

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Notice of Market-Dominant )  
Price Adjustment ) Docket No. R2013-1

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND  
VALPAK DEALERS' ASSOCIATION, INC.  
MOTION TO STRIKE STANDARD MAIL PRICE ADJUSTMENT  
FROM UNITED STATES POSTAL SERVICE  
NOTICE OF MARKET-DOMINANT PRICE ADJUSTMENT  
(October 22, 2012)**

Pursuant to section 21 of the Postal Regulatory Commission rules of practice, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. ("Valpak") hereby move to strike the Standard Mail price adjustments included in the Postal Service's Notice of Market-Dominant Price Adjustment filed with the Commission in the instant docket on October 11, 2012. As reasons therefor, Valpak states that the noticed **Standard Mail price adjustments are *prima facie* unlawful**, as they violate prior Commission remedial pricing orders, as well as the Postal Accountability and Enhancement Act and 39 U.S.C. § 101(d), as more specifically set forth below.

1. In its FY 2010 Annual Compliance Determination ("ACD") issued on March 29, 2011, the Commission calculated that Postal Service's pricing had allowed the Standard Mail Flats product to **lose an astonishing \$1.4 billion over three years** (FY 2008 - FY 2010), including \$577 million in FY 2010, finding that "This reflects an **unfair and inequitable** apportionment of the costs of postal operations to all Standard Mail users." FY 2010 ACD,

p. 106 (emphasis added).<sup>1</sup> The Commission found that prices for Standard Mail Flats were unlawful, as they did “**not comply** with section 101(d) of title 39.” *Id.* (emphasis added). The Commission exercised its statutory authority, and responsibility, to make this finding of noncompliance with respect to Standard Mail Flats pursuant to 39 U.S.C. § 3653(c).

2. Having made this finding of unlawful rates, the Commission then exercised its statutory authority to order the Postal Service to take remedial action pursuant to 39 U.S.C. § 3662(c), ordering (not requesting) the Postal Service:

a. “to increase the cost coverage of the Standard Mail Flats product through a combination of **above-average price adjustments**, consistent with the price cap requirements, and cost reductions until such time that the revenues for this product exceed attributable costs” which “**must begin with the next** market dominant price adjustment” (after March 29, 2011);

b. to submit “a schedule of future **above-CPI price increases** for Standard Mail Flats” within 90 days;

c. to report in subsequent **Annual Compliance Reports** (“ACRs”) certain information regarding operational changes, costing methodologies, and an estimated timeline for phasing out the subsidy; and

d. to report in subsequent **Notices of Market Dominant Price Adjustments** (including the instant docket) the following:

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<sup>1</sup> [http://www.prc.gov/Docs/72/72382/PRC\\_ACD\\_2010.pdf](http://www.prc.gov/Docs/72/72382/PRC_ACD_2010.pdf).

i. “an **explanation** of how the proposed prices will move the Flats cost coverage toward **100 percent**,” and

ii. “a statement **estimating** the effect that the proposed prices will have in **reducing the subsidy** of the Flats product.” [*Id.*, pp. 106-107 (emphasis added).]

3. On April 27, 2011, believing that the Commission had acted illegally, the Postal Service submitted a petition for review of the findings and remedial provisions of the FY 2010 ACD to the U.S. Court of Appeals for the District of Columbia Circuit.

4. On May 17, 2011, the Postal Service filed a motion to stay the portion of the Commission’s order requiring the Postal Service to file a **schedule** of future above-CPI price increases pending the Court of Appeals’ review,<sup>2</sup> and the Commission granted that motion on May 27, 2011 (Order No. 739<sup>3</sup>). In its order, the Commission explained that its Order only related to the schedule, as the “Postal Service Motion does not request a stay of the general remedial action regarding the Standard Mail Flats product established in the 2010 ACD.”<sup>4</sup> The limited stay was to “remain in effect until 30 days following resolution of the 2010 ACD petition for review.” *Id.*, p. 1. (The decision of the U.S. Court of Appeals was issued on April 17, 2012, with the Commission’s Order on Remand issued on August 9, 2012. Even

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<sup>2</sup> <http://www.prc.gov/Docs/72/72924/Mot.Stay.ACD..pdf>.

<sup>3</sup> [http://www.prc.gov/Docs/73/73096/Order\\_No\\_739.pdf](http://www.prc.gov/Docs/73/73096/Order_No_739.pdf).

<sup>4</sup> *See also* Order No. 987, p. 32 (“[T]he Commission did not release the Postal Service from its obligation to propose prices that move the Standard Mail Flats product toward compliance.”)

using the later August 9 date as the date of “resolution,” even the limited stay relating to the schedule expired on September 8, 2012, prior to the noticing of price adjustments in the instant docket on October 11, 2012. *See also* Order No. 1472 (Sept. 21, 2012), confirming termination of limited stay, discussed *infra.*)

5. On October 18, 2011, during the pendency of the petition for review, the Postal Service filed a Notice of Market Dominant Price Adjustments in Docket No. R2012-3. Prices for Standard Mail Flats were increased **2.209 percent**, which was **slightly (0.076 percent) above the CPI cap** of 2.133 percent. Due to the pendency of the appeal, the Commission only determined that the Postal Service “technically complied” with the FY 2010 ACD order by giving an above-average price increase, and had failed to provide the explanation required by the FY 2010 ACD, but allowed the noticed prices to go into effect. Order No. 987, pp. 32-33.<sup>5</sup>

6. Likewise, during the pendency of the petition for review of the FY 2010 ACD, on December 29, 2011, the Postal Service filed its FY 2011 ACR with the Commission. The Postal Service’s original filing was inadequate, but the Postal Service later provided some information in response to a Chairman’s Information Request.<sup>6</sup> However, the Postal Service still refused to provide cost savings estimates.<sup>7</sup> FY 2011 ACD,<sup>8</sup> pp. 114, 118. Again, the

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<sup>5</sup> [http://www.prc.gov/Docs/77/77970/Order\\_No\\_987.pdf](http://www.prc.gov/Docs/77/77970/Order_No_987.pdf).

<sup>6</sup> <http://www.prc.gov/Docs/80/80086/Responses.ChIR1.pdf>.

<sup>7</sup> In submitting unit cost data, the Postal Service demonstrated its failure to achieve any cost reductions for Standard Mail Flats as mandated by the FY 2010 ACD, reporting that unit costs increased from 44.8 cents per piece in FY 2010 to 46.3 cents per piece in FY 2011. The **unit loss** for each Standard Mail Flat increased from 8.2 cents per piece to

Commission determined that the Postal Service “did not provide the information required by the FY 2010 ACD.” *Id.*, p. 114. Delay in Postal Service compliance with the Commission’s remedial order caused the Postal Service to lose an even greater amount in FY 2011 than in FY 2010 — the loss of an additional **\$643 million** on Standard Mail Flats in FY 2011. Including those losses, losses from Standard Mail Flats over a four-year period exceeded **\$2 billion**. *Id.*, p. 115. On March 28, 2012, the Commission’s Annual Compliance Determination Report for FY 2011 found that pricing for Standard Mail Flats remained “out of compliance” in FY 2011, but did not order remedial action “given the pending litigation.” FY 2011 ACD, p. 119.

7. On April 17, 2012, the U.S. Court of Appeals affirmed the lawfulness of the Commission’s finding of noncompliance of Standard Mail Flats with 39 U.S.C. § 101(d). The Court remanded the matter to the Commission “for a definition of the circumstances that trigger § 101(d)’s failsafe protection, and for an explanation of why the particular remedy imposed here is appropriate to ameliorate that extremity.” U.S. Postal Service v. Postal Regulatory Commission, 676 F.3d 1105, 1109 (D.C. Cir. 2012).

8. On August 9, 2012, the Commission issued Order No. 1427 in Docket No. ACR2010-R, “Order on Remand.” As required by the Court of Appeals, the Commission clarified the basis for its earlier order, stating, *inter alia*, that “the Postal Service failed to take

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**9.5 cents per piece.** See FY 2011 ACD, p. 114.

<sup>8</sup> <http://www.prc.gov/Docs/81/81771/FY%202011%20ACD.pdf>.

remedial action notwithstanding repeated Commission admonitions that steps need to be taken to address the cost coverage shortfall.” Order No. 1427, p. 20.<sup>9</sup>

9. The Postal Service took no action in response to Order No. 1427, neither challenging the sufficiency of the Commission Order by bringing it to the attention of the Court of Appeals, nor filing a new petition to review the Order on Remand.

10. In Order No. 1472 (Sept. 21, 2012) issued in Docket No. ACR2010-R (“Notice and Order Confirming Termination of Stay”), the Commission: (i) confirmed that the limited stay relating to filing a schedule had terminated, ordering the Postal Service to “present the schedule of future price adjustments” in its next Annual Compliance Report; and (ii) required that the other aspects of its remedial order be implemented in the instant docket:

In its **next Notice of Market Dominant Price Adjustment** and Annual Compliance Report, the Postal Service shall provide information on the **general remedial actions** as described on pages 106-107 of the 2010 Annual Compliance Determination. [Order No. 1472, p. 3<sup>10</sup> (emphasis added).]

11. In the Postal Service’s “next Notice of Market Dominant Price Adjustment,” that is, the one filed in the instant docket, the Postal Service willfully disregarded the Commission’s orders in several respects, including:

a. Failing to give an above average CPI-U increase to Standard Mail Flats;

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<sup>9</sup> [http://www.prc.gov/Docs/84/84871/Order\\_1427.pdf](http://www.prc.gov/Docs/84/84871/Order_1427.pdf). See also FY 2008 ACD, p. 91, [http://www.prc.gov/Docs/62/62784/ACD%20Report\\_2008\\_FINAL.pdf](http://www.prc.gov/Docs/62/62784/ACD%20Report_2008_FINAL.pdf), and FY 2009 ACD, p. 84, [http://www.prc.gov/Docs/67/67396/ACD-2009%20\(1\).pdf](http://www.prc.gov/Docs/67/67396/ACD-2009%20(1).pdf).

<sup>10</sup> <http://www.prc.gov/Docs/85/85171/Order%201472.pdf>.

b. Failing to provide an adequate “explanation of how the proposed prices will move the Flats cost coverage toward 100 percent”; and

c. Failing to provide “a statement estimating the effect that the proposed prices will have in reducing the subsidy of the Flats product.” FY 2010 ACD, p. 107.

12. Rather than complying with the Commission’s order to give an “above average CPI-U increase to Standard Mail Flats” in the instant docket, the proposed increase for Standard Flats is only **2.570 percent**, which the Postal Service reports to be equal to the CPI price cap as well as the average Standard Mail increase of **2.570 percent**. The Postal Service’s noticed prices defy the Commission’s statutory authority to issue its remedial order, the Postal Service apparently believing that its compliance with Commission orders is optional, stating “the Commission’s ACD Order forces the Postal Service into a Hobson’s choice between compliance and generating additional revenue/contribution.” Notice, p. 22. A “Hobson’s choice” is an apparent choice, although there is really only one lawful option. However, in truth, having lost its appeal in the U.S. Court of Appeals, and standing silent after the Commission issued its Order on remand, the Postal Service had no choice; it was required to obey the Commission’s remedial order in the instant docket. Instead of compliance, the Postal Service proposes to substitute its judgment for that of the Commission, using what it calls “a balanced pricing approach.” *Id.*, p. 23.

13. The Commission’s remedial order required the Postal Service to notice with the 2011 price increase “above average” price increases for Standard Mail Flats. FY 2010 ACD, pp. 106-07.

14. The Postal Service misreads the Commission’s Order on Remand to invent a loophole, in an effort to avoid compliance:

the Commission further noted that “the finding of an ‘**extreme case**’ would not be justified, if, for example...the Postal Service were to demonstrate that price increases would be counterproductive under the statutory price cap...”. As the Postal Service will explain in more detail below, it believes that above average price increases for the Flats product would impair its ability to enhance its revenue/contribution under the price cap. [Notice, p. 21 (footnote omitted, emphasis added).]

The Postal Service attempts to use this quotation to usurp the Commission’s authority to determine when a finding of noncompliance should be made, two such findings having already been made — FY 2010 ACD and FY 2011 ACD.

15. Indeed, the Postal Service attempts to justify its noticed prices by showing with its “Standard Mail Contribution Model” that those prices are the most optimal to generate additional contribution for the Postal Service. However, in doing so, it ignores the products’ elasticities as reported to the Commission by the Postal Service, which (i) disregards factor 3 (“the effect of rate increases upon the general public, business mail users ...” 39 U.S.C. § 3622(c)(3)), and (ii) inconsistently reports the effect of the various scenarios on the Postal Service’s revenue. Also, its analysis presupposes that the only offset for pricing of Standard Mail Flats would be corresponding changes to Standard Mail Letters, as if those are the only two products in Standard Mail.

16. The Postal Service asserts that which is at best illogical — and at worst patently false — that the proposed average increases will “over time, move Flats toward 100 percent cost coverage.” *Id.* It also asserts without explanation or justification “that the proposed price

change sets Standard Mail Flats on a sustainable path toward 100 percent” and “estimates that Standard Mail Flats’ cost coverage will modestly increase in FY 2012.” *Id.*, pp. 24-25.

17. In addition to the noticed prices being illegal *per se*, nowhere in the Postal Service’s notice does it estimate the effect of the proposed prices on reducing the cross-subsidy from other Standard Mail products to Standard Mail Flats which had been found by the Commission. *See, e.g.*, FY 2011 ACD, pp. 117-18.

18. As a practical concern, the enormous continuing \$2 billion-plus losses from Standard Mail Flats contribute to jeopardizing the Postal Service’s survival.

19. Increasing Standard Mail Flats prices above those which the Postal Service noticed would cause the Standard Mail class to exceed the applicable price cap, unless offset by corresponding price reductions on other Standard Mail products.

20. The Postal Service has continued in the same pattern of noncompliance and defiance with respect to Standard Mail Flats that prompted the Commission to issue the current remedial measures. The Postal Service has not introduced any new arguments in its Notice, but is using the same shopworn excuses. Indeed, the U.S. Court of Appeals has already rejected the Postal Service’s arguments about maximizing revenue.<sup>11</sup> The Postal Service cannot seriously argue that its pricing flexibility under PAEA trumps the Commission’s power and authority under PAEA to issue remedial orders under 39 U.S.C. §§ 3653 and 3663. The Postal Service does not have any right to ignore the Commission’s remedial order.

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<sup>11</sup> “We have also considered the other contentions of the [Postal Service] and reject them.” U.S. Postal Service v. Postal Regulatory Commission, 676 F.3d at 1109.

21. The Commission issued Commission's Information Request No. 1 on October 18, 2012<sup>12</sup> seeking additional information about the Postal Service's noticed prices for Standard Mail Flats. The questions therein are important, exposing some of the weaknesses and inconsistencies in the Postal Service's filings, but do not address the issue of *prima facie* illegality of the Notice.

22. Only once since PAEA's enactment has the Commission found Postal Service pricing in violation of PAEA, and the Commission has been patient beyond measure. The Postal Service's appeal was litigated, and the Postal Service lost. The Postal Service now asks the Commission virtually to abdicate the remedial authority assigned to it by Congress. If these proposed prices are not stricken, then the Commission will have ceded one of its major duties under PAEA.

23. The Commission has the authority to order the relief requested in this motion as an extension of the authority to enforce its own duly issued orders. Furthermore, the Commission does not need any further information from the Postal Service in order to determine that the noticed Standard Mail Flats prices are *prima facie* not in compliance with prior orders. Indeed, it would appear to be in the best interest of the Postal Service for the Commission to strike the unlawful prices quickly, for once the Standard Mail prices are stricken the Postal Service could move rapidly to submit *prima facie* lawful rates upon which mailers could comment and which the Commission could evaluate. If the Commission delays ruling until the filing of comments from interested parties on October 31, 2012, issuance of the Commission's

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[http://www.prc.gov/Docs/85/85378/CIR\\_No\\_1.pdf](http://www.prc.gov/Docs/85/85378/CIR_No_1.pdf).

Order in November could make January 27, 2013 implementation of revised Standard Mail prices problematic.

24. The Postal Service has disregarded the guidance of the Commission in the FY 2008 ACD and the FY 2009 ACD. It challenged the Commission's finding of noncompliance and remedial order in the FY 2010 ACD, and it lost in federal court. It largely disregarded the Commission's remedial order in the FY 2011 ACR due to the pendency of the case it has now lost. It has no more dilatory tactics in its toolbox, resorting to sheer defiance of a Commission order, which it has done with noticed Standard Mail prices in this docket.

WHEREFOR, Valpak requests the Commission to strike the Standard Mail price adjustments in the Postal Service's Notice as *per se* unlawful, in violation of its order in the FY 2010 ACD, illegal under PAEA, with leave for the Postal Service to notice and file with the Commission revised Standard Mail price adjustments based around a meaningfully above-average price increase for Standard Mail Flats and associated justifications that are in full compliance with the Commission's previous orders, together with reductions in other Standard Mail prices.

Respectfully submitted,

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