

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.,
COMMENTS ON THE UNITED STATES POSTAL SERVICE
RESPONSE TO ORDER NO. 1541
(December 4, 2012)**

Pursuant to Commission Order No. 1556, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereinafter "Valpak") hereby file their comments on the "Response of the U.S. Postal Service to Order No. 1541."

The Postal Service filed its original Notice of Market Dominant Price Adjustment on October 11, 2012, and comments were due on November 1, 2012. Commission Order No. 1541 (Nov. 16, 2012) remanded the Standard Mail price adjustment to the Postal Service because the Standard Flats price adjustment was not in compliance with the Commission's directives in the FY 2010 Annual Compliance Determination ("ACD"). On November 26, 2012, the Postal Service filed its Response to Order No. 1541, changing proposed prices only for Standard Mail Flats. On November 27, 2012, the Commission invited comments, shortening the period for comments by two days. Order No. 1556.

COMMENTS

I. The Postal Service's Revised Submission Pertaining to Standard Mail Flats Prices Remains Out of Compliance with the Commission's Remedial Orders.

The Postal Service has noticed and submitted revised prices for Standard Mail products after the Commission found the initial prices to be “in conflict with the directives of the FY 2010 ACD” in Order No. 1541 (p. 48). The Postal Service asserts that it “is complying with the Commission’s directive by proposing an above-average price increase for Standard Mail Flats.” Postal Service Response, p. 5. As explained below, the new increase for Standard Flats is only 0.047 percent over CPI-U.¹ An increase in Standard Flats of such a tiny amount does not constitute compliance with the Commission’s prior orders.

In 2011, the coverage of Standard Flats was 79.35 percent. *See* attachment to Postal Service Response to CIR No. 1. Coverage would have to improve by 2,065 basis points² in order to reach 100 percent. The **initial** price adjustment would increase coverage by **190** basis points, which means that after-rates coverage still would be 1,875 basis points below 100 percent. At the rate of 190 basis points per year, it will be **2023** before Flats prices cover **current** attributable costs.

The Postal Service Response to Order No. 1541 states that: “The Postal Service estimates that the revised price adjustment could raise over four million dollars in additional

¹ If the Commission had not reversed its position on the revenue foregone issue, the proposed increase for Standard Mail would exceed the cap. Valpak believes that the Order No. 1541 failed to provide the reasoned analysis required by the Administrative Procedure Act.

² One basis point equals one one-hundredth of one percent.

revenue from Standard Mail Flats.” Response, pp. 4-5. Assuming that (i) there is no further increase in attributable costs for Flats, and (ii) all of the \$4 million of additional revenue becomes incremental contribution, coverage from the **remand** price adjustment will increase coverage by approximately **13** additional basis points for a total of **203** basis points. At that rate, the increased prices on remand shortens the time required to achieve 100 percent coverage by about an additional 25 days, based on the obviously unrealistic assumption of no further increase in costs.

Indeed, the Postal Service increase on Standard Flats rates on remand is tiny. Is this tiny increase truly consistent with what the Commission has ordered the Postal Service to do? Does a time frame of another decade or two with huge subsidies to Standard Flats comport with any reasonable reading of the Commission’s directive to achieve full cost coverage “as promptly as practicable”? It is necessary to return to what the Commission actually ordered.

In its FY 2010 ACD,³ issued March 29, 2011, the Commission **first** found Standard Flats prices in FY 2010 to be **out of compliance** under 39 U.S.C. section 101(d), and **then** directed the Postal Service to take several **remedial actions** under 39 U.S.C. section 3653(c):

- “the Postal Service is directed, pursuant to section 3653(c), to take remedial action **as promptly as practicable** to **effectively** address the unfair and inequitable apportionment of costs.” FY 2010 ACD, p. 16 (emphasis added).
- “the Commission directs the Postal Service to **increase the cost coverage** of the Standard Mail Flats product **through** a combination of **above-average price adjustments** ... and cost reductions until such time that the revenues for this product **exceed attributable costs.**” *Id.*, p. 106 (emphasis added).

³ The Commission also found Standard Flats prices in FY 2011 to be out of compliance, but took no further remedial action due to the pendency of the court appeal. FY 2011 ACD, p. 119.

- “**above-CPI increases** will be necessary....” *Id.*, p. 107 (footnote omitted) (emphasis added).
- “the Postal Service should move **as promptly as practicable** to eliminate this inequity. This process must **begin with the next market dominant price adjustment.**” *Id.* (emphasis added).
- “the Postal Service must begin the process of transitioning Standard Flats prices to **full cost coverage.**” *Id.* (emphasis added).
- “the Postal Service shall present a **schedule** of future **above-CPI price increases** for Standard Mail Flats.” *Id.* (emphasis added).

The Commission’s FY 2010 ACD directive can be understood to be a mandatory, remedial order to the Postal Service to: (i) reduce costs wherever possible, **and** (ii) present a schedule to reach 100 percent cost coverage, **and** (iii) increase prices above CPI, beginning with the next market dominant price adjustment after March 2011, and continuing thereafter, as promptly as practicable, to achieve a position where Standard Flats revenues exceed costs (*e.g.*, the cost coverage attains 100 percent).

i. Costs. The Postal Service has apparently found it impossible to reduce costs, as it provided the Commission with no “cost savings estimates” in Docket No. ACR2011, despite “requests for estimates” from the Commission. Indeed, one can deduce that costs have not been cut based on the fact that no progress has been made regarding Standard Flats as the unit contribution for Standard Mail Flats grew to **negative 9.5 cents** in FY 2011. FY 2011 ACD, pp. 117-18. In this docket, reliable cost savings continue to be elusive. The Postal Service provided estimates of future cost savings in its original Notice, but the Commission found those unreliable for several reasons. *See* Order No. 1541, pp. 36-37. The Postal Service provided no further cost data on remand.

ii. Schedule. The Commission’s directive to furnish a schedule included a sample schedule of above-CPI price increases that the Postal Service is to submit. *See* FY 2010 ACD, p. 107, Table VII-18. The Postal Service has never filed such a schedule. In its response to Order No. 1541, the Postal Service stated that “given the short amount of time the Postal Service had to prepare its revised rate adjustments ... it has not been able to assess the full impact of the revised price increase on Standard Mail Flats.” The Commission has directed that a schedule finally must be provided with the upcoming FY 2012 Annual Compliance Report (“ACR”). *See* Order No. 1472, p. 3.

iii. Pricing. Use of the format in the Commission’s chart in the FY 2010 ACD (Table VII-18) helps one evaluate how well the Postal Service is complying with the Commission’s remedial order:

Table VII-18

Schedule of Standard Mail Flats Prices Increase

Year	Flats Average Price Increase
2012	CPI-U + 0.076 percent
2013 (before remand)	CPI-U - 0.154 percent
2013 (after remand)	CPI-U + 0.047 percent
2014	CPI-U + X percent

The Postal Service’s paltry 0.076 percent increase over CPI-U in 2012 (Docket No. R2012-3) was allowed by the Commission because of the pendency of the Postal Service’s challenge to the Commission’s finding and remedial order in Docket No. ACR2010.

(“However, given the pending litigation the Commission will not require remedial action at this time.” FY 2011 ACD, p. 119.) Not only was there no pending litigation when the Postal Service noticed its price adjustments in Docket No. R2013-1, the Court had upheld the Commission’s authority to do exactly what it had done. Yet the Postal Service has continued to resist the remedial order.

On remand, the Postal Service states it has responded to Order No. 1541 as follows:

- (i) it “reduced the prebarcoding discount between automation and non-automation”;
- (ii) it “used the correct avoided costs ... for Automation 3-Digit Flats”; and finally
- (iii) “a number of minor mechanical adjustments were also made.” Postal Service Response, pp. 3-4.

What is the effect of what the Postal Service has done on remand? Amazingly, as compared to the originally proposed prices, **a majority of Standard Flats price cells** (including both piece and pound components) **have been reduced** and only a quarter have been increased:

- increase 24 price cells,
- **decrease 56 price cells**, and
- keep 26 price cells the same.

The Postal Service previously estimated that the price changes **initially** proposed in this docket would increase the cost coverage of Standard Flats by approximately **2** percentage points. *See* Postal Service Response to Commission Information Request No. 1, question 1. On remand, “the Postal Service estimates that the revised price adjustment could raise over four million dollars in additional revenue from Standard Mail Flats. All else equal, the change

may have a **slight positive effect** on Standard Mail Flats' cost coverage." Postal Service Response, pp. 4-5 (emphasis added). Assuming no further increase in attributable costs and optimistically assuming that all of the four million dollars becomes incremental contribution, the changes on **remand** would increase Flats' coverage further by approximately **0.13** percentage points.

Did the Commission mean in its FY 2010 ACD that a serious inequity exists but that the Postal Service could permit unjust cross-subsidization to continue fostering one particular form of advertising for another decade or two? By that point, the price cap could be superseded pursuant to 39 U.S.C. section 3622(d)(3). Surely the Commission's remand order could not have meant for the Postal Service to make such a *de minimis* increase for Standard Flats.

Indeed, footnote 66 of Order No. 1541, so heavily relied upon by the Postal Service, provides further recommendations "[i]f the Postal Service's proposed price adjustments for the Standard Mail minimally exceed the price cap." The Postal Service selected some of the Commission's "examples," but feigned confusion about operation of the cap to avoid increasing Flats prices any further. *See* Postal Service Response, p. 3 n.10.

The Postal Service was given a second chance by the Commission to submit a proper price increase for Standard Flats. The Commission graciously treated the Postal Service's initial noncompliant filing as "in effect, seeking a waiver" and "petitioning for relief" from the Commission's directives. Order No. 1541, p. 39. In reality, if the original filing and the Postal Service's Response to Order No. 1541 continue, this response to the Commission's remedial order might well be considered to be approaching "deliberate noncompliance," given

the totality of the circumstances, subjecting the Postal Service to a potential fine. *See* 39 U.S.C. § 3662(d).

As a related matter, the Postal Service was required to comply with all of the directives of the FY 2010 ACD, including certain reporting requirements. *See* Order No. 1472, p. 3 (“In its next Notice of Market Dominant Price Adjustment..., the Postal Service shall provide information on the general remedial actions as described on pages 106-107 of the 2010 Annual Compliance Determination.”). In its Response, the Postal Service stated that it did not have enough time to provide that required information (*see* p. 4), adding the following statement, unsupported by any analysis or facts:

Moreover, as stated above, the Postal Service is uncertain whether increasing the prices for Standard Mail Flats will either improve the product’s cost coverage or make a positive contribution to the Postal Service’s finances. Indeed, in **Docket No. R2006-1**, the last omnibus rate case prior to the enactment of the PAEA, the Commission raised prices for Standard Flats by as much as 41.1 percent to address cost differences based on shape between letters and flats. In spite of this increase, Flats’ persistent cost coverage problem has remained. Manifestly, simply **raising prices is not a panacea** guaranteed to “fix” underwater products, especially those in systemic decline. [*Id.*, pp. 5-6 (emphasis added).]

In 2007, the volume of Flats was 12.9 billion pieces, and in 2006 and prior years, it was presumably larger. The recently filed RPW Report for FY 2012 shows total Flats volume of 5.9 billion pieces, a decline of some 7 billion pieces. But for the Commission’s wise rate increase in Docket No. R2006-1 (which was followed by only *de minimis* rate increases thereafter), the Postal Service might be losing \$0.20 per piece on over 13 billion Flats

annually, which would total a loss of \$2.6 billion per year, instead of “only” some \$500 to \$600 million.

II. The Postal Service’s Response to Order No. 1541 Contains Inconsistent Allegations of Illegal Activity by the Commission, and Seeks to Re-litigate Issues It Lost in the U.S. Court of Appeals for the D.C. Circuit.

The Postal Service’s Response to Order No. 1541 contained different and somewhat inconsistent charges against the Commission for committing unlawful acts in Order No. 1541.

None of the views was supported, and none can be supported.

A. Postal Service’s First Assertion: Under PAEA, the Postal Service Has Unreviewable Authority to Set Prices.

The Postal Service begins its challenge to the Commission’s authority began by stating:

[T]he Postal Service nevertheless believes that **the Commission overstepped its authority** in Order 1541.... As Commissioner Taub aptly noted in dissent “the approach of the Commission is a step back in time toward its ratemaking role that was abolished with the former Postal Rate Commission.” In Order No. 1541 the **Commission assumed its former role**, but **under the PAEA the Postal Service is responsible for selecting the set of rates** which, **in its judgment**, is most consistent with its statutory mission. The Postal Service performed that responsibility through its **original rate proposal**. [Postal Service Response, p. 2 (emphasis added).]

Here the Postal Service adopts a truly astonishing legal position. The Postal Service appears to reject the Commission’s basic role in pricing supervision, and asserts its legal opinion that “under the PAEA the Postal Service is responsible for selecting the set of rates” which it believes best, even in the face of a Commission finding that those prices were unlawful. As the Postal Service’s original proposal purportedly reflected the Postal Service’s best “judgment [and was] most consistent with its statutory mission,” it argues that the

Commission should have deferred to it. The Postal Service asserts that the Commission's rejection of Postal Service prices, its remedial order, and enforcement of that order all exceed the Commission's "authority." The Postal Service enjoys two statutory monopolies,⁴ yet it seeks unfettered pricing authority.

1. Statutes Governing Postal Service and Commission Roles in Pricing.

In claiming that it is "the Postal Service" which "is responsible for selecting the rates" which it believes are best "in its judgment," the Postal Service rejects wholesale the current statutory postal pricing scheme. It is impossible to reconcile the Postal Service's claim to complete pricing dominance with the statutory scheme. For example:

- 39 U.S.C. section 3622 — the Postal Regulatory Commission's establishing a "modern system for **regulating rates** and classes for market-dominant products." (Emphasis added.)

Note that by using the word "regulating" rates and classes, PAEA describes the **role of the Commission** — not the role of the Postal Service which, obviously, cannot regulate itself. The Postal Service denies to the Commission this statutory role as the regulation of rates.

- 39 U.S.C. section 3652 — which requires the **Postal Service** to "prepare and submit to the Postal Regulatory Commission" a detailed report "in sufficient detail **to demonstrate** that all products during such year complied with all applicable requirements of this title...." (Emphasis added.)

⁴ The monopoly over letter mail is contained in the private express statutes. *See* 39 U.S.C. §§ 1693-99 and related regulations. The monopoly over the mail box is contained in 18 U.S.C. § 1725, and related regulations. *See generally* James I. Campbell, Jr., Study on Universal Postal Service and the Postal Monopoly, Appendix C, Postal Monopoly Laws: History and Development of the Monopoly on the Carriage of Mail and the Monopoly on Access to Mailboxes, <http://www.prc.gov/PRC-DOCS/library/USO%20Appendices/Appendix%20C.pdf>.

Note that the Postal Service **must demonstrate compliance** with “all applicable requirements of” Title 39 **to the Commission**. The Postal Service bears the burden of proof, and the Commission is the regulator of rates to ensure they comply with Title 39. The Postal Service appears to demand that the Commission abandon this statutory duty.

- 39 U.S.C. section 3653(a) and (b) — which **requires the Commission to issue a “Determination** of compliance or noncompliance” as to “whether **any rates or fees** in effect during such year (for products individually or collectively) were not in compliance with applicable provisions of this chapter (or regulations promulgated thereunder)....” (Emphasis added.)

Note that the Commission is charged with a duty to **evaluate** the Postal Service’s rates and publish its “determination” as to whether those rates are lawful or unlawful. There is no hint that the Postal Service’s judgment as to pricing is not reviewable by the Commission.

For both FY 2010 and FY 2011, the Commission found noncompliance of Standard Flats prices with 39 U.S.C. section 101(d) — which requires that “Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a **fair and equitable** basis.” (Emphasis added.) *See, e.g.*, FY 2010 ACD, p. 106.

- 39 U.S.C. section 3653(c) — whenever the Commission makes a “written determination of noncompliance” the Commission “**shall take appropriate action** in accordance with subsections (c) and (e)⁵ of section 3662 (as if a complaint averring such noncompliance had been duly filed and found under such section to be justified).” (Emphasis added.)

Note that a finding of noncompliance triggers a **statutory requirement** that the Commission take appropriate action.

- 39 U.S.C. section 3662(c) — “Action required if complaint found to be justified.--If the Postal Regulatory Commission finds the complaint to be justified, it **shall order that the Postal Service take such action** as the Commission considers appropriate **in order to achieve compliance** with the

⁵ As there is no subsection (e), this reference is understood to be a typo, actually referencing subsection (d).

applicable requirements and to **remedy the effects of any noncompliance** (such as **ordering unlawful rates to be adjusted to lawful levels**, ordering the cancellation of market tests, ordering the Postal Service to **discontinue providing loss-making products**,⁶ or requiring the Postal Service to make up for revenue shortfalls in competitive products).” (Emphasis added.)

Note that a finding of noncompliance triggers a **statutory requirement** that the Commission “order ... the Postal Service [to] take such action as the Commission considers appropriate” both “to achieve compliance” and “to remedy the effects of any noncompliance.” There is no hint that the Postal Service may disregard such an order even if it disagrees with it.

- 39 U.S.C. section 3662(d) — “(d) Authority to order fines in cases of deliberate noncompliance.--In addition, in cases of **deliberate noncompliance** by the Postal Service with the requirements of this title, the Postal Regulatory Commission **may order**, based on the nature, circumstances, extent, and seriousness of the noncompliance, **a fine** (in the amount specified by the Commission in its order) for each incidence of noncompliance. Fines resulting from the provision of competitive products shall be paid from the Competitive Products Fund established in section 2011. All receipts from fines imposed under this subsection shall be deposited in the general fund of the Treasury of the United States.” (Emphasis added.)

Note that Congress anticipated that the regulated Postal Service might resist the Commission’s remedial orders, and engage in “deliberate noncompliance,” and that it gave the Commission the power to impose a monetary fine, at its discretion, on the Postal Service.

- 39 U.S.C. section 3664 — “Enforcement of orders. The several district courts have jurisdiction specifically **to enforce, and to enjoin and restrain the Postal Service from violating**, any order issued by the Postal Regulatory Commission.” (Emphasis added.)

⁶ Interestingly, the Postal Service recently admitted that “the **rational response** [to a product that perennially loses money] **would be to terminate the money-losing product and raise prices on the money-making product.**” Postal Service Reply Comments, p. 5 (emphasis added). The Postal Service’s Reply Comments failed to note that elimination of the deficit on underwater products might obviate or mitigate the need to increase prices on profitable products.

Note that the supremacy is the Commission's remedial orders, enforceable in federal district court.

2. Postal Service Petition for Review of FY 2010 ACD.

The Postal Service exercised its right to challenge the Commission's authority in an Article III court when the Postal Service presented to the U.S. Court of Appeals for the D.C. Circuit its Petition for Review of the Commission's order in Docket No. ACR2010. There, the Postal Service made the same argument it now makes, more than one year ago:

The statute governing the PRC and the Postal Service, however, does not require that each market-dominant product cover its attributable costs, and **correcting the long-standing cost-coverage issue with respect to Standard Mail Flats** – a product with a current downward trend in volume – **is not in the best interests of the Postal Service**. Because such above-CPI price increases must be “consistent with the price cap requirements,” **the PRC's order necessarily curtails the Postal Service's limited price-cap increase authority** and precludes it from allocating that authority in such a fashion as to maximize our ability to maximize retained earnings and achieve financial stability by, for example, allocating more of that increase to Standard Mail Letters, a product with a trend of increasing volumes. **The PRC's order – which it lacked authority to issue** – may well have the perverse effect of decreasing the Standard Mail Class's contribution to attributable costs of the Postal Service at a time when the Postal Service can ill afford to absorb such a loss in contribution. [Brief of the United States Postal Service, pp. 1-2 (Oct. 7, 2011) (emphasis added).]

The Postal Service's position was rejected by the Court of Appeals, which upheld the Commission's view. U.S. Postal Service v. Postal Regulatory Commission, 676 F.3d 1105, 1108 (D.C. Cir. 2012).

Despite this clear language in Title 39, and the decision of the U.S. Court of Appeals for the D.C. Circuit on the Petition for Review, the Postal Service continues to adhere to its

position that it is self-regulating, based on little more than the use of the term “pricing flexibility” in 39 U.S.C. section 3622(b)(4) and (c)(7). But nowhere does PAEA grant the Postal Service “pricing flexibility” to implement rates in violation with Title 39, or grant the Postal Service the power to elevate pricing flexibility so as to override the Commission’s determinations that particular rates are unlawful.⁷ Indeed, upon making a finding of noncompliance, the Commission has the statutory duty to “achieve compliance with the applicable requirements and to remedy the effects of any noncompliance (such as ordering unlawful rates to be adjusted to lawful levels)....” 39 U.S.C. § 3622(c). The Commission has acted entirely within the law.

Although no one would question the Postal Service’s decision to exercise its prerogative to challenge the Commission’s authority to review its rates in court, once that appeal was resolved against the Postal Service,⁸ further resistance to the Commission’s authority comes

⁷ The Commission concisely explained this principle in its Brief on the Petition for Review:

The Commission agrees that the Postal Service enjoys a great deal of flexibility on pricing within each class of market-dominant mail products. But that **flexibility** must be “**consistent** with the overarching financial and policy goals set forth” in the **PAEA**, S. Rep. No. 108-318, at 8, including the policy that “[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.” 39 U.S.C. § 101(d). [Brief for Respondent Postal Regulatory Commission, p. 31 (emphasis added).]

⁸ It is significant that after the Court’s remand to the Commission, and the Commission’s issuance of its response, the Postal Service took no action, such as by challenging the Commission’s response back before the Court of Appeals, or by filing another petition for review. Moreover, the Postal Service never filed a petition for a writ of certiorari. As such, it yielded to that decision of the Court of Appeals.

dangerously close to constituting the type of “deliberate noncompliance” discussed in 39

U.S.C. section 3622(d).

B. Postal Service’s Second Assertion: It Has Considered or Complied with the Commission’s Remedial Order.

1. One Short Paragraph — Three Different Legal Views.

Later in its Response, the Postal Service shifted its ground for asserting that the Commission had no right to reject its Standard Mail prices:

[T]he Postal Service reiterates its belief that the **Commission has overstepped its authority** in Order No. 1541. As **accurately** stated in Commissioner Taub’s dissent, [footnote omitted] the **intent of the Congress** in passing the PAEA was to afford the Postal Service true pricing flexibility, **unencumbered** by the Commission’s own vestigial views on pricing strategy. The Commission’s Order here ignores that **Congressional Intent**. Under the PAEA, **the Postal Service is primarily responsible for setting prices**. Here, the Postal Service proposed prices which it believed reflected an appropriate balance between the need to improve cost coverage for Standard Mail Flats **pursuant to the Commission’s prior Order**, and the need for the Postal Service to increase contribution in order to remain economically viable. **The Postal Service fully complied with the Commission’s directives** concerning the pricing of Standard Mail Flats, and its statutory obligations, and the **Commission therefore exceed its authority** when it declined to fully approve the price proposal of the Postal Service. [Postal Service Response, p. 5 (emphasis added).]

Here, in one paragraph, in an effort to grasp at any straw, the Postal Service remarkably adopts three variant legal positions:

First, the Postal Service embraces Commissioner Taub’s use of the word “**unencumbered**” as “accurately” describing its pricing authority. The Postal Service says that its rates considered “the Commission’s prior Order” and made an “**appropriate balance**”

of that order and other objectives to make its own decision. Under this view, the Commission has only an advisory role in pricing, consistent with the Postal Service's earlier statement, as discussed in Section II.A., *supra*. This is consistent with the statement "the Commission has overstepped its authority." Nowhere does the Postal Service even try to ground its legal position on any provision of the U.S. Code or Commission regulations, or even on the legislative history of the bill, but rather on its characterization of one dissenting Commissioner's sense of what Congress meant to do. Note that the Postal Service does not here quote from the lengthy Taub dissent, but characterizes — we believe mischaracterizes — what Commissioner Taub wrote in his dissent, as discussed in Section II.B.2., *infra*.

Second, the Postal Service steps back from that radical claim to say only that "the Postal Service is **primarily** responsible for setting prices." This language could cover a multitude of meanings, such as that within the wide range of lawful rates, the Postal Service has a certain amount of flexibility, and Valpak would not disagree. But if the Postal Service meant that pricing flexibility overrides every other section of PAEA and its authority is primary over (or superior to) the Commission's authority, Valpak would strongly disagree. *See* footnote 7, *supra*.

Third, the Postal Service asserts that it "**fully complied** with the Commission's directives." Under this view, the Postal Service impliedly acknowledges the legitimacy of the Commission's remedial order and made a good faith effort to comply with both the letter and the spirit of that order. (The Dissent in Part of Commissioner Taub begins "I find that the Postal Service has complied with the Commission's most recent mandates in regard to Standard Flats." Order No. 1541, Dissent, p. 1.)

Of course, it is impossible to tell from the Postal Service's filing which of these various legal positions it adopts. Indeed, it would be useful for the Commission to issue an Information Request to find out what the Postal Service's legal view is so that it need not guess as to such an important matter.

2. Commissioner Taub's Dissent.

As stated above, the Postal Service takes liberties with Commissioner Taub's dissent. First, it would be a mistake to interpret Commissioner Taub's dissent as rejecting any role for the Commission in reviewing Postal Service rates. Indeed, he stated: "[a]s the law provides, the Commission will have the opportunity to assess the Postal Service's success in achieving this balance in future ACDs for the relevant fiscal year." Dissent, p. 2. Should the Postal Service's Annual Compliance Report for FY 2012 demonstrate the type of noncompliance with 39 U.S.C. section 101(d) rates that was demonstrated in the FY 2010 ACD and the FY 2011 ACD, Valpak has every confidence that the Commission will reach the same conclusion that it did previously, again find noncompliance, and this time issue an appropriate remedial order which, hopefully, the Postal Service will follow. Indeed, Commissioner Taub served on the Commission during its FY 2011 annual compliance review (FY 2011 ACD, p. 2), and presumably joined in the Commission's Annual Compliance Determination for FY 2011 where the Commission found that "the prices in effect in FY 2011 for Standard Mail Flats remain out of compliance." FY 2011 ACD, p. 119.

Second, Commissioner Taub criticized the concept of the Commission "selecting from among a spectrum of lawful rates and classifications the set of rates which is, in its judgment, most consistent with statutory criteria.... Within this spectrum the Postal Service is

responsible for selecting the set of rates which, in its judgment is most consistent with its statutory mission.” Dissent, p. 4. This observation is entirely consistent with the Commission having ruled out of bounds certain prices as being unlawful — such as those relating to Standard Flats. Indeed, nowhere has Commissioner Taub expressed a view that Standard Flats prices were lawful — but just that the Postal Service had done what it was directed to do.

Third, Commissioner Taub’s specific criticism was for the Commission usurping the Postal Service’s role to adopt specific rates, and did not express any doubt about the Commission’s power to reject unlawful rates: “The Commission may *reject* a given rate or classification as unlawful, but it should no longer *recommend* rates and classification except in the most extraordinary cases.” Dissent, p. 4 (italics original). The only place where the Commission recommended rates was in footnote 66 (on p. 49) where the “Commission sets forth two examples, both of which would permit the Postal Service to comply with the FY 2010 ACD...” Valpak also believes that inclusion of this footnote was unwise.

But even more important, suppose, *arguendo*, that the Postal Service’s characterization of Commissioner Taub’s dissent were correct. It would be a mistake to decide a matter of such importance as the very role of the Commission based on the general understanding of any one person six years after a law was enacted, which no court would view as determinative as to what the Congress actually did, over the statutory analysis set out in Section II.A., *supra*. Even when legislative intent is being ascertained from contemporaneous sources such as committee reports, floor debates, and the like, it is only looked to when a statute is vague or ambiguous. Even then, its use is subject to increasing skepticism from the federal judiciary.

C. The Postal Service Has Confused Congress’s Delegation of Limited Legislative Power to the Commission in 39 U.S.C. section 3622 with Congress’s Delegation of Judicial Power to the Commission in 39 U.S.C. section 3653.

The Postal Service’s claim that the Commission has exceeded its authority by its FY 2010 ACD remedial directive for violation of the Postal Service’s “pricing flexibility” in 39 U.S.C. section 3622(b)(4) and 3622(c)(7) appears to view that order as being based upon the Commission’s power under section 3622(a) to “establish ... a modern system for regulating rates and classes for market-dominant products.” Postal Service Response, p. 5. However, the Commission’s power to establish such postal regulatory system, a delegated **quasi-legislative** power, is not at issue here.

What is at issue here is the Commission’s **quasi-judicial power** under 39 U.S.C. section 3653, which grants the Commission authority to make an annual determination whether any rates were not in compliance with applicable statutes, regulations promulgated by the Commission under 39 U.S.C. section 3622, and backed by remedial powers under section 3662.

This carefully balanced statutory scheme established by Congress, whereby the Commission through its rulemaking powers allows the Postal Service certain “pricing flexibility,” is tempered by a requirement that both the Postal Service (and the Commission) must operate within certain statutory limitations. The statutory limitations can be understood only by analyzing the text of those provisions (as set out and discussed in Section II.A.1., *supra*), not by some quixotic search for Congressional intent divorced from the statutory text. The Commission’s quasi-judicial powers under section 3653 are not limited by the references

to pricing flexibility in section 3622. Justice Felix Frankfurter observed, “Congress expresses its meaning by words,” “Congressional purpose as manifest by text and context is not rendered doubtful by legislative history,” and judges “should of course be faithful to the meaning of a statute.” Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 615, 617 (1944).

One need “reach [no] further than [PAEA’s] plain language” and “structure” to conclude that Congress intended the Commission to exercise both (i) **quasi-legislative** power to establish a system of setting prices for market-dominant products, and (ii) **quasi-judicial** power to evaluate and remedy noncompliance with that pricing system and to remedy such noncompliance by ordering the Postal Service to make specific price adjustments. *See* EPA v. National Crushed Stone Assn., 449 U.S. 64, 69-80 (1980).

CONCLUSION

1. The Postal Service increase in Standard Flats pricing on remand is *de minimis*, negligible, token at best, and does not in any sense constitute meaningful compliance with the Commission’s remedial order. The Postal Service certainly by now understands that the Commission’s goal is to end Standard Flats as an underwater product in the near future, and its use of the phrase “appreciably greater,” to describe the magnitude of its increase over the average increase for Standard Mail, is so far afield as to be wholly inappropriate. The Commission’s remedial order assumed that the Postal Service would comply in good faith. Even after losing its petition for review in the U.S. Court of Appeals for the D.C. Circuit and implicitly accepting the Court’s decision and the Commission’s order through its subsequent inaction, the Postal Service simply has not complied. One possible lesson to be learned is that

in the FY 2012 ACD, the Commission will need to enter yet another remedial order which is appreciably more specific in what it expects from the Postal Service.

2. The Postal Service's rationale for noncompliance was predicated on various inconsistent and untenable legal theories that reveal that the Postal Service incorrectly views the Commission as powerless, or completely irrelevant, with respect to pricing.

3. The Postal Service continues to play favorites among groups of mailers, and attempts to make "winners" of those mailers that, without the largesse of the Postal Service, otherwise could be "losers." The continued multi-billion dollar deficit incurred by Standard Flats compels other groups of advertising mailers to cross-subsidize indefinitely those mailers that use Flats as their advertising medium. The Postal Service seemingly considers this situation is a reasonable, fair, and just pricing strategy, fully in accord with all the factors, objectives, and other policy considerations contained in PAEA. Alternatively, the Postal Service view is that its pricing flexibility tops everything else in PAEA, including the Commission's exercise of its quasi-judicial authority.

4. The Postal Service would prefer to sacrifice Saturday delivery and service at rural Post Offices rather than taking meaningful steps to eliminate the enormous subsidy to Standard Flats (and other underwater products). The Postal Service's unlawful subsidization of Standard Flats may thus erode needed Congressional support for the Postal Service.

5. The minimum price adjustment now proffered by the Postal Service is guaranteed to continue the incurrence of massive unnecessary losses on Standard Flats and, concurrently, to increase the accumulated deficit. Ultimately, if any taxpayer bailout is required to help the

Postal Service meet its payroll, the size of the bailout will be increased by losses due to the *de minimis* price adjustment proposed for Standard Flats.

6. Nevertheless, the Commission finds itself in a difficult position in this docket, as footnote 66 signaled in that it might accept a *de minimis* increase in Standard Flats pricing. While Valpak believes that Commission Order No. 1541 was generally well decided, it was substantially undermined by the *obiter dictum* in this footnote, which most unfortunately was included in the Order. Once included, the Postal Service saw its opportunity, and seized it.

7. While there still may be time for the Commission to reject the Postal Service's rates on remand, and have yet another round of prices noticed by December 13 go into effect by January 27, 2013, another option would be to have all price changes except Standard Mail prices go into effect on January 27, with Standard Mail prices going into effect as soon as the Postal Service proposes a lawful set of rates. However, if neither of these options is chosen, the Commission should have no reluctance to enter a more stringent remedial order in Docket No. ACD2012.

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