

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Modern Rules of Procedure )  
for the Issuance of Advisory Opinions )  
in Nature of Service Proceedings )

Docket No. RM2012-4

**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. 1738, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. ("Valpak") submitted initial comments on the Notice of Proposed Rulemaking on July 29, 2013. Initial Comments in response to Order No. 1738 were filed by the Greeting Card Association ("GCA"), National Newspaper Association ("NNA"), the Public Representative ("PR"), and the Postal Service. Valpak responds to the Initial Comments of each in turn.

**Reply to Greeting Card Association**

1. Limitation on Interrogatories. With respect to the Commission's proposed limitation of 25 interrogatories per intervenor, GCA notes that:

GCA believes that making the 25-question limit (proposed Rule 87; Order No. 1738, pp. 17, 18) include followup as well as initial interrogatories **could have unwelcome consequences**. Interrogatory responses **are not invariably complete and informative**. A party thus faces the choice of (i) "saving" some of its 25 interrogatories to use as follow-ups, if needed, and thereby possibly forgoing useful areas of inquiry at the outset, or (ii) using its entire allotment for initial interrogatories, with **the risk of receiving non-responsive, incomplete, or ambiguous answers** which it then may not pursue further. [GCA Initial Comments, p. 2 (emphasis added, footnote omitted).]

Valpak has had the same experience as GCA, in that interrogatory responses by the Postal Service “are not invariably complete and informative.” Valpak also concurs with GCA that the 25-interrogatory limit is fraught with problems, and would add that the 25-interrogatory limitation would be particularly problematic if the Postal Service again were to submit testimony from 11 witnesses, as it did in Docket No. N2010-1, or from 13 witnesses, as occurred recently in Docket No. N2012-1. If the 25-interrogatory limit included followup interrogatories, it would allow one initial interrogatory and one followup interrogatory per witness.

However, Valpak does not agree with GCA that the potentially serious problem which it identifies can be solved simply by amending the proposed rules as they apply to subparts of interrogatories. GCA Initial Comments, pp. 3-4. The proposed 25-interrogatory limit could provide an incentive for the Postal Service to divide presentation of its case among more witnesses. The Commission’s attempt to devise a one-size-fits-all rule might not work given the wide differences in the number of witnesses and complexity of the cases that have been experienced in prior dockets.

2. Limitation on Scope. With respect to the proposed limitation on scope of proceedings, GCA correctly notes that:

**the most significant proposed change ... is the policy of restricting the case to the Postal Service’s plan and excluding alternatives proposed by others. One need go no further back than Docket N2012-1 to see the value of alternative proposals, both to the Commission in arriving at its decision and to users of the published opinion.** [GCA Initial Comments, p. 6 (emphasis added).]

GCA then points out that under the rules, as proposed,

almost any attempt to raise an alternative would be subject to **objection, and exclusion**, under the proposed rules. With **no opportunity** to assess the likely **merits of an alternative on an informed basis**, it is not entirely clear how the Commission could decide whether the alternative was (or was not) worth pursuing in a public inquiry or special study. [*Id.*, p. 7 (emphasis added).]

Valpak concurs with the above statements by GCA. A blanket exclusion on consideration of meaningful and possibly superior alternatives is virtually guaranteed to result in a partially informed advisory opinion by the Commission.

However, having noted the folly of excluding alternatives from consideration during the course of an N-docket, GCA then goes on to suggest that after-the-fact study of alternatives might be a workable compromise to the prohibition against presentation of alternatives:

GCA would suggest that the Commission reinforce its public-inquiry-or-special-study policy by ... providing that a participant may, during the proceeding as well as afterwards, file a petition for institution of a public inquiry. [*Id.*, p. 7.]

Here, Valpak respectfully disagrees with GCA. Conducting some sort of after-the-fact study of an alternative long after the decision in the N-docket has been made, no matter how meritorious the alternative studied, would be well nigh impossible.

### **Reply to National Newspaper Association**

With respect to the proposed 25-interrogatory limit on discovery, on the basis of its own prior experience with respect to interrogatory responses, NNA notes that:

The Postal Service is **demonstrably capable of such opacity** in responses that the limitation **could run out long before clarity arrives**. The rules should permit at least one set of follow up interrogatories without limitation by a discovery cap. [*Id.*, p. 6 (emphasis added).]

Valpak concurs with NNA's observation that opaque responses from the Postal Service can be a serious problem, but for the reasons set out herein does not agree with NNA that simply allowing one set of, or even unlimited, followup interrogatories is a sufficient solution.

### **Reply to the Public Representative**

1. The PR addressed the proposed rule that would bar presentation of any alternative to the Postal Service's proposed change equivocally, stating:

A conclusion that comports with law and common sense is that ... the "direct case" the APA refers to as a participant's right in an agency proceeding does **not** ... mean a case presenting **significant or wholesale alternatives** to a well-defined "Postal Service proposal to effect a nationwide or substantially nationwide change in service." ... It seems logical that the opportunity for input means that **interested persons may** explore development of the Postal Service's to some degree and **suggest some modifications to the original proposal, but not a significant or wholesale replacement.** [*Id.*, pp. 26-27 (italics original, emphasis added).]

It is not clear how such a distinction could be made between "some" and "significant" modifications. Barring discussion of any alternatives would be unwise, as it would prevent good ideas from being brought to the Commission's attention. Subsequently, the PR states that:

this policy [of issuing advisory opinions that are targeted more precisely to the Postal Service's proposals] **should not foreclose participants from identifying alternatives or asking whether the Postal Service considered alternatives.** The companion provision for **special studies** or public inquiries identifies a path for further consideration, without delaying action on an immediate request. [*Id.*, p. 31 (emphasis added).]

Valpak concurs with the PR that participants should not be foreclosed from identifying alternatives or asking whether the Postal Service considered alternatives, but views the provision for *ex post* special studies as neither practical nor meaningful.

2. In a concluding section, the PR offers a pro forma retrospective application of proposed rules to Docket No. N2010-1 (Six-day to Five-day Street Delivery). The PR's retrospective analysis concluded that:

- participants' **proposals sponsoring either more days** of delivery (seven days) as *the rule* **or fewer** (four or less) **would clearly have been outside the scope of the proceeding;**
- however, as the status quo is always "on the table," participants' proposal to maintain the status quo are, as a matter of right, within the scope of the proceeding.

Under this analysis, it can be seen that a participant **interested in pursuing major alternatives has no obvious avenue, within the proposed set of rules, for bringing his or her alternative to the attention of the Commission** in the form of testimony. [*Id.*, p. 32 (emphasis added, footnote omitted).]

Again, it is unclear what is major or minor. For example, the PR does not address whether the alternative of maintaining Saturday delivery of parcels (as the Postal Service now embraces) would have been subject to objection and exclusion under the proposed rule. Should that be the case, it would be a good illustration of how the rule as proposed would lead to a less informed Advisory Opinion.

Efforts to constrain discussion of alternatives in order to compress the schedule of all N-dockets into a one-size-fits-all 90-day schedule simply will not serve the interest of fairness or issuance of an informed Advisory Opinion.

## Reply to the Postal Service

### 1. **Delayed Publication of Advisory Opinions Can Be Fixed by the Commission without Resort to a Fixed 90-Day Limit on all N-Cases.**

The Postal Service reviews the time required to process previous N-dockets:

The combination of unnecessarily long N-case proceedings and **delayed publication of advisory opinions** has undercut the purpose of the advisory opinion process: to provide timely expert advice to Postal Service management. [*Id.*, p. 3 (emphasis added).]

Footnote 5 summarizes briefly the total time required in several prior N-dockets. The Postal Service does not point out that the number of Postal Service witnesses in those six N-dockets ranged from 1 to 13. Nor does the Postal Service discuss that, in Docket No. N2010-1, the Commission required 150 days to issue its Advisory Opinion after reply briefs were filed, and in Docket Nos. N2009-1 and N2012-1 the Commission required, respectively, 84 and 70 days to issue its Advisory Opinion. Valpak observes that reducing the time required to issue an Advisory Opinion after reply briefs are filed could have materially reduced the total time required to process those prior dockets. However, a fixed one-size-fits-all 90-day time limit is not required, nor should it be necessary in order for the Commission to determine whether it wants to produce an Advisory Opinion within 30 days after reply briefs are filed.<sup>1</sup>

Section 3661(b) does not impose a 90-day limit. Indeed, it adopts the standard of “within a **reasonable** time prior to the effective date” of a proposed service change.

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<sup>1</sup> If field hearings had been eliminated, as Valpak suggested in its prior Initial Comments, then with no changes to the actual time for the Commission to produce its Advisory Opinion, the percent of total time for the Advisory Opinion would have increased significantly.

(Emphasis added.) The 90-day time limit first came into being when the Postal Rate Commission was first promulgating “standard” operating regulations. The “reasonable time” is not a date certain, as experience with the variety of N-dockets has shown. Certainly, what is reasonable for one case may well be reasonable for another. A fixed, 90-day timeline for Advisory Opinions is unreasonable (and thus unlawful) and should not be adopted by the Commission.

**2. Prospective Diminutions in Service under Review in N-Dockets Can Be Considerably More Complex than *ex post* After-the-Fact Annual Compliance Reviews.**

The Postal Service’s addresses the complexity of issues in N-dockets:

By committing to a 90-day schedule for N-cases, from a timing perspective, the Commission would treat N-cases consistently with **other more complex** Commission dockets and proceedings conducted by other federal agencies. [USPS Initial Comments, p. 4 (emphasis added).]

The preceding statement accords with its previously expressed view that the Commission’s after-the-fact annual compliance review (resulting in the Commission’s ACD) is equally (or more) complex than its prospective review of sometimes sweeping changes presented in N-dockets:

The Commission’s **most complex task** is arguably the **comprehensive survey of postal finances and operations** that yields the Annual Compliance Determination (ACD). [Initial Comments, June 18, 2012, p. 15 (emphasis added).]

The Postal Service would have one believe that Docket No. N2009-1, which dealt with major redesign of the retail network and threatened possible permanent closure of thousands of small (mostly rural) post offices is a comparatively straightforward, simple non-complex

matter. Likewise, the Postal Service would have one believe that complete redesign of the mail processing network in Docket No. N2012-1 — another permanent undertaking, including closure of half (or more) of all existing mail processing facilities, along with permanent elimination of the overnight delivery standard for local First-Class Mail — is comparatively simple compared to after-the-fact Annual Compliance Reviews. Of course, most issues raised in annual reviews are recurrent and largely predictable, completely unlike N-dockets, which are neither.

The Postal Service dwells on the fact that the Commission's Advisory Opinions are not binding, but fails to mention that Congress also reviews these Advisory Opinions. There is little gain by forcing expedition through rules which can lead only to “rubber-stamp” approval in an Advisory Opinion from the Commission. Indeed, obtaining approval of unpopular changes through a hurried Commission review process could increase Congressional and other opposition more than resolve issues.

**3. Changing Proposals Turn the Postal Service Submission into a Moving Target that Cannot and Should Not Be Subject to a Fixed 90-Day Limit.**

In its earlier Reply Comments in this docket (filed July 17, 2012), the Postal Service stated that:

The Postal Service has already explained why this approach [filing a proposal only when final] to N-cases makes no sense. In short, the advisory nature of N-cases makes them fundamentally dynamic, and the Postal Service should not be restrained from adjusting its service change concept **in response to feedback and new information.** [*Id.*, p. 14 (emphasis added).]

The Postal Service now rails against the proposed rule that would recognize its right to amend or otherwise change its case in midstream, since it would be followed by extension of the deadline:

Proposed Rule 3001.80 indicates that the intended 90-day procedural schedule will **be extended** for good cause, or if the Postal Service's formal proposal is **incomplete** or **modified** significantly after filing. The Commission provides no explanation or examples of the circumstances that qualify for good cause or that demonstrate incompleteness or significant modification. [Postal Service Initial Comments, p. 26.]

If the Postal Service insists on its right to alter its proposal as a case progresses, it should not be heard to insist simultaneously on a fixed 90-day time limit which cannot be extended.

**4. The Proposed Restriction on Discussion and Presentation of Alternatives Will Have a Chilling Effect on Feedback, New Information and Productive Give-and-Take in N-Dockets.**

Significantly, with its myopic focus on achieving a 90-day time limit, the Postal Service now would stifle almost completely the give-and-take of N-cases. It strongly favors almost complete elimination of feedback and new information via attempts by any intervenor to discuss alternatives to the Postal Service's proposed diminutions in service:

The Postal Service supports the Commission's attempt to focus discovery and rebuttal testimony on the service change proposal presented by the Postal Service, and to **prohibit rebuttal testimony and discovery that address alternative proposals**. [*Id.*, pp. 4-5 (emphasis added).]

The Postal Service appears to want Advisory Opinions that opine **only** on whether its proposed changes are **legally permissible**, **not** whether those changes, if implemented, would be **good policy** — that is, good, indifferent, or blatantly bad for the Postal Service, as well as

for the country. The Postal Service exhibits no interest in whether the Commission's expert advice can help ameliorate or improve any of its proposed diminutions in service.

As a hypothetical, consider that in this docket the Commission required all comments to focus exclusively on the rules **as proposed and not offer any alternatives**. Under this hypothetical, the scope of the Postal Service's comments under review here — which are replete with alternatives that range far beyond the scope of the proposed rules — would have been out of order. Under such a hypothetical, even the Postal Service might be led to complain that its due process rights were unduly restricted.

**5. In Another Wide-Ranging Alternative, the Postal Service Proposes to Eliminate Party Discovery Altogether.**

The Postal Service proposes to eliminate party discovery altogether. *See generally* USPS Initial Comments, Section II. To illustrate its perceived problem with party interrogatories under the proposed rules, the Postal Service poses the following extreme hypothetical:

For example, nothing in the Commission's proposed rules would prevent a scenario whereby each of five parties serves 25 interrogatories, each of which has an average of 10 non-discrete subparts, along with an average of 30 requests for production and 50 requests for admission, on the Postal Service on the same day. The Postal Service would then have only one week to respond to 1,250 interrogatory questions, 150 requests for production, and 250 requests for admission. [*Id.*, pp. 10-11.]

In lieu of receiving and responding to these 1,250 interrogatory questions, 150 requests for production, and 250 requests for admission, the Postal Service presumes, without explanation, that matters would be expedited by having all of them first directed to the Commission for it to sift through, reword, possibly consolidate and then redirect to the Postal Service. This

unwieldy process would be slowed even further where followup questions were necessary because of responses deemed to non-responsive, incomplete, or ambiguous.

Importantly, the Commission does not operate in a vacuum, where it has unfettered discretion. The Administrative Procedure Act requires that parties have a right “to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d). This statute only authorizes agencies to place one restriction on the right of cross-examination in formal rulemakings: “In **rule making** or determining claims for money or benefits or applications for initial licenses an agency may, **when a party will not be prejudiced** thereby, adopt procedures for the **submission of all or part of the evidence in written form.**” *Id.* (emphasis added). Thus, both the Postal Service’s proposal to eliminate interrogatories (*i.e.*, written cross-examination), and even the Commission’s proposal to place a numerical limit on interrogatories, are directly contrary to the Administrative Procedure Act.

**6. For Any Pre-filing Conference, the Postal Service Would Impose Undue Restrictions Designed to Limit an Open Information Exchange.**

The Postal Service seeks to limit pre-filing conferences to technical matters involving technical data or complex calculations:

In principle, the Postal Service does not oppose an **initial conference to clarify technical issues**, but the proposed Rule 3001.85 creates requirements that are unnecessarily burdensome and will not advance the objective of open information exchange. [*Id.*, p. 28 (emphasis added).]

A pre-filing conference limited to highly technical issues is of little value in most cases. Potential intervenors often need extensive, time-consuming internal consultation in order to decide whether to intervene actively. If a tentative decision to intervene is made, time and

effort are required to identify and line up expert witnesses. Few of the intervenor witnesses in the last six N-dockets have been people employed by, or on regular retainer from, the respective organizations. In order to get up to speed on a Postal Service proposal, before an N-docket is actually filed, they also need general information concerning the nature and likely scope of proposals to be submitted, not just technical data or complex calculations employing those data — a need that arises later in the proceeding. The Postal Service’s established practice of keeping almost everything highly secret prior to actual filing (when the clock on any fixed time limit starts), and then restricting questions and information flow at technical conferences to explaining **what** a witness did, but refusing to discuss **why** they did or did not do something is usually unhelpful. Unless policy issues can be discussed at a pre-filing conference, such a conference does little, if anything, to facilitate expedition.

**7. The Length of Briefs Should Not Be Limited.**

The Postal Service reacts to the Commission’s proposal to limit initial briefs to 14,000 words and reply brief to 7,000 words by suggesting “the Commission’s rules should reduce the length of all briefs while allowing more generous word limits for the Postal Service.” USPS Initial Comments, p. 45. Valpak opposes this proposal to stifle mailers from speaking and reiterates its belief that the Commission should not adopt any limits on the lengths of briefs.

Respectfully submitted,

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