

II. THE NAA FAILS TO MEET THE STANDARD FOR A STAY

Even if the Commission had the authority to award injunctive relief against its own Order, which it does not, the NAA has failed to establish that it would be entitled to such relief. A stay, like a preliminary injunction, is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."¹⁰ As NAA correctly cites, a complainant seeking a preliminary injunction must establish that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest.¹¹ Significantly, these four criteria are conjunctive. Each must be satisfied to warrant injunctive relief. As complainant, NAA bears the burden of proof, yet it has failed to meet that burden on any of the four elements.

A. The NAA Cannot Succeed on the Merits.

NAA argues that it has a substantial likelihood of success on the merits in the Court of Appeals because the NSA: (1) is tailored so narrowly that it is not realistically

¹⁰ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

¹¹ *Id.* at 20; *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (agreeing with the Ninth Circuit that the Supreme Court's decision in *Winter* requires plaintiffs to prove likelihood on each factor of the preliminary injunction analysis).

available to any other mailer, in violation of 39 U.S.C. §3622(c)(10); (2) would cause undue harm to the marketplace in violation of 39 U.S.C. §3622(c)(10)(B); (3) 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).¹² NAA cannot succeed on the merits of those arguments for the simple reason that it has not presented any facts demonstrating that the Commission's Order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. While it has presented conclusory assertions as to why it believes the Commission should have rejected the Valassis NSA, it has not explained why the Court of Appeals should not give deference to the Commission's findings.

The Court's review of the PRC's order is governed by the Administrative Procedure Act, 5 U.S.C. § 706. See 39 U.S.C. § 3663. The Commission's Order can only be set aside, *inter alia*, if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious if the decision was not based on a consideration of the relevant factors or if there has been a clear error of judgment. See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). Similarly, an agency action that is "devoid of needed factual support" may be struck down as arbitrary or capricious. *Assoc. of Data Processing Serv. Orgs. v. Board of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984).

¹² The Commission addressed each of these contentions in Order No. 1448. See Docket Nos. R2012-8 and MC2021-14, Order No. 1448 - Approving Addition of Valassis Direct Mail, Inc. NSA to the Market Dominant Product List, August 23, 2012.

In its review, the Commission considered three statutory factors: (1) whether the NSA would “improve the net financial position of the Postal Service” or “enhance the performance of mail preparations, processing, transportation, or other functions”; (2) whether it would “cause unreasonable harm to the marketplace”; and (3) whether it would be “available on public and reasonable terms to similarly situated mailers.”¹³

The Commission found that NAA’s assertions that price competition for Sunday insert advertisements would cause newspapers to abandon midweek TMC advertising was not sufficiently supported and did not “rebut the Postal Service’s projections that the NSA would produce net financial benefits.”¹⁴ The Commission evaluated the potential harm to the marketplace from two different perspectives. It concluded that from an economic perspective, as long as the Postal Service is not pricing its products below costs to drive its competitors out of business, the potential level of harm in the marketplace would not be unreasonable.¹⁵ The Commission also concluded that “protecting newspapers’ advertising from competition is not a policy found in the PAEA” and would “deny consumers the benefits of competition” when considering harm from a qualitative standpoint.¹⁶

Further, the Commission agreed with the Postal Service that the appropriate factors to consider when determining whether to extend a functionally equivalent NSA to a similarly situated mailer were that the NSA must (a) be a rate incentive designed to induce new volume in the delivery of a segment of Standard Mail Saturation Flats, (b) produce new volume and not merely diversion from existing mail programs, and (c) lead

¹³ Commission Order No.1448 at 16.

¹⁴ Commission Order No. 1448 at 22.

¹⁵ *Id.* at 27.

¹⁶ *Id.*

to financial gain for the Postal Service.¹⁷ While NAA argues that the Valassis NSA violates the prohibition against unduly discriminatory or preferential treatment among users of the mails, the Commission disagreed because, based on the above factors, the NSA would be available on reasonable terms to similarly situated mailers.¹⁸

Here, NAA has not shown why the Commission's findings were a clear error. NAA merely repeats the same speculative arguments and conclusions it made in the initial proceeding to review the Valassis NSA, and the Commission found those arguments to be insufficient. As discussed above, the Commission's findings were based on the relevant statutory factors and its findings were supported by facts on the record in the proceeding. NAA's mere disagreement does not mean that the Commission's decision was arbitrary and capricious, and NAA will not be able to demonstrate that the Commission acted arbitrarily or capriciously before the Court of Appeals.

B. The NAA Will Not Suffer Irreparable Harm in the Absence of a Stay.

As indicated throughout the Motion, NAA's primary concern is that the NSA purportedly will cause irreparable harm to NAA member newspapers, in the form of local market disruptions, and alleged massive and irreversible revenue losses, with a corresponding reduction in their ability to report and publish news and information in their communities. In addition, NAA argues that the Postal Service also will suffer irreparable harm through permanently lost revenues at a time when its finances are

¹⁷ *Id.* at 34–35.

¹⁸ *Id.* at 39.

deteriorating. Here again, the Commission addressed each of those arguments in Order No. 1448.¹⁹

NAA has not demonstrated that it will suffer irreparable harm. The NSA was just approved a few days ago, and it will take time for Valassis find interested advertisers who meet the criteria of the NSA willing to participate in the new shared programs. Furthermore, NAA, despite its assertions, has failed to establish that the NSA would be able to garner enough business to irreparably harm over 2,000 newspapers in the next 90 days. As NAA points out in its Motion, neither Valassis nor the Postal Service have indicated in what markets the NSA might be used or when they would begin to implement the NSA. In that respect, NAA's contentions regarding harm are unsupported and speculative at best.²⁰

NAA asserts that the Postal Service will be adversely affected "through permanently lost revenues at a time when its finances are deteriorating."²¹ This argument also fails. First, the fact that the Postal Service may suffer harm does not satisfy the NAA's burden of showing that the NAA itself is likely to suffer irreparable harm.²² Second, by definition, the lost revenue is not irreparable, as the alleged harm is monetary in nature.²³

¹⁹ *Id.* at 23-28.

²⁰ See *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.") (quoting *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (1958)).

²¹ Motion, at 2.

²² See *Jayaraj v. Scappini*, 66 F.3d 36, 40 (2nd Cir. 1995) (vacating preliminary injunction in part because the plaintiff's allegations that the defendant, his government employer, would suffer harm by not reinstating him during the course of the law suit "presents no direct injury" to the plaintiff).

²³ See *Sampson*, 415 U.S. at 90 (1974); see also *Jayaraj*, 66 F.3d at 39 ("Therefore, where monetary damages may provide adequate compensation, a preliminary injunction should not issue.").

The NAA further asserts that newspapers will experience local market disruptions, and massive and irreversible revenue losses, with a corresponding reduction in their ability to report and publish news and information in their communities, as result of the Valassis NSA.²⁴ This assertion does not satisfy the NAA's burden of showing a likelihood of irreparable harm for the reasons cited above. Again, monetary damages are not irreparable, and these alleged, speculative revenue losses would only likely substantially affect a small number of NAA member newspapers, if any at all.

Further, the alleged harm resulting from the implementation of the NSA does not constitute a hardship— it represents fair competition. NAA does not identify a single specific harm it will suffer as a result of implementation of the Valassis NSA. This is because such harm to the NAA does not exist and is only unsupported speculation. As such, the NAA does not satisfy its burden of showing a likelihood of irreparable harm.

C. The Balance of Equity Does Not Tip in the NAA's Favor.

The Postal Service would suffer real harms as a consequence of an order staying Order No. 1448. In volatile advertising markets, delays in implementing programs that could generate new revenues would deprive both the Postal Service and Valassis of needed income. Such delays would also be a severe impediment to the Postal Service's ability to use its pricing flexibility to negotiate contracts and implement them upon Commission's approval.

The Postal Service emphasizes the importance of its obligation and ability to negotiate agreements that will improve its financial condition. Especially in the current, challenging economic conditions, and in light of the evolving trends involving alternative

²⁴ Motion at 2.

means of delivery that have undermined the Postal Service's revenue base, it is extremely important that the Postal Service be permitted to move forward with agreements like the Valassis NSA. Such agreements will generate new incremental Standard Mail Saturation volumes and revenues and provide contribution to covering the Postal Service's institutional costs.

D. A Stay Is Not in the Public Interest.

NAA argues that granting the stay is in the public's interest, but does not provide any reason to support its contention other than generally referencing its earlier arguments. The issuance of a stay, were that possibility available in this case, would harm the Postal Service and would not advance the public interest. A stable Postal Service providing sustainable and comprehensive postal services is in the public interest. In order to ensure such stability, Postal Service must continue to be given the flexibility to offer these types of new products should it wish to remain a competitive and viable entity for the public.

The Postal Service agrees with the notion that the distribution of news and information is vital to the public, and that advertising revenue makes up the vast majority of funding for newspapers. However, the Postal Service also believes that the distribution of mail to all citizens is a vital service, which greatly benefits the public, and can only continue by raising revenues. As explained in the Commission's Order, the narrow focus of the Valassis NSA will raise the Postal Service's revenue without unreasonably harming the marketplace. This NSA supplements existing distribution channels with another option, which also benefits the public. Injecting more competition in the marketplace benefits the public by creating more outlets to send their advertising mail, all while sustaining the Postal Service.

Requiring the Postal Service to delay implementation of the NSA pending judicial review does nothing to further the public interest. It simply causes delay and further financial risk to an already vulnerable Postal Service.

Conclusion

Based upon the foregoing, the Commission should deny NAA's Motion for Stay.

Respectfully submitted,
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August 28, 2012