

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rules Pursuant to 39 U.S.C. 404a)

Docket No. RM2013-4

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
REPLY COMMENTS ON
NOTICE OF PROPOSED RULEMAKING
(August 28, 2013)**

In response to Order No. 1739, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. ("Valpak") submitted Initial Comments on the Notice of Proposed Rulemaking on July 29, 2013. The following reply comments address the Initial Comments filed by Pitney Bowes, the Postal Service, the Public Representative, Time Inc., United Parcel Service, and Valassis.

I. Initial Comments that the Proposed Substantive Rules Would Improperly Shift the Burden of Proof away from the Postal Service.

Pitney Bowes correctly explains that the proposed substantive rules implementing section 404a(a)(1) would take the burden of proof imposing statute and turn it on its head:

This heightened burden of proof is inconsistent with the plain language of the PAEA and should be removed.... Congress assigned the burden of proof to the Postal Service, not the complainant. A complainant alleging a violation of section 404a(a)(1) should be able to state a *prima facie* case merely by showing that the Postal Service has established a rule or regulation that establishes the terms of competition. It is then up to the Postal Service to demonstrate why the regulation should be allowed to stand. Proposed subpart 3032.5 has it backward. [Pitney Bowes Initial Comments, pp. 2-3.]

United Parcel Service ("UPS") recognized this same problem with respect to the proposed rule:

The proposed rule would add to the complainant's burden additional elements that are not set forth in the statute.... [T]he statute imposes that burden on the Postal Service when it says that the Postal Service must “demonstrate[] that the [action] does not create an unfair competitive advantage for itself” Section 404a(a)(1).... Only when *the Postal Service* can prove that its challenged action does not create an unfair competitive advantage may its action continue under this section. In short, at best the proposed rule improperly shifts to the complainant a burden that the statute imposes on the Postal Service. [UPS Initial Comments, pp. 5, 7.]

A complaint must only allege a violation of the statute (39 U.S.C. § 3662(b)(1)(A)), not somehow prove it, or as the proposed rule states, “show” it. The statute imposes the burden of proof on the Postal Service, not the complainant.

II. Initial Comments about Showing Harm to Competition.

The proposed rule implementing 39 U.S.C. § 404a(a)(1) requires that a complaint “show”¹ three elements: (i) a Postal Service rule or regulation has the effect of either precluding competition or establishing the terms of competition; (ii) the rule, regulation, or standard harmed the complainant; and (iii) the rule, regulation, or standard harmed competition. *See* proposed rule 3032.5(a). With respect to element (iii), the Public Representative (“PR”) argues that the Commission should not apply Sherman Act analysis to complaints involving section 404a:

The Public Representative does not believe that the Commission should apply [the Microsoft antitrust litigation] interpretation of the Sherman Act to section 404a(a)(1).... Section 404a(a)(1) differs most dramatically from the Sherman Act in the focus of its inquiry. While the Sherman Act examines competitive behavior, section 404a(a)(1) examines regulations. The balance that courts need to strike between promoting competition while preventing the destruction of

¹ As explained in section I, *supra*, the correct verb with respect to a complaint should be “allege,” not “show.”

competition is not present when the Commission examines the Postal Service's regulations. [PR Initial Comments, pp. 8-9.]

Thus, it appears that the PR is urging the Commission to eliminate element (iii) and, if this is what the PR is urging, Valpak agrees, for the reasons set out by the PR.

UPS takes the PR's analysis a step further, arguing:

The proposed rule would add to the complainant's burden additional elements that are not set forth in the statute.... The proposed rule, but not the statute, requires the complainant to show **harm** to the **person** filing the complaint, as well as to **competition**.... [A] complainant may be able to demonstrate that a Postal Service action "establish[es] the terms of competition" – the sole showing explicitly required by Section 404a(a)(1) – before any harm occurs. Barring a complainant from filing a complaint until actual harm has occurred is not required by the statute and could inflict injury on the complainant that may otherwise be avoidable.... Thus, UPS urges the Commission to follow its usual approach of limiting new, untried rules to procedural matters and to substantive rules that parallel the statutory language, rather than requiring from the outset a complainant to prove elements that are not explicitly required by the statute. [UPS Initial Comments, pp. 5, 8-9 (emphasis added).]

As the comments of both the PR and UPS demonstrate, the proposed rules deviate from the statute. Sections 404a and 3662 impose the only preconditions to bring a complaint.

Section 404a(c) states: "**Any party ... who believes** that the Postal Service has violated this section may bring a complaint in accordance with section 3662."

(Emphasis added.) (There is no requirement to "show" anything.)

Section 3662, referenced by 404a(c), also uses the word "believe" and does not require any higher showing: "**Any interested person ... who believes** the Postal Service is not operating in conformance with the requirements of the provisions of section ... 404a (or regulations promulgated under any of those provisions) may lodge a

complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.” 39 U.S.C. § 3662(a) (emphasis added).

Although the Commission has the authority to prescribe the “form and manner” of a complaint, it does not have the authority to create additional substantive requirements beyond those established by Congress. Element (iii) — harm to competition — is not expressly, or even implicitly, required by the statute.

Section 404a(a)(1) prohibits “the Postal Service [from] ... establish[ing] any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition.” There are two stated exceptions to this prohibition: (i) “[e]xcept as specifically authorized by law,” and (ii) “unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself....” Thus, if the Postal Service has implemented a regulation that has the effect of “precluding competition” or “establish[ing] the terms of competition” without either of the exceptions being applicable, then it has already violated section 404a(a)(1), and the Commission should not craft rules designed to immunize the Postal Service from the need to defend against any legitimate complaint alleging that it has done so.

III. Initial Comments Opposing Accelerated Procedures.

The Postal Service, Time Inc., and Valassis all express extreme concern about the review of Postal Service regulations, evidencing a fear that this statute will be applied in any meaningful way by the Commission. These three parties urge the Commission to erect procedural barriers to the filing of complaints, which it has no authority to do, evidencing both a desire to minimize the effect of 404a and a lack of confidence in current Postal Service rules,

regulations, or standards. The Commission's role is not to impede parties from raising legitimate complaints, but to facilitate the filing and evaluation of complaints that meet statutory minimums.

A. The Postal Service

The Postal Service believes that dockets it initiates (such as a request for an Advisory Opinion) should be expedited, but dockets initiated by third parties against it should not: "The Postal Service's different positions on the two sets of proposed rules reflect differences in the proceedings that would be subject to the proposed rules." USPS Initial Comments, p. 2. N-dockets, the Postal Service explains, result in an opinion that is only advisory and which may come after implementation of a service change has begun. On the other hand, "§ 404a complaint proceedings involve past conduct and lead to binding orders with potentially wide-reaching effect on markets connected to postal services." *Id.*, p. 3. The Postal Service's opposition to 404a complaints being completed within 90 days is remarkable given the Postal Service's arguments in Docket No. RM2012-4 that N-dockets are less complicated than an annual compliance review (which is statutorily confined to a 90-day process) and thus advisory opinions should be issued within 90 days of the request. *See* Docket No. RM2012-4, USPS Initial Comments (July 29, 2013), pp. 2-4. The Postal Service does not recognize that 404a complaint dockets are by definition narrowly focused and could never reach the complexity or breadth of an N-docket (or even an Annual Compliance Determination, which does result in binding determinations).

The Postal Service asks the Commission completely "to withdraw its proposed rules for Section 404a complaints, and instead aim to expedite complaint proceedings ... within the

existing framework of its current Rules of Practice and Procedure.” USPS Initial Comments, p. 22. The Postal Service’s comments reflect visceral hostility to having any complaint filed against it, yet largely assert the interests of others, not itself. *See* USPS Initial Comments, pp. 5-15, 19-20. In truth, the proposed accelerated procedures seem particularly well suited to complaints involving few factual disputes such as section 404a-based complaints. If there were cases where the Postal Service would have need of significant discovery (as it claims on pages 8-9), the complainant would also need significant discovery against the Postal Service, and would be expected to bring its complaint under the traditional procedures, not the new rules.

B. Time Inc.

Time Inc. expresses concern about the financial harm to the struggling Postal Service, but its comments reveal that its real concern is not the Postal Service, but rather protecting subsidies to those products and services that constitute a serious and continual drain on the Postal Service’s finances:

The Commission’s proposal ... poses a **particular threat to** any segments of the mailing, publishing, and advertising industries which may have been among the beneficiaries of allegedly “anticompetitive” Postal Service pricing policies (whether these policies be manifested through alleged “**subsidies**” to “underwater” products, or through “excessively” high, or low, passthroughs of workshare cost savings, or “**excessively favorable terms**” in Negotiated Service Agreements, or even through differences in relative markups over cost which a potential complainant may believe to be unfair or imprudent). [Time Initial Comments, p. 6 (emphasis added).]

Time candidly admits it wants to shield from scrutiny under section 404a subsidies to money-losing products and NSAs with excessively favorable terms. This argument demonstrates the need for the proposed rules, not any infirmity in the rules themselves.

C. Valassis

Valassis also perceives that the proposed rules could pose a threat to its NSA with the Postal Service (now the subject of a petition for review pending in the U.S. Court of Appeals for the D.C. Circuit), stating: “the core problem with the Commission’s proposed rule is that it will likely severely impair the due process rights of the respondent Postal Service **and other parties who oppose the complaint...**” Valassis Initial Comments, p. 2 (emphasis added). Although Valassis bemoans the lack of due process in considering a hypothetical complaint against its NSA, it had no problem with the accelerated procedure that was used to present the NSA to the Commission for its initial approval, where, for example, opponents of an NSA have no discovery rights — only the ability to request the Commission to issue information requests.

CONCLUSION

The Commission’s proposed rules were properly designed to allow for the consideration of complaints based on violation of section 404a. Section 404a addresses the area where a government monopoly is most likely to abuse its power — to manipulate its own rules, regulations, and standards to discourage competition with its monopoly. In enacting section 404a, Congress demonstrated great concern about such abusive conduct, and although the Commission’s proposed rules need some revision (*see* section I, *supra*), they properly

allow for the expeditious consideration of complaints to correct abuses of monopoly power by the Postal Service.

Respectfully submitted,

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